NORTH CAROLINA COURT OF APPEALS REPORTS

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299 N.C. APP.

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ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ADAMS HOMES AEC, LLC, PLAINTIFF
v.
STANLY COUNTY, NORTH CAROLINA, DEFENDANT

No. COA24-924

Filed 21 May 2025

Public Works—assessment of system development fees—water and sewage—county ordinance—"new development"—deference to county's interpretation

In a declaratory judgment action where a homebuilder (plaintiff) that owned multiple parcels within a development challenged the imposition of system development fees (SDFs) by Stanly County (defendant) in connection to the development's water and sewer system, the trial court's order granting summary judgment for defendant was affirmed where the SDFs had properly been assessed pursuant to a county ordinance, which imposed the fees upon parcels constituting "new development." Where the definition of "new development" was ambiguous under both the ordinance and the associated enabling statute, defendant reasonably interpreted the term to include parcels with completed construction that increased the number of "service units," which defendant reasonably defined as actual impervious surfaces requiring water capacity, and this definition of "new development" included plaintiff's parcels.

Judge FREEMAN concurring in result only.

Appeal by Plaintiff from an order entered 18 July 2024 by Judge Claire V. Hill in Stanly County Superior Court. Heard in the Court of Appeals 9 April 2025.

Shumaker, Loop & Kendrick, LLP by Frederick M. Thurman, Jr., for Plaintiff-Appellant.

Womble, Bond, Dickenson (US) LLP, by Alexander J. Buckley, for Defendant-Appellee.

WOOD, Judge.

Adams Homes AEC, LLC ("Plaintiff") appeals from an order denying Plaintiff's Motion for Summary Judgment and granting the cross Motion for Summary Judgment for Stanly County ("Defendant").

I. Factual and Procedural Background

In September 2007, a developer recorded a map for a new development in the City of Locust, North Carolina, named Glenwood at the Village of Redbridge (the "Development"). In May 2018, Plaintiff began acquiring multiple parcels within the existing development. In November 2018, Defendant entered an Interlocal Agreement with the City of Locust. The City of Locust is primarily located in Stanly County, however certain portions of the city limits, including the Development, are in Cabarrus County. Cabarrus County did not have the infrastructure necessary to provide water and sewer services to those neighborhoods therefore, the interlocal agreement was created in which Defendant agreed to provide water service to all the developments within the City of Locust including those in Cabarrus County.

Plaintiff began building homes on their parcels within the Development sometime after the Interlocal Agreement was signed and upon completion of the homes would arrange with Defendant for the installation of water meters and the commencement of water services.

In September 2022, Defendant enacted Ordinance SCU No. 2022-02, "An Ordinance to Adopt System Development Fees for the Water and Sewer System as Authorized by Article 8 of Chapter 162A of the North Carolina General Statutes" (the "Ordinance"). The Ordinance is a land use plan which allows Defendant to collect System Development Fees, a charge or assessment for service imposed for new developments, to fund the costs of capital improvements attributable to expanding capacity to service new developments.

In May 2023, Defendant began charging Plaintiff a system development fee ("SDF") under the Ordinance for each parcel in the Development when it was connected to water services. Plaintiff paid the fees under protest. On 13 June 2023, Plaintiff filed a Complaint for Declaratory Judgment against Defendant. Defendant filed their answer to Plaintiff's complaint on 16 August 2023.

On 29 May 2024, Plaintiff filed a Motion for Summary Judgment, and on 31 May 2024, Defendant filed a cross Motion for Summary Judgment. Both motions for summary judgment were heard in Stanly County Superior Court on 10 June 2024. On 18 June 2024, the trial court filed an order denying Plaintiff's motion for summary judgment and granting Defendant's motion for the same finding, "Defendant Stanly County has properly interpreted Ordinance No. 2022-02" and the "System Development Fees assessed by Stanly County . . . were validly assessed and done so in a manner consistent with the Ordinance."

Plaintiff filed written notice of appeal on 18 July 2024.

II. Analysis

On appeal, Plaintiff contends the trial court erred as a matter of law in interpreting Ordinance SCU No. 2022-02 and granting summary judgment to the Defendant. Specifically, Plaintiff contends their parcels do not meet the definition of "new development" as outlined in the Ordinance. We disagree.

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." *Galloway as Trustee of Melissa Galloway Snell Living Trust Dated May 1, 2018 v. Snell*, 384 N.C. 285, 287, 885 S.E.2d 834, 836 (2023).

B. Interpretation of Ordinance SCU No. 2022-02

In 2017, the North Carolina General Assembly enacted session law 2017-138 (HB 436) known as the "Public Water and Sewer System Development Fee Act" ("the Act") amending Chapter 162A of the General Statutes. 2017 N.C. Sess. Laws 138; N.C. Gen. Stat. §§ 162A-200 to -215 (2024). This amendment authorized procedures and methods for the calculation and authorization of system development fees to be charged by local governments. A system development fee ("SDF") is defined by statute as, "[a] charge or assessment for service . . . imposed with respect to

new development to fund costs of capital improvements necessitated by and attributable to such new development, to recoup costs of existing facilities which serve such new development, or a combination of those costs. . . ." N.C. Gen. Stat. § 162A-201(9) (2024).

In September 2022, Defendant enacted Ordinance SCU No. 2022-02, "An Ordinance to Adopt System Development Fees for the Water and Sewer System as Authorized by Article 8 of Chapter 162A of the North Carolina General Statutes" ("the Ordinance") in compliance with the Act passed by the General Assembly. The Ordinance specifically states, "[s]ystem development fees shall be charged consistent with the requirements of [N.C. Gen. Stat.] Chapter 162A, Article 8 as such may be amended from time to time. Terms used in this section shall have the same meanings as set forth in [N.C. Gen. Stat.] Chapter 162A, Article 8." Ordinance SCU No. 2022-02.

Under the Ordinance, "new development" is defined in pertinent part as,

> . . . any of the following occurring after the September 6, 2021 (the one year look back period for platted subdivisions required by [N.C. Gen. Stat.] § 162A-201) *that increases the water and/or sewer capacity necessary to serve that development*:
>
> a. The subdivision of land;
>
> b. The construction, reconstruction, redevelopment, conversion, structural alteration, relocation, or enlargement of any structure *which increases the number of service units*; or
>
> c. Any use or extension of the use of land *which increases the number of service units*.

Ordinance SCU No. 2022-02 (emphasis added). This definition is consistent with the definition of "new development" in N.C. Gen. Stat. § 162A-201(6).

Plaintiff's argument hinges on the definition of "service units." Plaintiff argues that service units should mean the capacity necessary to serve the development as determined when the original map was approved and recorded in Cabarrus County, in which case there was no "increase in service units" based on Plaintiff's home building activity that would qualifying as "new development." We disagree.

We review issues of statutory construction *de novo*. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009). "If the

statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *JVC Enters., LLC v. City of Concord*, 376 N.C. 782, 785, 855 S.E.2d 158, 161 (2021). However, if the statutory language is ambiguous, "[i]t is well settled that . . . the court should defer to the agency's interpretation of the statute as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *State ex rel. Utils. Comm'n v. Env't Working Grp.*, 295 N.C. App. 650, 662, 907 S.E.2d 409, 417 (2024).

The term "service unit" is not defined within the Ordinance. However, it is defined within N.C. Gen. Stat. § 162A-201(8), and the Ordinance explicitly included the terms of the Act. Under the Act service unit is defined as "[a] unit of measure, typically an equivalent residential unit, calculated in accordance with generally accepted engineering or planning standards." N.C. Gen. Stat. § 162A-201(8) (2024). An equivalent residential unit ("ERU") is not defined within Article 8 of N.C. Gen. Stat. § 162A-201 and a thorough review of the General Statutes and Administrative Code reveal no use of the term. Additionally, there is a dearth of case law defining an ERU. In *Smith Chapel Baptist Church v. City of Durham*, our Supreme Court heard a case involving a City of Durham code in which Durham defined an ERU as "2,400 square feet of impervious surface, which is the average amount of impervious surface on a single family property in the city." *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 817, 517 S.E.2d 874, 882 (1999) (citing Durham, N.C., Code ch. 23, art. VIII, § 23–201). Notably, in *Smith Chapel Baptist Church* our Supreme Court did not define what an ERU is. Other cities and towns within North Carolina utilize similar definitions of ERU in their codes as Durham does, typically when referencing storm water management. In Kinston an ERU is defined as "the total impervious area of a typical single-family residential property, and is determined as the median impervious area of a representative sample, as determined by the city, of all developed residential properties in the single-family residential category." Kinston, N.C., Code part II, ch. 19, art. IV, § 19-182. In Kings Mountain the code reads "such charges shall be based on the amount of impervious surface on each parcel as determined by the equivalent residential unit standard. For purposes of this chapter, an equivalent residential unit (ERU) is 2000 square feet of impervious surface." Kings Mountain, N.C., Code title V, ch. 54, § 54.006. In Apex an ERU is defined as 2,700 square feet of impervious surface, which is the average amount of impervious surface on a single-family detached property in the town (based on GIS analysis). Apex, N.C., Code ch. 12, art. III, div. VII, §12-111.

According to definitions currently in use within the state of North Carolina, an ERU is a measurement equal to the average area of impervious surface on a parcel of land for a single-family residential property in the applicable regulated area. We apply this definition to the context of the statute as "[w]e first look at the statute as a 'composite whole' to avoid construing any of its words or phrases out of context." *In re Expungement for Spencer*, 140 N.C. App. 776, 779, 538 S.E.2d 236, 238 (2000) (cleaned up). In applying this definition of ERU to section (A)(2)(b) of Ordinance SCU No. 2022-02, new development occurs when "construction, reconstruction, redevelopment, conversion, structural alteration, relocation or enlargement of any structure increases the number of [measurements equal to the average area of impervious surface on a parcel of land for a single-family residential property in Stanly County]." This definition lacks precision and is ambiguous. One could perceive "the measurements equal to the average area" as a calculation of estimated possible capacity needed in the future based on the recorded maps as posited by the Plaintiff or alternatively it could be the number of actual impervious surfaces of "average area" in existence for which water capacity is imminently necessary as argued by Defendant.

Since the Ordinance and the Act are ambiguous in regard to the definition of service units or equivalent residential units and, therefore, what qualifies as new development, precedent dictates that we "should defer to the agency's interpretation of the statute as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *State ex rel. Utils. Comm'n v. Env't Working Grp.*, 295 N.C. App. 650, 662, 907 S.E.2d 409, 417 (2024).

In this instance, Defendant contends their Ordinance should be read to include increases in the number of actual ERUs in existence as constituting "new development." We agree. Defendant's reading of ERUs within the definition of "new development" is a reasonable construction of the Ordinance that gives meaning not only to all the words within section (A)(2) of Ordinance SCU No. 2022-02 but is also consistent with other sections within the entirety of Ordinance SCU No. 2022-02 as well as the enabling statute N.C. Gen. Stat. § 162A-201.

Within section (A)(2) of the Ordinance, reading ERUs to refer to actual impervious surface gives meaning to each of the nouns utilized in subsections b and c. This aligns with the presumption that "when the legislature enacts a statute, it intentionally includes and gives meaning to every word therein." *Happel v. Guilford Cnty. Bd. of Educ.*, 387 N.C. 186, 207, 913 S.E.2d 174, 192 (2025). If the actual existence or creation (new construction) of an impervious surface is read into the definition,

then "construction, reconstruction, redevelopment, conversion, structural alteration, relocation, or enlargement of any structure" potentially increases the number of service units. In contrast, if ERUs refer to impervious surfaces that potentially could exist, and the corresponding capacities determined upon the original plot map of a development, then irrespective of any future building or land uses the number of service units as determined at the time the map was filed would not increase.

Within the broader reading of the Ordinance, section E subsections 2 and 3 both support Defendant's interpretation. Subsection 2 states,

> For all [non-subdivision] new development, the County shall collect the system development fee at the earlier of either of the following:
>
> (a) The time of application for connection of the individual unit of development to the service or facilities.
>
> (b) When water or sewer service is committed by the county.

Ordinance SCU No. 2022-02(E)(2). The Ordinance authorizes a fee collection once an actual structure is prepared to receive water services not when a proposed subdivision map is recorded and possible water capacity could be calculated. If the later reading of the Ordinance were adopted then Defendant would collect fees based on the capacity suggested when the map is filed, a proposal that could negatively impact developers who may or may not be able to complete the proposed development as drawn and may not have the funds to pay all water fees long before any houses are ready for sale. Such a payment schedule was explicitly prohibited by the legislature in N.C. Gen. Stat. § 162A-213, which creates a specific timeline for the collection of system development fees anchored on either the building of a structure or the connection of a structure to the service. N.C. Gen. Stat. § 162A-213 (2024). Additionally, subsection 3 states,

> For ongoing subdivisions currently under construction, the system development fees shall be due at the time of application for water and/or sewer service. All subdivided lots that have completed dwellings and the owner or developer has made application and paid for water and/or sewer connection shall not pay system development fees for those lots.

Ordinance SCU No. 2022-02(E)(3). Again, this subsection of the Ordinance is consistent with the notion that the completion of

construction effectively increases the number of service units thereby triggering the system development fees.

Finally, N.C. Gen. Stat. § 162A-201 defines "existing development" as "[l]and subdivisions, structures, and land uses in existence at the start of the written analysis process required by [N.C. Gen. Stat. §] 162A-205, no more than one year prior to the adoption of a system development fee." N.C. Gen. Stat. § 162A-201(3) (2024). Based on this clear and unambiguous definition, the parcels at issue in the case *sub judice* do not qualify as existing development because the structures and land uses in contest were not in existence one year prior to the 6 September 2022 adoption of system development fees. If Plaintiff's proposed definition of ERU were incorporated in the Ordinance defining new development, then any parcels that were mapped prior to 6 September 2021 but have not completed construction or applied for water or sewer services, such as the parcels at issue here, would be neither new development nor existing development. This is an issue the legislature likely would have foreseen and a result they would not have intended to occur. Therefore, we agree with Defendant that a reasonable and permissible construction of the Act and Ordinance would include such parcels by reading the definition of ERUs to refer to actual completed construction of an average impervious surface.

III. Conclusion

Section (A)(2)(b) of Ordinance SCU No. 2022-02 based on N.C. Gen. Stat. §162-201(6) and (8) is ambiguous; therefore, statutory interpretation precedent dictates we turn to Defendant Stanly County's interpretation of its own Ordinance. Finding Defendant's interpretation to be both reasonable and based on a permissible construction of the statute, we affirm the trial court's order granting summary judgment for Defendant.

AFFIRMED.

Judge ARROWOOD concurs.

Judge FREEMAN concurs in result only.

BRIDGES v. BRIDGES

[299 N.C. App. 9 (2025)]

BECKY MINTER BRIDGES, PLAINTIFF
v.
PHILIP KEITH BRIDGES, DEFENDANT

No. COA24-984

Filed 21 May 2025

Contempt—civil—purge prior to entry of written order—vacated

A trial court's order finding defendant in civil contempt for his failure to pay court-ordered child support, uninsured medical expenses, and attorney fees was vacated because, although the court orally found defendant in contempt of its child support order—incarcerating him and requiring him to pay the child support and medical expenses he owed to purge himself of contempt—defendant executed a cash bond for the purge amount before the court filed its written contempt order; once defendant purged the contempt, the trial court lacked authority to hold defendant in contempt.

Appeal by Defendant from Order entered 29 September 2023 by Judge Erin S. Hucks in Union County District Court. Heard in the Court of Appeals 9 April 2025.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky L. Brammer, for Defendant-Appellant.

Becky Minter Bridges, pro se Plaintiff-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Philip Keith Bridges (Defendant) appeals from an Order holding him in civil contempt for failure to pay child support and uninsured medical expenses. The Record before us tends to reflect the following:

Defendant and Becky Minter Bridges (Plaintiff) separated in October 2019. They had three minor children during the course of their marriage. Plaintiff filed a Complaint seeking child custody, child support, and equitable distribution on 8 November 2019. The trial court entered an Order Regarding Temporary Child Custody and Child Support on 23 November 2020 providing: the parties had joint legal custody of the children, Plaintiff had primary physical custody of the children, and Defendant was responsible for child support of $1,071.28 per month and

38.44% of the children's uninsured medical expenses after Plaintiff paid the first $250.00. Plaintiff filed a Motion for Civil Contempt and Motion for Attorney's Fees on 12 April 2021.

The trial court held a hearing on child custody, child support, and Plaintiff's Motions on 9 and 10 September 2021. The trial court entered an Order Regarding Permanent Child Custody, Child Support, Civil Contempt and Attorney's Fees (Permanent Order) on 14 February 2022. Based on evidence presented during the hearing, the trial court found Defendant's child support obligation should be $725.01 per month, but in the decretal portion, the trial court ordered Defendant to pay $881.62 per month in child support. The trial court ordered the new obligation to be effective as of 1 October 2021. The trial court also found Plaintiff had incurred $8,030.00 in attorney fees and ordered Defendant to pay $150.00 per month until he had paid that sum in full.

Plaintiff filed a Motion for Civil Contempt on 23 June 2023, alleging Defendant owed $3,176.48 in unpaid child support, $171.58 in unpaid uninsured medical expenses, and $1,350.00 in attorney fees. The trial court heard arguments on this matter on 5 September 2023. The same day, at oral rendition, the trial court found Defendant in contempt of the Permanent Order and required Defendant pay the total amount of child support and medical expenses he owed—$3,348.06—to purge himself of contempt. On 10 September 2023, Defendant executed a cash bond for the purge amount. The trial court entered its written Contempt Order articulating its Findings and Conclusions on 29 September 2023. In the Contempt Order, the trial court found Defendant in willful contempt of the Permanent Order and that Defendant had already purged himself of that contempt. In the decretal portion of the Contempt Order, the trial court stated: "Defendant/Father is in civil contempt of this Court's Order entered on February 14, 2022." Plaintiff timely filed Notice of Appeal on 11 October 2023.

Issue

The dispositive issue on appeal is whether the trial court erred by holding Defendant in contempt after he had paid the entirety of the purge amount.

Analysis

"In contrast to criminal contempt which 'is administered as punishment for acts already committed that have impeded the administration of justice, . . . [c]ivil contempt, . . . , is employed to coerce disobedient defendants into complying with orders of court.' " *Ruth v. Ruth*, 158 N.C.

App. 123, 126, 579 S.E.2d 909, 912 (2003) (alterations in original) (quoting *Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984)). In *Ruth*, this Court held the lower tribunal improperly held a party in contempt where she had complied with the underlying court order after issuance of a show cause order. *Id.* at 126-27, 579 S.E.2d at 912.

This Court expanded on *Ruth* in *McKinney v. McKinney*, 253 N.C. App. 473, 799 S.E.2d 280 (2017). There, the Court noted *Ruth* held "a district court 'does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to show cause why he should not be held in contempt of court.' " *Id.* at 476, 799 S.E.2d at 283 (quoting *Ruth*, 158 N.C. App. at 126, 579 S.E.2d at 912). Building on that proposition, this Court held the trial court likewise lacked authority to hold the contemnor in contempt where, between oral rendition of the order and entry of the written order, the contemnor purged himself of the contempt. *Id.* at 477, 799 S.E.2d at 283.

The Court reasoned that because the trial court's contempt order had not been written and entered before the contemnor purged the contempt, it was not effective. *Id. See also* N.C. R. Civ. P., Rule 58 ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court[.]"); *see also Olson v. McMillian*, 144 N.C. App. 615, 619, 548 S.E.2d 571, 574 (2001) ("When a trial court's oral order is not reduced to writing, it is non-existent[.]" (citation and quotation marks omitted)). Therefore, similarly to *Ruth*, the trial court could not hold the contemnor in contempt, even though the trial court had orally rendered its ruling. *McKinney*, 253 N.C. App. at 477, 799 S.E.2d at 283. As a result, this Court vacated the civil contempt order. *Id.* Although this holding goes further than the Court did in *Ruth*—given that *Ruth* solely addressed a contemnor's compliance after issuance of a show cause order where there had not yet been a determination of contempt—where a panel of the Court of Appeals has decided the issue, we are bound by that precedent. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Here, the trial court heard arguments on Plaintiff's Motion for Civil Contempt on 5 September 2023. The same day, the trial court orally found Defendant was in contempt of its Order. Defendant was incarcerated and ordered to pay the total amount of child support and medical expenses he owed—$3,348.06—to purge himself of contempt. Defendant executed a cash bond for the purge amount on 10 September 2023. On 29 September 2023, the trial court filed its written order finding Defendant in contempt and that Defendant had purged himself of

that contempt. Consistent with *McKinney*, the trial court did not have authority to hold Defendant in contempt because he had purged the contempt prior to entry of the written order. Thus, the trial court erred by holding Defendant in contempt. Therefore, we are compelled to vacate the Contempt Order.[1]

Conclusion

Accordingly, for the foregoing reasons, we vacate the Contempt Order.

VACATED.

Judges COLLINS and CARPENTER concur.

IN THE MATTER OF J.A.S.F., J.A.S.F., M.S.S-F., MINOR CHILDREN

No. COA24-1006

Filed 21 May 2025

Child Abuse, Dependency, and Neglect—permanency planning order—guardianship—no sworn testimony—findings of fact unsupported

In an abuse and neglect proceeding involving three minor children—the older two having been removed from the family home for, among other reasons, their exposure to domestic violence and substance abuse, and the third and youngest child having been removed shortly after his birth—the permanency planning order awarding guardianship of the children to their foster parents was vacated because the district court's findings of fact did not support its conclusions of law or its decree where the court did not receive any sworn oral testimony or take judicial notice of any previous matter but merely received the prospective guardians' affidavits and reports from the county department of social services and the children's guardian ad litem into evidence.

Appeal by respondent-mother from permanency planning orders entered 13 August 2024 by Judge Robert A. Mullinax, Jr. in Caldwell County District Court. Heard in the Court of Appeals 23 April 2025.

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1. Because we conclude the Contempt Order must be vacated, we do not reach the merits of Defendant's other arguments.

Stephen Schoeberle, for petitioner-appellee Caldwell County Department of Social Services.

Michelle F. Lynch, for Guardian ad Litem.

Jeffrey L. Miller, for respondent-appellant mother.

FREEMAN, Judge.

Respondent-mother appeals from the trial court's permanency planning orders awarding guardianship of Ja.A.S.F. ("Jim"), Jo.A.S.F. ("Jed"), and M.S.S.F. ("Mark") to the children's foster parents.[1] On appeal, respondent-mother argues: (1) the permanency planning order was not supported by competent evidence, (2) the trial court failed to find she was unfit or acted inconsistently with her constitutionally protected status, and (3) she received ineffective assistance of counsel. After careful review, we agree the permanency planning order was not supported by competent evidence. Accordingly, we vacate and remand.

I. Factual and Procedural Background

The Caldwell County Department of Social Services ("DSS") became involved with respondent-mother, Jim, and Jed, after the Lenior Police Department received a call on 30 July 2021. Thereafter, law enforcement discovered that respondent-mother was strangled by the children's father, Gerber Salinas Paredes, in the presence of the two children in the family's home. Paredes was subsequently charged with felony assault by strangulation and his bond conditions prohibited conduct with respondent-mother.[2]

On 2 August 2021, DSS assisted respondent-mother to obtain housing at the Caldwell County Shelter Home. But on 23 August 2021, respondent-mother was asked to leave that shelter based on a "lack of cooperation and ongoing contact" with Paredes. DSS began providing case management services to the family on 16 September 2021 and a few days later, Jim and Jed were placed with a temporary safety provider due to continual safety concerns. On 25 September 2021, DSS was notified that respondent-mother had removed the children from the temporary

1. Pseudonyms are used to protect the juveniles' identities pursuant to N.C. R. App. P. 42(b).

2. Though Paredes is the father of all the children in this action, he was later deported to his country of origin and is not a party to this action.

safety provider and ceased communication with the temporary safety provider. DSS located the children's parents and the children around 6 October 2021. While DSS continued to assist respondent-mother and the children locate housing, respondent-mother and the children returned to the home where Paredes resided.

On 2 November 2021 Paredes tested positive for amphetamines, cocaine, methamphetamine, cannabinoids, and benzoylecgonine in a hair follicle screening. On 20 December 2021, Jim and Jed tested positive for amphetamines, cocaine, and methamphetamine in hair follicle screenings.

On 27 January 2022, respondent-mother asked DSS to help her find new housing after reporting a domestic violence incident with Paredes in the presence of the children. On 2 February 2022, respondent-mother and the children left the housing that DSS provided, so respondent-mother could resume a relationship with Paredes. Around 6:45 a.m. that day, Paredes, respondent-mother, and the children were involved in a car accident in which the family's vehicle flipped over. When law enforcement arrived at the scene, they did not find any members of the family. DSS later discovered that the parents left the scene with the children and went to a nearby home. Neither respondent-mother nor Paredes sought medical attention for the children, despite the children not having been buckled into car seats at the time of the accident. DSS notified emergency medical services for the children to receive medical attention and subsequently filed a petition alleging Jim and Jed were neglected and dependent. That same day, the trial court ordered DSS to take non-secure custody of Jim and Jed. On 8 February 2022, the trial court ordered continued non-secure custody to DSS.

On 15 March 2022, the trial court conducted an adjudicatory hearing on DSS's petition. In its 30 March 2022 order following the hearing, the trial court found that Paredes and respondent-mother were living together, respondent-mother was employed, and both parents had received some mental health services. In that order, the trial court adjudicated Jim and Jed as neglected and dependent. Further, the trial court ordered both parents to: enter into and comply with DSS' Out-Of-Home Family Services Agreements; complete and comply with a comprehensive clinical assessments; sign consent agreements for placement providers to release information to DSS; complete a parenting classes and comply with recommendations; comply with random urine and hair follicle drug screens; maintain stable housing and stable employment; and notify DSS "of all medications taken and comply with pill count requests." The trial court ordered the children to remain in DSS custody

and continued placement in foster care. Both parents were individually granted one hour of supervised visitation a week.

On 5 July 2022, the trial court held a permanency planning hearing for Jim and Jed and ordered a primary permanent plan of reunification and a secondary plan of adoption. Specifically, the trial court found that respondent-mother had begun counseling and a domestic violence assessment but had not attended or participated in further recommended sessions; respondent-mother had quit her job; and neither parent had visited the children for a six-week period, but on 22 April 2022, both parents had started visiting weekly. This hearing and order established that the parents had entered into their case plans on 6 April 2022 and required them to complete and comply with the tasks in their respective case plans.

On 15 November 2022, respondent-mother gave birth to Mark and the next day, DSS obtained non-secure custody of Mark after his release from the hospital. Two days later, DSS filed a petition alleging that Mark was neglected and dependent. Mark was adjudicated neglected and dependent on 16 March 2023.

On 6 December 2022, the trial court held another permanency planning hearing for Jim and Jed. In its 6 December 2022 order, the trial court found respondent-mother had made limited progress on her case plan; her visitation with the children was sporadic but going well; and she had tested positive for amphetamine and methamphetamine in August 2022. The trial court ceased reunification efforts, made adoption the primary plan with guardianship as the secondary plan, and awarded respondent-mother one hour of supervised visitation a month. The trial court ceased Paredes' visitation. Then, in the next permanency planning hearing for Jim and Jed held on 1 March 2023, the trial court re-iterated its orders, and the same primary and secondary plans remained in place.

On 6 June 2023, the trial court held permanency planning hearings for all the children. Jim and Jed's primary and secondary plans, respectively, remained adoption and guardianship. Further, the trial court ordered Mark's initial primary plan as reunification and secondary plan to be adoption. At the permanency planning hearings on 5 December 2023 and on 21 May 2024, the primary and secondary plans for all the children remained the same.

At the 13 August 2024 permanency planning hearing, the trial court changed all the children's primary plans to guardianship and secondary plans to adoption. At the hearing, the trial court heard counsel's arguments and spoke with the children's prospective guardians regarding

their legal and financial obligations. Though the trial court received a DSS report, a GAL report, and the prospective guardians' affidavits, it did not hear any oral testimony. Rather, the trial court stated it would "adopt the recommendations contained in the department's reports simply providing guardianship as ordered[.]" Subsequently, the trial court awarded guardianship to the prospective guardians and continued its prior grant of visitation for respondent-mother.

II. Jurisdiction

This Court has jurisdiction to review "[a]ny order, other than a nonsecure custody order, that changes legal custody of a juvenile." N.C.G.S. § 7B-1001(a)(4) (2023). Accordingly, we have jurisdiction to review the trial court's permanency planning order awarding guardianship to Jim, Jed, and Mark's foster parents.

III. Standard of Review

"This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re P.O.*, 207 N.C. App. 35, 41 (2010). "The trial court's findings of fact are conclusive on appeal if unchallenged or if supported by competent evidence in the record." *In re I.K.*, 377 N.C. 417, 422 (2021) (cleaned up).

A "decision of the trial court regarding best interests of a juvenile," such as a decision on guardianship or visitation, "is within the trial court's discretion and will not be overturned absent an abuse of discretion." *In re L.M.*, 238 N.C. App. 345, 349 (2014). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re A.P.W.*, 378 N.C. 405, 410 (2021) (cleaned up). We review de novo the trial court's conclusions of law. *In re P.O.*, 207 N.C. App. at 41.

IV. Discussion

Respondent-mother first argues the permanency planning order was not supported by competent evidence. Because we agree with respondent-mother's contention that the 13 August 2024 permanency planning order was not supported by competent evidence, we need not reach respondent-mother's remaining arguments.

Chapter 7B of our General Statutes "divides abuse, neglect, and dependency proceedings into two" stages: first the adjudicatory stage, and second, the dispositional stage. *In re J.M.*, 384 N.C. 584, 592 (2023). Such proceedings "require the application of different evidentiary

standards at each stage[.]" *In re O.W.*, 164 N.C. App. 699, 701 (2004) (citations omitted). At the adjudicatory stage, "heightened requirements are in place to protect the rights of . . . the juvenile's parent and assure due process of law," because "the adjudication is a formal, adversarial process, aimed at determining the truth or falsehood of the allegations in the petition." *In re K.W.*, 272 N.C. App. 487, 491–92 (2020) (cleaned up). Therefore, "[t]he trial court must apply the Rules of Evidence, and can find a child abused, neglected, or dependent only if that status is proven by clear and convincing evidence[.]" *Id.* (citations omitted). Our Supreme Court has confirmed this, holding that, in the adjudicatory phase, "the trial court may not rely solely on prior court orders and reports but must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented." *In re T.N.H.*, 372 N.C. 403, 410 (2019).

After the trial court finds and concludes in the adjudicatory phase that a child is abused, neglected, or dependent, "the court then moves on to an initial disposition hearing." *In re K.W.*, 272 N.C. App. at 491 (citation omitted). At the dispositional stage, "the trial court, in its discretion, determines the child's placement based on the best interests of the child." *Id.* Our Court has described that the initial dispositional hearing "may be informal" because—contrary to the adjudicatory phase—the trial court may consider "evidence otherwise barred by the Rules of Evidence[.]" *Id.* at 492 (citations omitted); *see also* N.C.G.S. § 7B-901(a) (2023). Thus, the trial court may "incorporate into its findings information obtained from written reports by the parties," and "findings made at adjudication[,]" as well as "rely on written reports in the disposition hearing even if they have not been admitted into evidence." *Id.* (citation omitted). "If these sources of fact are sufficient to support the trial court's conclusions of law and its ultimate disposition, there is no need for the court to hear additional testimony." *Id.*

Specifically, section 7B-906.1 of our General Statutes, which governs review and permanency planning hearings, provides that "the court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, *or* testimony *or* evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C.G.S. § 7B-906.1(c) (2023) (emphasis added). Therefore, "[a]s a type of dispositional hearing, a permanency planning hearing 'may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile.' " *In re J.H.*, 244 N.C. App. 255, 270 (2015) (citing N.C.G.S. § 7B-901 (2013)).

Our Supreme Court has not held the requirement articulated in *In re T.N.H.*, that the trial court must receive some oral testimony in the adjudicatory phase, applies to the *dispositional* stage of a juvenile proceeding. Nor has our Supreme Court overruled the line of cases from this Court imposing such a requirement despite the tension between those cases and the evidentiary standard articulated in subsection 7B-906.1(c). *See, e.g.*, *In re J.T.*, 252 N.C. App. 19 (2017); *In re D.Y.*, 202 N.C. App. 140 (2010); *In re D.L.*, 166 N.C. App. 574, (2004). Accordingly, we are still bound by this Court's precedent.[3] *See also In re Civil Penalty*, 324 N.C. 373, 384 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

When a trial court's factual findings in a permanency planning order were solely based on "court reports, prior orders, and the arguments of counsel[,]" we have held that "the trial court's conclusions of law were in error without additional evidence offered to support the trial court's findings of fact[.]" *In re J.T.*, 252 N.C. at 21 (citing *In re D.L.*, 166 N.C. App. 574 (2004); *In re D.Y.*, 202 N.C. App. 140 (2010)). In these cases, "this Court reversed the permanency planning orders" where court reports "were the only admissible evidence offered by DSS at the permanency planning hearings." *Id.* (citing *In re D.L.*, 166 N.C. App. at 582; *In re D.Y.*, 202 N.C. App. at 142–23). Further, this Court has clearly articulated that counsel's statements "are not considered evidence." *Id.* (citing *In re D.L.*, 166 N.C. App. at 582).

Similarly, the trial court in *In re J.T.* did not hear oral testimony, but "only heard statements from the attorneys involved in the case[,]" accepted court reports "submitted by the guardian ad litem and a DSS social worker[,] and incorporated those reports by reference in its orders." 252 N.C. App. at 21. This Court again held that "in the absence of testimony," and where the trial court only heard statements from attorneys and incorporated reports by reference, the trial court's factual findings "were unsupported by competent evidence, and its conclusions

3. We observe that Section 7B-901(a) of our General Statutes, which governs initial dispositional hearings, articulates an *identical* evidentiary standard to that section which governs permanency planning hearings, declaring that "[t]he court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, including testimony or evidence from any person who is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C.G.S. § 7B-901(a) (2023). However, this Court has reached different holdings as to an oral testimony requirement in initial dispositional hearings and later dispositional hearings, like permanency planning and review hearings. *See In re K.W.*, 272 N.C. App. at 491–93. *Cf. In re J.T.*, 252 N.C. App. 19, 21 (2017).

of law were in error." *Id. See also In re S.P.*, 267 N.C. App. 533, 536–37 (2019) (holding such case was indistinguishable from *In re D.L.*, *In re D.Y.*, and *In re J.T.* where the trial court heard no testimony, accepted court reports, swore in the preparers of the court reports, and heard arguments from counsel).

The operative facts of the present case are no different from those in this Court's prior decisions. Here, the trial court did not receive any sworn oral testimony or take judicial notice of any previous matter but merely received reports and the prospective guardians' affidavits into evidence. Therefore, we are constrained to hold that the trial court's factual findings were unsupported by competent evidence and subsequently, its conclusions of law were erroneous.[4]

To the extent that the GAL and DSS argue that requiring oral testimony goes against the evidentiary requirements of permanency planning proceedings as codified in section 7B-901(a) and our Supreme Court's precedent, we are compelled to follow this Court's precedent and similarly vacate the trial court's order in light of *In re D.L.*, *In re D.Y.*, and *In re J.T.*[5]

V. Conclusion

For a permanency planning order to be supported by competent evidence, this Court's precedent requires some oral testimony, and therefore, more than court reports, attorney's statements, and prior orders. In this case, the trial court heard no oral testimony but instead relied on court reports and prospective guardians' affidavits to make its factual findings. Accordingly, we vacate and remand the trial court' permanency panning order so that the trial court may conduct another hearing in compliance with this Court's precedent.

VACATED AND REMANDED.

Judges COLLINS AND MURRY concur.

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4. To the extent that the GAL and DSS argue the guardians' affidavits were testimonial in nature, such affidavits still fail to satisfy this Court's requirement for live "oral testimony" at permanency planning hearings. *See In re J.T.*, 252 N.C. App. at 21.

5. We note our Court clearly stated in *In re K.W.*, "[t]he trial court did not err in proceeding with disposition absent the presentation of sworn testimony at the disposition hearing[,]" because "[s]ection 7B-901(a) explicitly allows the court in its disposition order to rely on written reports, and to incorporate the findings it made at the adjudication hearing." 272 N.C. App. at 487, 493, 492. In other words, "[i]f these sources of fact are sufficient to support the trial court's conclusions of law and its ultimate disposition, there is no need for the court to hear additional testimony." *Id.* at 492.

IN RE N.M.W. AND A.N.D.

No. COA24-890

Filed 21 May 2025

1. Termination of Parental Rights—right to counsel—waiver—forfeiture—aggressive behavior toward court-appointed counsels

In a termination of parental rights case, respondent-father's right to counsel under N.C.G.S. § 7B-1101.1(a) was not violated where the trial court's findings of fact showed that he had waived his right to counsel through "egregious dilatory or abusive" conduct—namely, verbal harassment and other threatening behavior directed at his multiple court-appointed attorneys (or their staff) throughout the case. Additionally, after respondent-father's final appointed counsel withdrew, respondent-father indicated a willingness to proceed pro se during a colloquy with the trial court, after which he signed a written waiver of counsel. Furthermore, even if respondent-father's waiver was neither knowing nor voluntary, his aggressive behavior toward his appointed attorneys still constituted a clear forfeiture of his right to counsel.

2. Termination of Parental Rights—cessation of reunification efforts—consideration of statutory factors—required findings of fact

After respondent-mother's two children had been adjudicated as neglected and dependent juveniles, the order ceasing reunification efforts with respondent-mother and the subsequent order terminating her parental rights in both children were vacated because, in the former order, the trial court failed to enter statutorily-required findings of fact showing that reunification efforts clearly would be unsuccessful or would be inconsistent with the children's health or safety—specifically, there were no findings showing that it had considered each of the factors enumerated in N.C.G.S. § 7B-906.2(d), such as whether respondent-mother had remained available to the department of social services and the guardian ad litem for her children, or whether she had acted in a manner inconsistent with her parental rights and with the health and safety of her children.

Judge STROUD concurring in part and dissenting in part.

IN RE N.M.W.

[299 N.C. App. 20 (2025)]

Appeal by respondents from orders entered 3 November 2023 and 30 May 2024 by Judge Andrew K. Wigmore in Carteret County District Court. Heard in the Court of Appeals 22 April 2025.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for the respondent-appellant-Father.

Jason Senges, for the respondent-appellant-Mother.

Stephanie Sonzogni, for the petitioner-appellee Carteret County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Maya M. Engle, and Stephen V. Carey, for the Guardian ad Litem.

TYSON, Judge.

Respondent-mother appeals from the district court's order ceasing reunification efforts with her daughters, A.N.D. ("Ann"), born 2014, and N.M.W. ("Nora"), born 2020. Respondent-mother also appeals the termination of her parental rights to Ann. Respondent-mother and Respondent-father both appeal from the termination of parental rights to Nora. We affirm the order terminating Respondent-father's parental rights to Nora. We vacate the order ceasing Respondent-mother's reunification efforts with daughters Ann and Nora, vacate the termination of Respondent-mother's parental rights to Ann and Nora, and remand for further statutorily-required findings and conclusions.

I. Background

Respondent-mother is the biological mother to R.J.D. ("Robert"), Ann and Nora. Robert lives with his paternal grandmother and is not involved in this process. Ann's biological father died in 2014. Respondent-mother and Respondent-father are parents of Nora.

Respondent-mother has interacted with child protective services since 2013 in three states: Maryland, Ohio, and North Carolina. The Carteret County Department of Health and Human Services ("DHHS") received three complaints about Ann's living conditions, allegations of domestic violence between Respondent-mother and Respondent-father, improper supervision, and sexualized and aggressive behavior by Ann.

The United States Coast Guard was patrolling the Morehead City Channel on 9 August 2019. The Guardsmen observed a sailing vessel,

identified as the "Quest" with Maryland Vessel Registration 8909AH, impeding traffic operating in the channel. The Quest had dragged its anchor from its original position nearer the marsh and south of the Morehead City Marina. The Guardsmen observed Respondent-mother sitting in the open cockpit near the stern.

Respondent-mother was dressed in a grey shirt, blue jeans, and rubber boots. She reported being fourteen weeks pregnant and Ann, her daughter, being aboard. Guardsmen observed approximately one foot of standing water inside the vessel's well, a large amount of live wires exiting storage compartments on the port and starboard sides entering the standing water inside the cabin, a heavy odor of diesel fuel emanating from the cabin, a large amount of garbage inside and outside of the cabin, and an extreme amount of filth located on the deck and inside the cabin. The Guardsmen encountered Ann on the bed inside the forward cabin. The Coast Guard removed the boarding party from the vessel, did not seek the source of the leaks, nor conduct a safety inspection.

Respondent-mother reported to the Guardsmen she resided on the vessel with Respondent-father and Ann. She also told the Guardsmen she and Ann were struggling to make ends meet, had nowhere else to go, and asserted she "was over living on the boat." The Guardsmen removed Respondent-mother and Ann from the vessel with her consent, transported them to the marina, and contacted the Morehead City Police Department for assistance to get them placed into a shelter.

DHHS filed a juvenile petition over a month later on 18 September 2019 alleging Ann to be neglected and dependent. Respondent-mother stipulated to the adjudication, which was entered by the district court on 13 December 2019.

The district court kept custody of Ann with DHHS and set concurrent plans of reunification as a primary plan and secondary plans of adoption and custody. Respondent-mother was ordered, *inter alia*, to maintain stability, find employment, seek counseling, complete a parenting evaluation, follow the recommendations for mental health treatment, and seek domestic violence counseling.

Nora was born on 9 February 2020 and after Ann's disposition hearing. DHHS filed a juvenile petition for two-day-old Nora alleging she was a neglected and dependent juvenile and took the newborn into non secure custody. The juvenile petition made similar allegations contained in Ann's prior petition. Nora was adjudicated as a neglected and dependent juvenile on 10 September 2020. The district court established a

primary plan for Nora of reunification with a secondary concurrent plan of adoption and custody.

Respondent-father of Nora was ordered, *inter alia*, to obtain mental health treatment for any diagnosis, remain sober and drug free, submit to drug tests, participate in a twelve-week substance abuse intensive outpatient program for three hours a day and attend three Alcoholics Anonymous/Narcotics Anonymous meetings per week, attend and complete parenting classes and show skills learned, complete a batterer's intervention program, and to refrain from domestic violence.

Respondent-mother received therapeutic services, completed a comprehensive clinical assessment. She also cleaned the boat and docked it at an appropriate location.

Both Respondent-mother and Respondent-father made progress on their respective plans. Respondent-mother and Respondent-father moved into a home in Onslow County. The district court adopted a plan of reunification with a secondary concurrent plan of custody or guardianship and ordered a gradual reunification working toward a trial home placement in February 2021. Ann was returned to Respondent-mother and Respondent-father's home on 24 April 2021 and Nora was returned a month later on 28 May 2021.

Respondent-mother voluntarily placed both Ann and Nora with Nora's former foster parent on 4 July 2021. Respondent-mother alleged domestic violence by Respondent-father, but later recanted the allegations. Ann alleged sexual abuse by Respondent-father, which was investigated by Onslow County child protective services and was found to be unsubstantiated. The district court suspended the trial home placement and suspended Respondent-mother and Respondent-father's visitation with both their children on 23 July 2021.

Ann purportedly assaulted another child in the foster home, was involuntarily committed to Carteret Health Care, and was later placed in a therapeutic foster home. The district court amended the permanent plan of reunification with a concurrent plan of guardianship. The district court also ordered the home placement to remain suspended until Respondent-mother and Respondent-father had re-engaged in anger management, domestic violence, and couples counseling. Respondent-father was ordered to complete the domestic violence offender assessment with the STOP program and engaged in domestic violence offender and anger management group therapy.

Respondent-father was involuntarily discharged from a domestic violence offender program, but he engaged with an online program. Respondent-mother and Respondent-father's home condition declined, with hazards present. Respondent-mother and Respondent-father were evicted from their home in July 2022 after live marijuana plants were found inside a shed located on the property.

The district court changed the plan to adoption with a concurrent secondary plan of reunification and suspended visitation on 16 September 2022. DHHS filed a petitions to terminate the mother's and father's parental rights to both juveniles on 1 December 2022. The district court ceased reunification efforts for both children on 21 April 2023 by an order entered six months later on 3 November 2023. Respondent-mother preserved her right of appeal.

Following hearings on 3 November 2023, 16 November 2023, and 12 January 2023, the trial court entered an order terminating Respondent-mother's parental rights to Ann and Respondent-mother and Respondent-father's rights to Nora. Respondent-mother and Respondent-father appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2023).

III. Issues

Respondent-father argues the district court violated his right to counsel. Respondent-mother argues the district court failed to make the statutory findings required to cease reunification efforts and improperly set a sole plan of adoption.

IV. Respondent-father's Appeal

[1] Respondent-father argues he did not knowingly and voluntarily waive his right to counsel. Respondent-father asserts he had received no prior notice of his counsel's intent to withdraw.

A. Standard of Review

Our Supreme Court has held:

> A trial court's determination concerning whether a parent has waived his or her right to counsel is a conclusion of law that must be made in light of the statutorily[-]prescribed criteria, so we review the question of whether the trial court erroneously determined that a parent [had]

> waived or forfeited his or her statutory right to counsel in a termination of parental rights proceeding using a *de novo* standard of review.

In re K.M.W., 376 N.C. 195, 209-10, 851 S.E.2d 849, 860 (2020).

B. Analysis

N.C. Gen. Stat. § 7B-1101.1(a) mandates parents to be represented by counsel during termination of parental rights actions, unless findings and supported conclusions show the parent has forfeited or waived such right. N.C. Gen. Stat. § 7B-1101.1(a) (2023).

After entering an appearance before the court, an attorney may not abandon a client and case without "(1) justifiable cause, (2) reasonable notice [to the client], and (3) the permission of the court." *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965) (citation omitted). "Where an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion. The Court must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal." *Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 217, 321 S.E.2d 514, 516 (1984).

A parent may waive representation by counsel if findings and conclusions support his actions constitute "egregious dilatory or abusive conduct." *In re K.M.W.*, 376 N.C. at 209, 851 S.E.2d at 860 (citation omitted).

Our Supreme Court explained in *K.M.W.*:

> In order to adequately protect a parent's due process rights in a termination of parental rights proceeding, the General Assembly has created a statutory right to counsel for parents involved in termination proceedings. More specifically, N.C.G.S. § 1101.1(a) provides that "[t]he parent [in a termination of parental proceeding] has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." Although parents eligible for the appointment of counsel in termination of parental rights proceedings may waive their right to counsel, they are entitled to do so only "after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary."

Id. at 208-09, 851 S.E.2d at 859.

Respondent-father was removed from a Batterer's Intervention Program purportedly due to "threatening behaviors toward the GAL,

the Social Worker and [Respondent-mother's] previous attorney." Respondent-father's first appointed attorney, Joshua Winks, moved for and was allowed to withdraw. Respondent-father's next appointed attorney, Elizabeth Ponder, also moved for and was allowed to withdraw due to Respondent-father's purported harassment.

Respondent-father then waived the assistance of appointed counsel and proceeded *pro se*. Following DHHS's petition to terminate his parental rights to Nora, the trial court suggested appointing him counsel for the TPR proceeding. Respondent-father agreed and the court appointed attorney John Curtis, who also moved and was allowed to withdraw due to alleged irreconcilable differences.

Respondent-father requested yet another attorney, and Michael Barnhill was appointed by the court to represent him. The proceeding was delayed for almost three months to allow Barnhill to review the file, meet with Respondent-father, and prepare for the TPR proceeding.

Respondent-father never met with Barnhill. At the TPR proceeding on 3 November 2023 Barnhill moved to withdraw as counsel. Barnhill told the district court Respondent-father had purportedly verbally abused his staff to the point his assistant felt the need to call law enforcement officers, Respondent-father had left disparaging and aggressive voicemails for him and at the church's phone where Barnhill served as the pastor. Barnhill surmised Respondent-father either had or would perjure himself. Barnhill was allowed to withdraw.

The district court noted Respondent-father's actions and conduct appeared to be a stalling tactic:

> And that's a consent by the Respondent Parent that Barnhill will be allowed to withdraw, and he is ready to proceed without an attorney today. That all efforts to have an attorney for [Respondent-father] have been made by the Court. There's been numerous attorneys through the years of the DSS case that have had to withdraw—have been allowed to withdraw; and although he represented himself through the DSS matter, we thought it necessary to make sure that he had court appointed attorney for the termination of parental rights matter; and he has basically forced two attorneys to withdraw in that matter and has asked to proceed on his own. The court is going to allow it.

The district court conducted a colloquy to determine if Respondent-father could proceed *pro se*. The district court also inquired

of Respondent-father whether he wanted to proceed *pro se*, was prepared to proceed without counsel, and after affirmative responses had Respondent-father to execute a written waiver of counsel. Any issue in the attorney-client relationships resulted from Respondent-father's conduct. Respondent-father expressly consented to the withdrawal of Barnhill, executed a written waiver, and elected to proceed *pro se* for the second time.

The district court's findings show Respondent-father both voluntarily and knowingly waived his right to counsel. Presuming, without deciding Respondent-father did not knowingly and voluntarily waive his right to counsel, his multiple actions and conduct with multiple appointed counsels constituted a forfeiture of counsel. *See State v. Moore*, 290 N.C. 610, 893 S.E.2d 231, *appeal dismissed*, 385 N.C. 624, 895 S.E.2d 402 (2023). The district court noted Respondent-father's conduct had caused three of his prior appointed counsels to withdraw. The order terminating Respondent-father's parental rights to Nora is affirmed.

V. Respondent-mother's Appeal

[2] Respondent-mother argues the district court failed to comply with the statutory mandate of N.C. Gen. Stat. § 7B-906.2 (2023), by failing to make the required findings to support a conclusion to allow it to discontinue and cease reunification efforts. *Id.*

A. Standard of Review

This Court "reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018).

B. Analysis

The General Assembly has mandated: "Reunification *shall remain a primary* or secondary plan unless the court made findings under G.S. 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2023) (emphasis supplied).

Specific and supported evidentiary findings must show:

(1) Whether the parent is making adequate progress within a reasonable period of time under the plan.

(2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.

(3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.

(4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2023).

"Subsection . . . 906.2(d) requires written findings which shall demonstrate the degree of success or failure toward reunification. We therefore hold that only those factors which demonstrate the degree of success or failure toward reunification require written findings." *In re L.L.*, 386 N.C. 706, 716, 909 S.E.2d 151, 159 (2024). The trial court failed to find and make the statutory findings and supported conclusions of whether Respondent-mother had remained available to DHHS and the guardian *ad litem* for her children, whether she is acting in a manner inconsistent with her parental rights, and inconsistent with the health or safety of the juvenile, "which demonstrate the degree of success or failure toward reunification." *Id.* The orders of the district court ceasing reunification and terminating Respondent-mother's parental rights to Ann and Nora are vacated.

VI. Conclusion

Respondent-father's right to counsel was not violated after he had expressly consented to his attorney's withdrawal due to his repeated egregious and dilatory behaviors and express waiver of counsel. The order terminating Respondent-father's parental rights to Nora is affirmed.

Statutorily-mandated findings "which demonstrate the degree of success or failure toward reunification" do not support the district court's conclusion to cease reunification efforts with Respondent-mother. *Id.* The district court's order ceasing reunification efforts and order terminating Respondent-mother's parental rights to Ann and Nora are vacated.

Respondent-mother's case is remanded for a prompt permanency planning hearing consistent with the parent's constitutionally-protected rights to the care, custody, and control of her children and for DHHS to provide the statutorily-mandated efforts and services to assist her to reunify with her children. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judge HAMPSON concurs.

Judge STROUD concurs in part and dissents in part.

STROUD, Judge, concurring in part and dissenting in part.

I concur with the majority opinion affirming the Order terminating Father's parental rights. I dissent from the majority opinion as to Mother's appeal challenging the Permanency Planning Order and the Termination Order. I would affirm the trial court's order based on the many detailed findings of fact in both the Permanency Planning Order and the Termination Order, all of which are binding on appeal. *See In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019). It is apparent from these detailed orders that the trial court properly considered all the factors required under North Carolina General Statute Section 7B-906.2, even if the trial court did not "track the statutory language verbatim[.]" *See In re L.L.*, 386 N.C. 706, 716, 909 S.E.2d 151, 159 (2024) ("[T]he trial court's written findings need not track the statutory language verbatim, but they must make clear that the trial court considered the evidence in light of whether reunification would be clearly unsuccessful or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." (citation and quotation marks omitted)). The findings show that the trial court addressed " 'the degree of success or failure toward reunification[,]' " *id.* (quoting N.C. Gen. Stat. § 7B-906.2(d)), and found that despite years of efforts by the Department of Social Services ("DSS") in North Carolina as well as two other states, there were "concern[s]" Mother was "just checking boxes on her case plan" to the extent she complied, but otherwise did not make any "real change."

Mother has raised no argument on appeal regarding the Termination Order but addresses only the Permanency Planning Order. Mother first argues that the trial court "failed to adhere to the statutory mandates by setting a sole plan of adoption and by failing to make the necessary findings to cease reunification efforts." She contends that under North Carolina General Statute Section 7B-906.2(b), concurrent plans are required "until a permanent plan is or has been achieved." N.C. Gen. Stat. § 7B-906.2(b) (2023). But she also acknowledges that if the Permanency Planning Order fails to include any required findings, we may consider both the Termination Order and the Permanency Planning Order together and any lack of findings in the Permanency Planning Order

can be cured by the findings in the Termination Order. *See In re L.R.L.B.*, 377 N.C. 311, 320, 857 S.E.2d 105, 114 (2021) ("[W]hen reviewing an order that eliminates reunification from the permanent plan in conjunction with an order terminating parental rights pursuant to [North Carolina General Statute Section] 7B-1001(a1)(2), we consider both orders together as provided in [North Carolina General Statute Section] 7B-1001(a2). Based on this statutory directive, we concluded in *In re L.M.T.* that incomplete findings of fact in the cease reunification order may be cured by findings of fact in the termination order. Although [the] respondent-mother contends that a 2017 amendment to [North Carolina General Statute Section] 7B-1001 'abrogated' our ruling in *In re L.M.T.* on this issue, we find her argument unpersuasive." (quotation marks omitted) (citing *In re L.M.T.*, 367 N.C. 165, 170, 752 S.E.2d 453, 457 (2013))).

Mother argues that in the Permanency Planning Order, the trial court "failed to make necessary findings to cease reunification efforts [ ]" as required by North Carolina General Statute Section 7B-906.2(d), but her argument overlooks most of the trial court's other extensive and detailed findings in both the Permanency Planning Order and the Termination Order addressing each factor. Under the standard established by our Supreme Court in *In re L.L.*, the trial court's order is sufficient:

> At the outset, we reiterate this Court's previously articulated standard for written findings under the Juvenile Code. Specifically, the trial court's written findings need not track the statutory language verbatim, but they must make clear that the trial court considered the evidence in light of whether reunification would be clearly unsuccessful or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.
>
> Similarly, in keeping with this Court's approach under [North Carolina General Statute Sections] 7B-906.1(e) and 7B-1110(a), we recognize the Juvenile Code's flexibility for written findings that are responsive to each permanency-planning dispute. Subsection . . . 906.2(d) requires written findings which shall demonstrate the degree of success or failure toward reunification. We therefore hold that only those factors which demonstrate the degree of success or failure toward reunification require written findings.

386 N.C. at 716, 909 S.E.2d at 159 (citations and quotation marks omitted).

Mother challenges only one finding in the Permanency Planning Order as unsupported by the evidence, Finding of Fact No. 61, entitled "[e]fforts toward reunification." She challenges none of the other nearly nine pages of findings regarding the grounds for termination of parental rights as unsupported by the evidence. Therefore, all of these unchallenged findings are binding on this Court. *See In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) ("Findings of fact not challenged by [the] respondent are deemed supported by competent evidence and are binding on appeal." (citation omitted)). Mother argues Finding of Fact No. 61 does "not make clear the time frame of the efforts of the department and if they have been properly addressed since the last hearing." Finding of Fact No. 61 is supported by the evidence, and this finding summarizes a long series of actions DSS had taken to assist Mother in being able to reunify with her children over the years since they were taken into custody. In the context of the entire order, the time frame is clear; it covers the entire life of the case since Ann was first taken into custody and since Nora's birth. The trial court did not need to make a finding about the date of each action when the evidence clearly supports Finding of Fact No. 61 and the other findings in the Permanency Planning Order make it clear that the trial court addressed the factors under North Carolina General Statute Section 7B-906.2(d).

Mother acknowledges in her brief that the Termination Order "cures any defect with regards to [North Carolina General Statute Section 7B-]906.2(d)(1) and (2)." Thus, her argument remains only as to North Carolina General Statute Section 7B-906.2(d)(3), "[w]hether the parent remains available to the court, the department, and the guardian ad litem for the juvenile[,] and 7B-906.2(d)(4), "[w]hether the parent is acting in a manner inconsistent with the health or safety of the juvenile." N.C. Gen. Stat. § 7B-906.2(d)(3)-(4).

The trial court's nearly nine pages of findings in the Permanency Planning Order do not use these exact words but the findings address both factors. Mother did not attend the permanency planning hearing and attended only the first two days of the three-day termination hearing. However, the findings overall show Mother had been available most of the time to DSS, the GAL, and the court, and she had engaged in some programs and classes over the years, but she failed to demonstrate that she learned anything from these programs. Mother's problem was not her availability; it was her persistent failure to benefit from the "near-continuous" services provided to her over a period of years. Her behaviors remained unchanged. The trial court found that "[g]iven the lack of progress in spite of the services provided, and that the parents have engaged in some services but no change is evident, reunification

efforts at this point would be futile." The Termination Order includes even more findings addressing Mother's long history of assistance from DSS, her limited engagement, and her failure to benefit from these services. The Termination Order also includes extensive and detailed findings regarding the efforts of DSS in North Carolina as well as Maryland and Ohio before this case to address the same recurring issues arising from domestic violence and Mother's mental health concerns. Specifically, the trial court found "[t]he same behaviors" resulting in DSS involvement and removal of the children "remained through the case, and continued through this hearing." Mother "made excuses, blamed others, and failed to take advantage of services in a meaningful way which would show change[ ]" in her behaviors. She was provided "opportunity after opportunity, as well as additional time to make change, and did not take advantage of it." The trial court found this lack of meaningful progress would not "allow[ ] reunification to occur." The trial court noted North Carolina is not the only state where there has been intervention by Child Protective Services ("CPS") but there have been "numerous interventions by CPS (in multiple states) as to [Ann]." "In spite of a myriad of near continuous services and treatment provided, the parents have been unable to remediate the issues that have led to DSS involvement." There is an "extensive [CPS] history in Maryland and Ohio dating back to 2013 with [Mother.]" The same issues with Mother arose in both Maryland and Ohio and remained at the time of the termination hearing.

Also, even if the trial court's findings in the Permanency Planning Order were insufficient, as the majority has determined, the Orders should not be vacated and remanded for a new hearing. At most, the Permanency Planning Order should be remanded for the trial court to make additional findings of fact. Mother has failed to demonstrate that "the trial court's error was material and prejudicial so as to warrant vacating and reversing the permanency planning order at issue and vacating the termination of parental rights order." *In re L.R.L.B.*, 377 N.C. at 326, 857 S.E.2d at 118. Even if the majority's analysis of the Permanency Planning Order is correct, the Order should be remanded to the trial court to make additional findings, as explained in detail by our Supreme Court in *In re L.R.L.B.*:

> We do not discern that the Legislature enacted [North Carolina General Statute Section] 7B-1001(a2) with the intention of disengaging an entire termination of parental rights process in the event that a trial court omits a single finding under [North Carolina General Statute Section] 7B-906.2(d)(1)–(4) from its trial court order which eliminates reunification from a child's permanent plan. Unlike

the specific finding that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety which is required by [North Carolina General Statute Section] 7B-906.2(b) before eliminating reunification from the permanent plan, no particular finding under [North Carolina General Statute Section] 7B-906.2(d)(3) is required to support the trial court's decision. [North Carolina General Statute Section] 7B-906.2(d) merely requires the trial court to make written findings as to each of the issues enumerated in [North Carolina General Statute Section] 7B-906.2(d)(1)–(4), and to consider whether the issues demonstrate the parent's degree of success or failure toward reunification. A finding that the parent has remained available to the trial court and other parties under [North Carolina General Statute Section] 7B-906.2(d)(3) does not preclude the trial court from eliminating reunification from the permanent plan based on the other factors in [North Carolina General Statute Section] 7B-906.2(d). *Cf. In re R.D.*, 376 N.C. 244, 259, 852 S.E.2d 117 (2020) (concluding that the balancing of the six dispositional factors in [North Carolina General Statute Section] 7B-1110(a) "is uniquely reserved to the trial court and will not be disturbed by this Court on appeal").

To obtain relief on appeal, an appellant must not only show error, but that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action. It is the trial court's authority as the finder of fact to assign weight to various pieces of evidence . . . in exercising its discretion to determine[ ] that ceasing reunification is in the best interests of the child[.] Upon considering the trial court's order that eliminated reunification from the permanent plan together with its order terminating parental rights, and determining that the trial court's order eliminating reunification may be cured upon remand to the trial court . . . due to insufficient findings of fact contained in the order because it does not address the issue embodied in [North Carolina General Statute Section] 7B-906.2(d)(3) as to "whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile," we conclude that [the] respondent-mother has not shown that the trial

> court's error was material and prejudicial so as to warrant vacating and reversing the permanency planning order at issue and vacating the termination of parental rights order.
>
> *We therefore believe that the appropriate remedy for the trial court's error here is to remand this matter to the trial court for the entry of additional findings in contemplation of [North Carolina General Statute Section] 7B-906.2(d)(3). This Court's precedent . . . regarding the relationship between incomplete findings in an order which ceases reunification efforts and the findings of fact in a subsequent termination of parental rights order[ ] authorizes such a remedy. In the event that the trial court concludes, after making additional findings, that its decision to eliminate reunification from the juvenile[ ]'s permanent plan in its . . . permanency planning order was in error, then the trial court shall vacate said order as well as vacate the order terminating [the] respondent-mother's parental rights, enter a new permanent plan for the juvenile that includes reunification, and resume the permanency planning review process. If the trial court's additional findings under [North Carolina General Statute Section] 7B-906.2(d)(3) do not alter its finding under [North Carolina General Statute Section] 7B-906.2(b) that further reunification efforts are clearly futile or inconsistent with the juvenile's need for a safe, permanent home within a reasonable period of time, then the trial court may simply amend its permanency planning order to include the additional findings, and the . . . order terminating [the] respondent-mother's parental rights may remain undisturbed.*

Id. at 325-27, 857 S.E.2d at 117-18 (emphasis added) (citations, quotation marks, ellipsis, and brackets omitted).

Therefore, I concur in part with the majority opinion as to termination of Father's parental rights but otherwise dissent from the portion vacating the Permanency Planning Order and the Termination Order as to Mother. Both the trial court's Permanency Planning Order and Termination Order made extensive and detailed findings regarding Mother's lack of progress to remedy the behaviors leading to the removal of her children. In reading the findings of both orders together, as prescribed by our Supreme Court in *In re L.R.L.B.*, *see id.* at 320, 857 S.E.2d at 114, they are more than sufficient to support a conclusion to

cease reunification efforts under North Carolina General Statute Section 7B-906.2. And even if the Permanency Planning Order is insufficient, this court should not vacate both orders but should remand to the trial court for additional findings as dictated by *In re L.R.L.B. See id.* at 325-27, 857 S.E.2d at 117-18.

IN THE MATTER OF THE WILL OF FRANKLIN D. ARNETTE, DECEASED

No. COA24-796

Filed 21 May 2025

Wills—caveat proceeding—after-born heirs—putative father—paternity established prior to decedent's death

In a caveat proceeding filed by three of decedent's children (caveators) who had not been named in decedent's will, the trial court properly concluded—albeit on an incorrect basis—that caveators were pretermitted heirs who were entitled to take shares in decedent's estate pursuant to N.C.G.S. § 29-19 (involving succession rights of children born out of wedlock). Although the trial court incorrectly determined that caveators could take under subsection 29-19(b)(1)—which did not apply because caveators had not been finally adjudicated as decedent's heirs prior to reaching the age of majority—caveators were nevertheless entitled to take under subsection 29-19(b)(2), the requirements of which were satisfied by decedent during his lifetime. Decedent acknowledged his paternity of caveators in an affidavit of parentage, consent order, and amended paternity order, all of which were filed with the clerk of superior court in decedent's county of residence while he was alive. Further, caveators provided timely notice of their claim in compliance with section 29-19(b). Therefore, the trial court's order entered in favor of caveators was affirmed as reaching the correct result.

Appeal by Betty Arnette from Order entered 16 February 2024 by Judge Regina M. Joe in Cumberland County Superior Court. Heard in the Court of Appeals 25 February 2025.

Sharon A. Keyes for Propounder-Appellant.

Yarborough, Winters & Neville, P.A., by J. Thomas Neville, for Caveators-Appellees.

HAMPSON, Judge.

Factual and Procedural Background

Betty Arnette (Propounder-Appellant) appeals from an Order entered in favor of Connie Parker, Debra Monk, and Christina McQueen (Caveators-Appellees) granting Caveators-Appellees' Motion to Cause Amendment to Persons Entitled to Share in Decedent's Estate. The Record before us tends to reflect the following:

Franklin D. Arnette (Decedent) executed one will during his lifetime. Following Decedent's death on 29 August 2020, Propounder-Appellant, as the executrix of Decedent's estate, filed an application to probate Decedent's Will on 22 October 2020. In the application, Propounder-Appellant did not list the Caveators-Appellees as Decedent's heirs. At the time the Will was executed, 2 October 2012, Caveators-Appellees were not adjudicated legal heirs of Decedent nor were they included in the Will.

On 15 November 2019, Decedent properly executed and filed an Affidavit of Parentage and Consent Order of Paternity (Consent Order) in Cumberland County as to each of the Caveators-Appellees. An Amended Paternity Order adjudging Decedent "the biological father of the [Caveators-Appellees] in accordance with NCGS § 49-14" was subsequently entered on 12 February 2020. In its Findings of Fact, the trial court found "the sworn, written affidavit[s] of parentage executed by the natural father [and natural mother] of the children" alongside "their sworn signatures to the affidavits and consent order filed on November 15, 2019" to be clear, cogent, and convincing evidence Decedent was the biological father of Caveators-Appellees. Following entry of the Amended Paternity Order, Decedent was listed as the natural father on Caveators-Appellees' respective birth certificates.

On 30 November 2020, after Propounder-Appellant's application to probate the Will, Caveators-Appellees filed a Caveat seeking statutory shares of Decedent's estate. On 9 February 2021, Caveators-Appellees' counsel sent a written letter to Propounder-Appellant's counsel explaining Caveators-Appellees' claim as entitled after-born children of Decedent. The letter contained copies of the Amended Paternity Order, birth certificates with Decedent listed as the father, and DNA tests identifying Decedent as Caveators-Appellees' biological father.

Propounder-Appellant subsequently posted the Notice to Creditors on 11 May 2021 and filed a Motion to Dismiss the Caveat pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil

Procedure. Within Propounder-Appellant's Motion to Dismiss, she acknowledged receipt of the written letter and additional documents from Caveators-Appellees' counsel. The trial court denied the Motion to Dismiss on 29 March 2022. In the Order denying the Motion to Dismiss the Caveat, the trial court concluded "[Caveators-Appellees] are pretermitted heirs, being after-born children born out of wedlock and are heirs to the Decedent pursuant to N.C.G.S. § 29-19(b)."

On 1 April 2022, Caveators-Appellees filed a Motion to Cause Amendment to Persons Entitled to Share in Decedent's Estate (Motion to Amend). Prior to the hearing on the Motion, Propounder-Appellant filed Notice of Appeal from the Order denying the Motion to Dismiss the Caveat entered on 29 March 2022. On 13 October 2023, this Court dismissed the appeal on interlocutory grounds.

The trial court entered an Order granting Caveators-Appellees' Motion to Amend on 16 February 2024 (Order to Amend). Caveators-Appellees subsequently filed a voluntary dismissal of the Caveat on 27 February 2024. Propounder-Appellant timely filed Notice of Appeal from the Order to Amend on 18 March 2024. Propounder-Appellant did not appeal the Order denying the Motion to Dismiss the Caveat entered on 29 March 2022, which concluded Caveators-Appellees are pretermitted heirs of Decedent's estate.

Issue

The dispositive issue on appeal is whether the trial court erred in concluding the Caveators-Appellees are pretermitted heirs under N.C. Gen. Stat. § 29-19(b).

Analysis

When an appeal in a probate matter "contains specific findings of fact or conclusions to which the appellant takes exception, the trial court on appeal is to apply the whole record test." *In re Estate of Mangum*, 212 N.C. App. 211, 212, 713 S.E.2d 18, 20 (2011) (citing *In re Estate of Swinson*, 62 N.C. App. 412, 415-16, 303 S.E.2d 361, 363-64 (1983)). "The standard of review in this Court is the same as in the [trial court]." *Id.* (citing *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2-3 (1995)).

Applying the whole record test, we consider "whether the facts found by the trial judge support the judgment." *In re Estate of Swinson*, 62 N.C. App. 412, 417, 303 S.E.2d 361, 364 (1983) (citing *In re Sams' Estate*, 236 N.C. 228, 229-30, 72 S.E.2d 421, 422 (1952)). The whole record test requires the following determinations: "(1) whether the findings of fact are supported by the evidence; (2) whether the conclusions

of law are supported by the findings of fact; and (3) whether the order or judgment is consistent with the conclusions of law and applicable law." *In re Estate of Williams*, 246 N.C. App. 76, 81, 783 S.E.2d 253, 257 (2016) (citing N.C. Gen. Stat. § 1-301.3(d) (2023)). If there is sufficient evidence to support the findings, we must affirm. *Mangum*, 212 N.C. App. at 212, 713 S.E.2d at 20 (citing *Swinson*, 62 N.C. App. at 415, 303 S.E.2d at 363).

"An illegitimate child's right to inherit from her putative father is established only via strict compliance with" statutory requirements. *In re Williams*, 208 N.C. App. 148, 152, 701 S.E.2d 399, 401 (2010). N.C. Gen. Stat. § 29-19(b) provides:

> (b) For purposes of intestate succession, a child born out of wedlock shall be entitled to take by, through and from:
>
> (1) Any person who has been finally adjudged to be the father of the child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;
>
> (2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of the child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.
>
> . . . .
>
> Notwithstanding the above provisions, no person shall be entitled to take hereunder unless the person has given written notice of the basis of the person's claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors.

In the case *sub judice*, Propounder-Appellant takes exception to the trial court's Findings of Fact and Conclusions of Law that Caveators-Appellees are after-born children born out of wedlock entitled to take from Decedent's estate. The trial court concluded Caveators-Appellees are entitled to take under N.C. Gen. Stat. § 29-19(b)(1). Upon review, we agree with Propounder-Appellant that Section 29-19(b)(1) does not apply to Caveators-Appellees because they were not finally adjudicated as Decedent's heirs before they reached the age of majority as required by the corresponding statutory provision. *See*

N.C. Gen. Stat. § 49-14(a) (2023) ("The paternity of a child born out of wedlock may be established by civil action at any time *prior* to such child's eighteenth birthday." (emphasis added)). However, we conclude Caveators-Appellees are entitled to take from Decedent's estate under N.C. Gen. Stat. § 29-19(b)(2). Thus, although the trial court's stated rationale—N.C. Gen. Stat. § 29-19(b)(1)—is inapplicable in this case, the trial court nonetheless reached the correct result: concluding Caveators-Appellees are pretermitted heirs entitled to shares of Decedent's estate. "[W]here a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Orlando Residence, Ltd. v. All. Hosp. Mgmt., LLC*, 375 N.C. 140, 150, 846 S.E.2d 701, 708 (2020) (quoting *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990)).[1]

On 12 February 2020, the trial court entered an Amended Paternity Order "adjudging that the Decedent was the biological father of the [Caveators-Appellees]". That Order included the following Finding of Fact:

> The court finds that *the sworn, written affidavit of parentage executed by the natural father of the children named herein*, and the sworn, written affidavit of parentage executed by the natural mother of the children named herein have been executed in accordance with NCGS 110-132(a). The court finds further that by affixing their sworn signatures to the affidavits and consent order filed on November 15, 2019, the natural mother and *natural father of the children named herein do consent to the entry of this amended order approving the affidavit of parentage* pursuant to NCGS 110-132 and understand that such consent will waive any right to revoke the affidavit of parentage.

(emphasis added). On 30 November 2020, Caveators-Appellees filed a Caveat to Decedent's Will. Propounder-Appellant then filed a Motion to Dismiss the Caveat on 15 June 2021. The Order denying Propounder-Appellant's Motion to Dismiss the Caveat, entered on 29 March 2022, made the following Findings of Fact:

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1. Propounder-Appellant raises an additional argument under N.C. Gen. Stat. § 29-19(b)(1) that N.C. Gen. Stat. § 49-14 establishes paternity for child support, rather than legitimation. Given our disposition in this case, we do not reach the merits of Propounder-Appellant's additional argument under N.C. Gen. Stat. § 29-19(b)(1).

> 8. The [Caveators-Appellees] are pretermitted heirs as defined by N.C.G.S. § 29-19(b)(1) or N.C.G.S. § 29-18 and N.C.G.S. § 28A-22-2.
>
> 9. As pretermitted heirs, the [Caveators-Appellees] have a right to share in the Decedent's estate to the same extent the after-born, after-adopted, or entitled after-born child born out of wedlock would have shared if the testator had died intestate.

The trial court concluded, as a matter of law, "[Caveators-Appellees] are pretermitted heirs, being after-born children born out of wedlock and are heirs to the Decedent pursuant to N.C.G.S. § 29-19(b)." This Court dismissed Propounder-Appellant's initial appeal of the Order denying the Motion to Dismiss the Caveat as interlocutory. Since entry of the Order to Amend, Propounder-Appellant has not again appealed the Order denying her Motion to Dismiss the Caveat. Prior to this appeal, Propounder-Appellant did not contest Caveators-Appellees' status as Decedent's after-born children.[2]

Based in part on these prior Orders, the trial court made the following Findings of Fact in the Order to Amend:

> 8. On November 15, 2019, a Consent Order of Paternity was properly executed by the Decedent and filed on November 15, 2019 in the Civil District Court, Cumberland County, North Carolina (19 CVD 6943).
>
> 9. On February 12, 2020, a certain Amended Paternity Order was entered by the Honorable Toni S. King, District Court Judge presiding, in the Civil District Court, Cumberland County, North Carolina (19 CVD 6943) adjudging that the Decedent was the biological father of the [Caveators-Appellees] pursuant to N.C.G.S. § 49-14.
>
> 10. On March 29, 2022, the Honorable Tiffany Powers, presiding Superior Court Judge over the July 21, 2021 Cumberland County Civil Superior Session, signed an order in this case adjudicating and decreeing that the [Caveators-Appellees] were pretermitted heirs with standing to file a caveat without prejudice to their statutory share.

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2. In fact, Propounder-Appellant's counsel stated to the trial court that she was not "arguing the documents that were provided to the District Court in order to legitimate these children . . . [because] there's no question that these children are going to get a share under the law depending on how the estate plays out[.]"

. . . .

> 12. This Court further confirms all previous orders rendered by Judge Powers and Judge King finding that [Caveators-Appellees], Deborah Ann Monk, Connie Francis Monk and Christina Arnette Monk, are lineal descendants and pretermitted heirs.
>
> 13. As heirs of the Decedent, the [Caveators-Appellees] are entitled to share in the Decedent'[s] Estate and are further entitled to an order providing for the amendment of the application for probate allowing for their inclusion as pretermitted heirs of the Decedent.

Applying the whole record test, we consider whether Caveators-Appellees satisfied the criteria under N.C. Gen. Stat. § 29-19(b)(2): (1) acknowledgment of paternity during Decedent's and the children's lifetime (2) in a written instrument executed or acknowledged before a qualifying certifying officer that was (3) filed during his and the children's lifetimes with a superior court clerk in a county where he or the children reside.

Decedent acknowledged himself as Caveators-Appellees' father in the Affidavit of Parentage and subsequent Consent Order. Both the Affidavit of Parentage and Consent Order were executed before a judge, pursuant to N.C. Gen. Stat. § 52-10(b), and filed by Decedent with the clerk of court in Cumberland County. Further, the Amended Paternity Order adjudicating Decedent as Caveators-Appellees' biological father, pursuant to N.C. Gen. Stat. § 52-10(b), was entered with Decedent's consent.

"[N.C. Gen. Stat. § 29-19(b)(2)] does not place any limitations on the type of written instrument" required to acknowledge paternity. *Mangum*, 212 N.C. App. at 213, 713 S.E.2d at 20. In *Mangum*, this Court affirmed an order concluding a voluntary parenting agreement was sufficient evidence of paternal acknowledgment and allowing a biological father to take from his natural child's estate under N.C. Gen. Stat. § 29-19(b)(2). *Id.* at 214-15, 713 S.E.2d at 20-21. Indeed, we have recognized a voluntary support order, filed alongside an affidavit of parentage, constituted paternal acknowledgment to allow a child to inherit from their biological father's estate. *In re Estate of Potts*, 186 N.C. App. 460, 651 S.E.2d 297 (2007). Further, this Court has clarified that an affidavit of parentage filed with the clerk of court meets the statutory requirements for a written acknowledgment of paternity. *See Williams*, 246 N.C. App. at 81, 783 S.E.2d at 257 ("N.C. Gen. Stat. § 29-19(b)(2) allows legitimation to

occur if the unwed father acknowledges the child while both the father and child are living through the signing, notarization, and filing of an Affidavit of Parentage with the office of the clerk of the superior [court] where either the father or child resides.").

Here, Decedent acknowledged his paternity of Caveators-Appellees in the Affidavit of Paternity, Consent Order, and Amended Paternity Order which were all filed in Cumberland County—Decedent's place of residence—during Decedent's lifetime. Upon their filing with the clerk of court, these written instruments satisfied the requirements under N.C. Gen. Stat. § 29-19(b)(2): (1) acknowledgment of paternity during Decedent's and the children's lifetime (2) in a written instrument executed or acknowledged before a qualifying certifying officer that was (3) filed during his and the children's lifetimes with a superior court clerk in a county where he or the children reside. *See also Williams*, 246 N.C. App. at 81, 783 S.E.2d at 257. The Affidavit of Paternity, Consent Order, and Amended Paternity Order are sufficient evidence to support the trial court's Conclusion Caveators-Appellees are pretermitted heirs entitled to share in Decedent's estate. *See* N.C. Gen. Stat. § 29-19(b)(2) (2023); *see also Williams*, 246 N.C. App. at 81, 783 S.E.2d at 257.

Propounder-Appellant also contends "[Caveators-Appellees] did not file any formal claim in the estate for after-born status until April 1, 2022, when [the Motion to Amend] was filed", in violation of N.C. Gen. Stat. § 29-19(b). Propounder-Appellant argues Caveators-Appellees missed the notice requirement by over six months, as the Notice to Creditors was posted on 11 May 2021. However, in the Order to Amend, the trial court made the following Finding of Fact:

> 11. The Caveat was filed on November 30, 2020 and thereby satisfied the notice requirements regarding posting pursuant to N.C.G.S. § 29-19.

As the trial court recognized, Caveators-Appellees filed the Caveat to Decedent's Will *before* the Notice to Creditors was posted. The Caveat alleges Caveators-Appellees' claim as Decedent's heirs. Caveators-Appellees provided further notice of their claim by sending a copy of the Amended Paternity Order and copies of Caveators-Appellees' birth certificates to Propounder-Appellant's counsel on 9 February 2021. Propounder-Appellant affirmed receipt of the copies in her Motion to Dismiss the Caveat. Indeed, Caveators-Appellees written notice of their claim via the Caveat and the written letter to Propounder-Appellant's counsel provides sufficient evidence to support the trial court's Conclusion the timely notice requirements under N.C. Gen. Stat. § 29-19(b) were met.

Thus, Caveators-Appellees are pretermitted heirs under N.C. Gen. Stat. § 29-19(b)(2). Therefore, Caveators-Appellees are entitled to share in Decedent's estate despite being omitted from the Will. Consequently, the trial court did not err in granting the Motion to Amend.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order Granting Motion to Cause Amendment to Persons Entitled to Share in Decedent's Estate.

AFFIRMED.

Chief Judge DILLON and Judge FREEMAN concur.

LEGAL IMPACT FOR CHICKENS, Plaintiff
v.
CASE FARMS, L.L.C., CASE FOODS INC., And
CASE FARMS PROCESSING, INC., Defendants

No. COA24-673

Filed 21 May 2025

Animals—Protection of Animals Act—poultry production process exempt—motion to dismiss proper

The trial court properly dismissed a complaint brought by a nonprofit entity against defendants (businesses engaged in the raising and slaughtering of chickens for consumption) for failure to state a claim upon which relief could be granted where the legislation that defendants were alleged to have violated, section 19A-1 of the General Statutes (the Protection of Animals Act), specifically exempted "lawful activities" conducted for the production of poultry and for the primary purpose of providing food for human or animal consumption. Whether defendants were exempt from suit under the Act was a question of statutory interpretation and, thus, a question of law properly resolved by the court at the pleading stage. Further, plaintiff's argument that some of the systems and steps defendants employed in their poultry-production operation were either unlawful or not for the purpose of producing poultry or food for consumption failed because the plain meaning of "lawful activities" is one's collective acts not contrary to law; accordingly, the legislation's exemption was directed at the entire series of steps undertaken in

producing poultry, rather than requiring consideration of the lawfulness or purpose of any individual step in the process.

Appeal by Plaintiff from order entered 15 December 2023 by Judge Wesley W. Barkley in Burke County District Court. Heard in the Court of Appeals 11 February 2025.

Davis Hartman & Wright, LLP, by R. Daniel Gibson, for Plaintiff-Appellant.

Hamilton Stephens Steele & Martin PLLC, by Rebecca K. Cheny, Mark R. Kutny, and Jacklyn Bragano, for Defendant-Appellees.

Ward and Smith, P.A., by Christopher S. Edwards, for Beautiful Together, Inc., amicus curiae.

Michael Best & Frederich LLP, by Michael G. Schietzelt and Luke Taylor, for Dega Mobile Veterinary Care, Dr. Laura Cochrane, and Dr. Martha Smith-Blackmore, amici curiae.

Milberg Coleman Bryson Phillips Grossman PLLC, by Lucy N. Inman and Katharine W. Batchelor, for The Cornucopia Institute, Farm Animal Concerns Trust, and The Northeast Organic Dairy Producers Alliance, amicus curiae.

Jordan Price Wall Gray Jones & Carlton PLLC, by H. Weldon Jones, III, for The North Carolina Poultry Federation, Inc., amicus curiae.

Phillip Jacob Parker Jr., Stephen A. Woodson, Meghan N. Cook, and Stacy Revels Sereno, for North Carolina Farm Bureau Federation, Inc. & North Carolina Pork Counsil, amici curiae.

CARPENTER, Judge.

Legal Impact for Chickens ("Plaintiff") appeals from the trial court's 15 December 2023 order (the "Order") granting the motion to dismiss filed by Case Farms, LLC, Case Foods, Inc., and Case Farms Processing, Inc. (collectively, "Defendants"). On appeal, Plaintiff argues the trial court erred by granting Defendants' motion to dismiss for failure to state a claim under Rule 12(b)(6). After careful review, we affirm the Order.

I. Factual & Procedural Background

This case concerns an action initiated by Plaintiff, a non-profit organization, against: Case Farms LLC, a poultry producer; Case Foods, Inc., Case Farms' parent corporation; and Case Farms Processing, Inc., a subsidiary of Case Foods. Generally speaking, Defendants are in the business of raising and slaughtering broiler-meat chickens for commercial sale. The allegations in Plaintiff's complaint concern Defendants' conduct in connection with the growth, slaughter, and sales process at two locations in Morganton, North Carolina: 5067 Foreman Street (the "Hatchery") and 121 Rand Street (the "Slaughterhouse").

Defendants' process for raising and slaughtering chickens can be summarized as follows. First, chicks gestate as eggs in the "setter room" at the Hatchery. Then, when the eggs are expected to hatch, Defendants move the eggs to a "hatcher." Once the chicks hatch, Defendants place the chicks in rectangular-shaped trays to be transported. Defendants next place the trays on a system of conveyor belts where pistons redirect or push the trays to various locations at the Hatchery. After the chicks are moved using the conveyor-belt system, Defendants drive the chicks to affiliated "grower farms" where they are raised until they are ready to be slaughtered. Once the chickens are ready to be slaughtered, Defendants drive the chickens from the "grower farms" to the Slaughterhouse. At the Slaughterhouse, Defendants paralyze the chickens in a stun bath, cut their necks using automated machinery, and place them in a scalder tank filled with boiling water. Finally, machines process the slaughtered chickens for human consumption.

On 24 May 2023, Plaintiff filed a complaint and request for injunctive relief, alleging Defendants violated section 19A-1 of our General Statutes of North Carolina, entitled the Protection of Animals Act (the "PAA"). Thereafter, on 19 June 2023, Plaintiff filed an amended complaint and request for injunctive relief. On 16 August 2023, Defendants filed a motion to dismiss and answer to Plaintiff's first amended complaint. Then, Plaintiff amended its first complaint with Defendants' written consent. Thereafter, Plaintiff filed its second amended complaint (the "Complaint") alleging Defendants "engaged in intentional, affirmative, and reckless acts of neglect and extreme violence causing unjustifiable and unnecessary physical pain, suffering, and death towards the animals under its care and control."

To summarize, Plaintiff alleged Defendants' treatment of chickens at various stages throughout the hatching and slaughtering process amounted to animal cruelty. Specifically, Plaintiff alleged that

Defendants: (1) starve chicks that hatch early in the setter room; (2) allow chicks to overheat and die in the Hatchery; (3) allow chicks to be maimed and crushed by the conveyor-belt system; (4) crush chicks between transport trays; (5) allow chicks to fall to their death through the floor of transport trucks; (6) intentionally run over chickens with their vehicles; (7) allow chickens to overheat in the transport trucks; (8) bury injured chickens alive under dead chickens; and (9) boil chickens alive. Plaintiff did not allege that Defendants' hatching and slaughtering operation as a whole was illegal or otherwise prohibited by law.

On 15 November 2023, Defendants filed an answer and motion to dismiss under Rule 12(b)(6). On 15 December 2023, following a hearing on the matter, the trial court entered the Order. In the Order, the trial court concluded that the PAA was "inapplicable to Defendants" because they were exempt from suit under sections 19A-1(2) and (3). On 30 January 2024, Plaintiff filed notice of appeal.[1]

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(2) (2023).

III. Issue

The sole issue is whether the trial court erred by granting Defendants' motion to dismiss for failure to state a claim upon which relief may be granted.

IV. Analysis

Plaintiff makes two assertions in support of its primary argument that the trial court erred by granting Defendants' motion to dismiss. First, Plaintiff asserts the trial court improperly considered questions of fact and mixed questions of law and fact at the 12(b)(6) stage. Next, Plaintiff asserts that Defendants are not exempt from suit under the PAA because their individual systems and processes are either unlawful or not conducted for the purpose of producing poultry or food for human or animal consumption. For the reasons outlined below, we disagree with Plaintiff.

A. The PAA

The PAA provides a "civil remedy for the protection and humane treatment of animals in addition to any criminal remedies that are

1. The parties stipulated to the Order being served on Plaintiff on 2 January 2024. Thus, Plaintiff's notice of appeal was timely since the Order was served on Plaintiff more than three days after it was entered. *See* N.C. R. App. P. 3(c)(2).

available . . . ." N.C. Gen. Stat. § 19A-2 (2023). Under this statutory scheme, any "person" can seek a preliminary injunction against "any person who owns or has possession of an animal" by filing a verified complaint alleging "cruelty to an animal." *Id*. at § 19A-3. "Cruelty [to an animal]" and "cruel treatment [of an animal]" are defined by the PAA as "every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted." *Id*. at § 19A-1. The PAA also provides that "person has the same meaning as in [N.C. Gen. Stat. §] 12-3." *Id*. at § 19A-1(3); *see* N.C. Gen. Stat. § 12-3(6) (2023) ("The word 'person' shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary.").

But the PAA does not apply, in pertinent part, to:

> *Lawful activities* conducted . . . for purposes of production of . . . poultry [or]
>
> *Lawful activities* conducted for the primary purpose of providing food for human or animal consumption.

N.C. Gen. Stat. § 19A-1.1(2) and (3) (emphases added).

B. Standard of Review

This Court reviews a trial court's order granting a Rule 12(b)(6) motion to dismiss de novo. *See Taylor v. Bank of America, N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022) (citing *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)). Likewise, we review issues of statutory construction de novo. *Wilson v. Funeral Directors Inc. v. N.C. Bd. of Funeral Serv.*, 244 N.C. App. 768, 773, 781 S.E.2d 507, 510 (2016) (citations omitted). " '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, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Motions to dismiss brought under Rule 12(b)(6), "test[] the legal sufficiency of [a] complaint." *Proctor v. City of Jacksonville*, 296 N.C. App. 665, 669, 910 S.E.2d 269, 273 (2024); *see Estate of Graham v. Lambert*, 385 N.C. 644, 656, 898 S.E.2d 888, 899 (2024) ("At the pleading stage, a 12(b)(6) motion tests the law of the claim, not the facts which support it.") (internal quotation marks and citation omitted). When reviewing the trial court's grant of a motion to dismiss, we consider "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Bridges*, 366 N.C. at 541, 742 S.E.2d at 794. We treat factual allegations

as true and ignore legal conclusions. *See Proctor*, 296 N.C. App. at 669, 910 S.E.2d at 273.

It is proper for the trial court to dismiss the claim if one of the following is true: "(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." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 204 (2005) (quotation marks and citation omitted).

C. Rule 12(b)(6) Limitations

First, Plaintiff asserts it was improper for the trial court to conclude Defendants were exempt from suit under the PAA at the 12(b)(6) stage because determining Defendants' exemption status involved questions of fact and mixed questions of law and fact. Specifically, Plaintiff argues the question of whether Defendants activities are *lawful* is a mixed question of law and fact because it requires applying legal principles to the allegations in the complaint. Likewise, Plaintiff argues the determination of the *purpose* of Defendants' activities is a pure question of fact. In Plaintiff's view, these questions should have been presented to a jury for determination.

"Questions of statutory interpretation are ultimately questions of law for the courts . . . ." *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018). Stated differently, "[t]he interpretation of statutory language is a matter of law, and thus, appropriately resolved upon a Rule 12(b)(6) motion." *Peacock v. Shinn*, 139 N.C. App. 487, 497, 533 S.E.2d 842, 849 (2000).

Here, the trial court, in ruling on Defendants' 12(b)(6) motion, resolved the issue of whether Defendants were exempt under the PAA. Before reaching this conclusion, the trial court interpreted the relevant provisions of the PAA and ultimately ruled that Defendants' pertinent activity—commercial raising and slaughtering of chickens—was exempt from suit. Indeed, in the Order the trial court determined the PAA was "inapplicable to Defendants." This language demonstrates the trial court's determination of Defendants' exemption status was rooted in statutory interpretation. *See N.C. Bar & Tavern Ass'n v. Cooper*, 293 N.C. App. 402, 411, 901 S.E.2d 355, 364 (2024) (determining the language used by the trial court in its order indicated the trial court relied on statutory interpretation). Accordingly, the trial court did not improperly resolve issues of fact or mixed issues of law and fact at

the 12(b)(6) stage. Instead, the trial court properly addressed a question of law—whether Defendants were exempt from suit under the PAA.

D. Defendants' Exemption Status

Next, Plaintiff asserts that Defendants are not exempt from the PAA because some of the individual systems and processes Defendants employ in their poultry-production operation are either unlawful or not for the purpose of producing poultry or providing food for consumption. In other words, Plaintiff seeks to narrow our focus from Defendants' operation as a whole to individual steps within Defendants' poultry-production process. According to Plaintiff, every stage in Defendants' operation should be analyzed for its lawfulness and purpose. Conversely, Defendants argue they are exempt because their entire operation—commercial raising and slaughtering of chickens—is both lawful and conducted for the purpose of producing food for consumption.

The parties' arguments require us to interpret the relevant exemptions under the PAA. In doing so, we consider whether our General Assembly intended to exempt Defendants from suit under the circumstances of this case, with the outcome turning on how the relevant "activity" is defined.

"Our primary goal in construing a statute is 'to ensure that the purpose of the legislature, the legislative intent, is accomplished.' " *Wynn v. Frederick*, 385 N.C. 576, 581, 895 S.E.2d 371, 377 (2023) (quoting *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). Because the best indicia of legislative intent is the plain language of the statute, our analysis begins there. *Id.* at 581, 895 S.E.2d at 377. When interpreting the plain language of a statute, "undefined words [] 'must be given their common and ordinary meaning.' " *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 701 (2019) (quoting *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974)). "Absent precedent, we look to dictionaries to discern a word's common meaning." *N.C. Dep't of Env't Quality v. N.C. Farm Bureau Fed'n*, 291 N.C. App. 188, 193, 895 S.E.2d 437, 441 (2023) (citing *Midrex Techs., Inc. v. N.C. Dep't of Rev.*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016)). "If the plain language of the statute is unambiguous, we 'apply the statute[] as written.' " *Wynn*, 385 N.C. at 581, 895 S.E.2d at 377 (quoting *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 202, 675 S.E.2d 641, 649 (2009)) (alteration in original).

"If the plain language of the statute is ambiguous, however, we then look to other methods of statutory construction such as the broader statutory context, 'the structure of the statute[,] and certain canons of

statutory construction' to ascertain the legislature's intent." *Id.* at 581, 895 S.E.2d at 377 (quoting *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)) (alteration in original). Further, we may also "consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute." *O&M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006). "[R]emedial statute[s] must be construed broadly 'in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained.' " *Id.* at 268, 624 S.E.2d at 348 (quoting *Puckett v. Sellars*, 235 N.C. 264, 267, 69 S.E.2d 497, 499 (1952)).

This panel appears to be the first to interpret the PAA exemptions at issue in this case. Accordingly, we begin by examining the plain language of the PAA to determine which "activities" the General Assembly intended to exempt from suit. The PAA provides, in pertinent part, that an individual or entity is immune from suit if they are engaging in:

> *Lawful activities* conducted . . . for purposes of production of . . . poultry [or]
>
> *Lawful activities* conducted for the primary purpose of providing food for human or animal consumption.

N.C. Gen. Stat. § 19A-1.1(2) and (3) (emphases added).

The phrase "lawful activities" is not defined by the PAA or precedent. Thus, we consult dictionaries to discern the common meaning of the words "lawful" and "activities." *See N.C. Dep't of Env't Quality*, 291 N.C. App. at 193, 895 S.E.2d at 441 (citing *Midrex Techs., Inc.*, 369 N.C. at 258, 794 S.E.2d at 792). According to Black's Law Dictionary, "lawful" means "[n]ot contrary to law; permitted by law." *Lawful*, Black's Law Dictionary (8th ed. 2004). "Activities," the plural form of "activity," means "[t]he collective acts of one person or of two or more people engaged in a common enterprise." *Activity*, Black's Law Dictionary (8th ed. 2004). Thus, the phrase "lawful activities" under the PAA means one's *collective acts* or behaviors, not contrary to law. Accordingly, we find the PAA to be unambiguous and apply the statute as written. *See Wynn*, 385 N.C. at 581, 895 S.E.2d at 377.

The process of raising and slaughtering chickens is comprised of a series of tasks conducted for a common purpose—to produce poultry. Therefore, contrary to Plaintiff's interpretation, we hold the exempted activity is not each individual step within the commercial poultry-production process, but rather the entire process itself.

Defendants' operation involves a collective series of tasks in pursuit of a common outcome—to produce and sell poultry products for profit. Accordingly, we conclude the General Assembly intended to exempt Defendants' commercial poultry-production operation as a whole from suit under the PAA, provided the operation is permitted by law. Because Plaintiff's complaint does not and cannot support a claim that Defendants' operation of raising and processing poultry is illegal or otherwise prohibited by law, the trial court properly granted Defendants' motion to dismiss. *See Newberne*, 359 N.C. at 784, 618 S.E.2d at 204.

V. Conclusion

Under the circumstances of this case, Defendants' poultry-production operation is exempt under the PAA. Accordingly, we affirm the Order.

AFFIRMED.

Judges ARROWOOD and MURRY concur.

ERIK NELSON, PLAINTIFF
v.
LLOYD T. SMITH AND JENNIFER G. SMITH, DEFENDANTS

No. COA24-646

Filed 21 May 2025

1. Workers' Compensation—exclusivity provision—inapplicable to employer's landlords—negligence claim against landlords not barred

In plaintiff's negligence action arising from toxic mold exposure in his workplace, although plaintiff had filed a complaint with the Industrial Commission and subsequently entered into a compromise settlement agreement with his employer (a company), the exclusivity provision of the Workers' Compensation Act did not apply to bar plaintiff's claim against defendants—two individuals who, besides being officers in the company, owned the property in which the company leased space as a commercial tenant. Since defendants and the company were separate entities, plaintiff was not barred from asserting his negligence claims against defendants in their individual capacities as property owners and landlords of the workplace. Therefore, the trial court erred by granting defendants' motion to

dismiss plaintiff's negligence claim for lack of subject matter jurisdiction under Civil Procedure Rule 12(b)(1).

2. Contracts—release agreement between employer and employee —"affiliate"—negligence claims against individuals not barred

In plaintiff's negligence action arising from toxic mold exposure in his workplace, although plaintiff and his employer (a company) entered into a compromise settlement agreement (approved by the Industrial Commission) and signed a general release agreement, the release agreement did not serve to bar plaintiff's claims against defendants—two individuals who, besides being officers in the company, owned the property in which the company leased space as a commercial tenant—where plaintiff asserted his claims against defendants in their individual capacities as property owners and landlords of the workplace. By the plain language and express terms of the release agreement, defendants were not subject to the release: first, as individuals, they did not qualify as affiliates of the company; and second, in the context of plaintiff's claims, they were not acting in their official capacities in the course and scope of their employment with the company. Therefore, the trial court erred by granting defendants' motion to dismiss plaintiff's negligence claim for lack of subject matter jurisdiction under Civil Procedure Rule 12(b)(1).

3. Appeal and Error—preservation of issues—motion to dismiss granted on one basis—no ruling obtained on second basis—second issue dismissed

In an appeal from the trial court's order granting defendants' motion to dismiss plaintiff's negligence action pursuant to Civil Procedure Rule 12(b)(1), where the trial court did not rule on defendants' motion to dismiss pursuant to Civil Procedure Rule 12(b)(6), plaintiff's argument regarding Rule 12(b)(6) was not properly before the appellate court and was dismissed.

Appeal by Plaintiff from order entered 27 March 2024 by Judge Quintin McGee in New Hanover County Superior Court. Heard in the Court of Appeals 26 February 2025.

Perry, Brandt & McLemore, by Holden K. McLemore, and Terrazas PLLC, by Kevin J. Terrazas, pro hac vice, for Plaintiff-Appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and G. Anderson Stein, for Defendants-Appellees.

COLLINS, Judge.

Plaintiff Erik Nelson appeals from the trial court's order granting Lloyd T. Smith and Jennifer G. Smith's (collectively, "Defendants") motion to dismiss for lack of subject matter jurisdiction. Plaintiff argues that the trial court erred by granting Defendants' motion to dismiss because the exclusivity provision of the Workers' Compensation Act does not bar Plaintiff's claim and the parties' release agreement does not release Defendants from liability. For the following reasons, we reverse the trial court's order granting Defendants' motion to dismiss.

I. Background

Plaintiff commenced this action on 3 July 2023 by filing a complaint against Defendants. Defendants filed a motion to dismiss and a memorandum in support of that motion with attachments, including Plaintiff's Form 18 filed with the North Carolina Industrial Commission, a document listing Cortech Solutions, Inc.'s insurance carriers, and the Commission's order approving Plaintiff's Compromise Settlement Agreement with Cortech. The facts below are drawn from the parties' filings:[1]

Plaintiff began his employment with Cortech in February 2011. Defendant Lloyd T. Smith was the President of Cortech and Defendant Jennifer G. Smith was the Secretary and Treasurer. Plaintiff worked at Cortech's principal office ("Workplace"), located in Wilmington, North Carolina. The Workplace was not owned by Cortech; Defendants in their individual capacities owned the commercial property ("Property") in which the Workplace was located. Defendants were the landlords of the Workplace. Cortech was one of several commercial tenants who leased office space in the Property from Defendants.

Throughout the course of Plaintiff's employment with Cortech, the Workplace flooded in some capacity approximately fifteen times. While working, Plaintiff frequently smelled mildew in the Workplace.

Several months after he started working at the Workplace, in the summer of 2011, Plaintiff began experiencing various flu-like symptoms, including dizziness and cognitive difficulty. In August 2012, Plaintiff was diagnosed with Lyme Disease. Plaintiff's symptoms were ongoing; in May 2017, Plaintiff asked Cortech if he could work from home on the

1. In deciding a motion under North Carolina Rule of Civil Procedure 12(b)(1), the court need not confine itself to the face of the pleadings and may consider matters outside of the pleadings. *Harris v. Matthews*, 361 N.C. 265, 271 (2007).

days he did not feel well or was undergoing medical treatment. Cortech denied his request.

In September 2018, Hurricane Florence caused significant damage to the Property, and in the weeks following the hurricane, Plaintiff noticed what he believed was mold emerging from the baseboards of the Property. Defendants never closed the Property or Workplace to allow for proper remediation, nor did they, to Plaintiff's knowledge, consult any professionals regarding the extent of the damage.

In or around March 2019, Plaintiff's doctor requested that Plaintiff order an Environmental Relative Moldiness Index test. Plaintiff paid for the test and performed it in accordance with its instructions. For the test, Plaintiff took dust samples from various areas around his personal workspace, including his desk, phone, and shelves. The test found that Plaintiff's workspace was "beyond the highest level of classification, level 'Q4', for the presence of mold." The results indicated that the tested areas around Plaintiff's workspace were not safe and that "[r]e-occupancy is ill-advised until further remediation and re-assessment are conclusive."

Plaintiff immediately reported the test results to Defendants. Because Defendants took no action, Plaintiff filed a complaint with the Occupational Safety and Health Administration. In response to this complaint, Defendants arranged for an inspection and mold testing of the Workplace in June 2019. The results of that testing indicated that mold was present throughout approximately eighty percent of the Workplace.

Plaintiff filed a Form 18, "Notice of Accident to Employer," with the Commission on 12 August 2019 for his injuries resulting from "ongoing exposure to water damage and mold." One month later, in September 2019, Cortech terminated Plaintiff from his employment.

Plaintiff and Cortech entered into a compromise settlement agreement wherein Cortech agreed to pay Plaintiff $25,000 for any injuries giving rise to his claim; the Commission approved the agreement on 16 March 2021. Plaintiff also signed a general release agreement, wherein Plaintiff agreed "to resolve all current and future disputes concerning Plaintiff's employment with Cortech Solutions, Inc. along with all of its affiliates and subsidiaries" in exchange for additional consideration.

Plaintiff filed a complaint against Defendants on 3 July 2023 for negligence, gross negligence, and punitive damages. Plaintiff alleged that he suffered various health issues as a result of toxic mold exposure while working at the Workplace, "including immune system dysregulation

with autoimmune conditions resulting, hormone dysregulation, cardiac complications, kidney damage, neurologic sequelae identified within an MRI as diffuse white matter damage, weight loss, fatigue, [and] nausea[.]" Defendants moved to dismiss Plaintiff's claims pursuant to Rules 12(b)(1) and 12(b)(6). After a hearing, the trial court granted Defendant's motion under Rule 12(b)(1). Plaintiff appeals.

II. Discussion

Plaintiff argues that the trial court erred by granting Defendants' motion to dismiss for lack of subject matter jurisdiction because the exclusivity provision of the Workers' Compensation Act does not bar Plaintiff's claim and the release agreement does not release Defendants from further liability.

"A Rule 12(b)(1) motion to dismiss represents a challenge to the trial court's subject matter jurisdiction over a plaintiff's claims." *Marlow v. TCS Designs, Inc.*, 288 N.C. App. 567, 572 (2023); N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2023). This Court reviews a trial court's grant of a motion to dismiss for lack of subject matter jurisdiction de novo, "under which it views the allegations as true and the supporting record in the light most favorable to the non-moving party[.]" *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 624 (2022) (cleaned up). "[M]atters outside the pleadings . . . may be considered and weighed by the court in determining the existence of jurisdiction over the subject matter." *Tart v. Walker*, 38 N.C. App. 500, 502 (1978) (citation omitted). "Under a *de novo* review, th[is] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *McAdoo v. Univ. of N.C. at Chapel Hill*, 225 N.C. App. 50, 51 (2013) (quotation marks and citation omitted).

A. Exclusivity Provision of the Workers' Compensation Act

[1] Plaintiff contends that the exclusivity provision of the Act does not bar his claim because Defendants, in their individual capacities as owners of the Property and landlords of the Workplace, are separate from Cortech, Plaintiff's employer. We agree.

The exclusivity provision of the Act provides, in pertinent part,

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise on account of such injury or death.

N.C. Gen. Stat. § 97-10.1 (2023). In other words, the Act "provide[s] certain limited benefits to an injured employee regardless of negligence on the part of the employer, and simultaneously [] deprive[s] the employee of certain rights he had at the common law." *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 118 (1980) (citations omitted).

"In exchange for these limited but assured benefits, the employee is generally barred from suing the employer for potentially larger damages in civil negligence actions and is instead limited exclusively to those remedies set forth in the Act." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556 (2003) (quotation marks and citations omitted). However, this general rule of exclusivity only bars the employee from bringing additional claims against *his employer*, not separate entities.

For example, in *Phillips v. Stowe Mills, Inc.*, "the owner of a building, a parent corporation of the tenant employer, could not invoke the exclusivity provisions of the [] Act to bar recovery by an injured employee simply because the employer was a wholly owned subsidiary of the parent corporation." *Cameron v. Merisel, Inc.*, 163 N.C. App. 224, 233 (2004) (citing *Phillips*, 5 N.C. App. 150, 154 (1969)). "This Court concluded that, because the parent corporation was not the employer of the plaintiff and the employer corporation and parent corporation were separate entities, the [] Act's exclusivity bar did not apply to the parent corporation." *Id.*

Similarly, in *Cameron v. Merisel, Inc.*, the plaintiff was employed by Merisel, Inc. and Merisel Americas, Inc., who leased the building where plaintiff worked from Merisel Properties, Inc. 163 N.C. App. at 232. The plaintiff filed a negligence claim against Merisel Properties after he suffered serious medical complications as a result of alleged toxic mold exposure within his workplace. *Id.* at 225-26. This Court held, "The allegations in the present case do not reveal that Merisel Properties is anything more than a related, but separate entity, from Merisel and Merisel Americas, and thus does not show at this point an absolute bar to recovery due to the exclusivity provisions of the [] Act." *Id.* at 233.

Here, Plaintiff alleges:

> 2. The parties against whom this action is brought include the owner/landlord of the commercial property (the "Property") located at 1409 Audubon Blvd., Wilmington, NC 28403.
>
> . . . .
>
> 4. At all times relevant herein, Plaintiff timely reported and notified Defendants of all defects, issues, and other

> concerns he experienced during the course of his employment at the Property.
>
> 5. At all times relevant hereto, Defendants knew that the [W]orkplace was contaminated with toxic mold and that exposure to the toxic mold in the [W]orkplace was substantially certain to cause serious injury or death of those exposed to the toxic mold.
>
> 6. Nevertheless, Defendants failed to take any appropriate measures to ensure the proper maintenance and management of the [W]orkplace conditions.
>
> . . .
>
> 10. . . . From 2011 through 2019, Plaintiff worked for Cortech Solutions, Inc. [] which, based upon information and belief, was one of several commercial tenants that leased space in the Property owned by Defendants.
>
> 11. . . . At all times relevant hereto, Defendants were the owners/landlords of the Property. . . . Additionally, at all times relevant hereto, Defendant Lloyd T. Smith was the President of Cortech and Defendant Jennifer G. Smith was the Secretary and Treasurer of Cortech.

Although Defendant Lloyd T. Smith was the President of Cortech and Defendant Jennifer G. Smith was the Secretary and Treasurer of Cortech, Defendants were not acting as Cortech when they engaged in the duties associated with their ownership of the Property. Defendants owned and operated the Property—where Cortech leased office space—in their individual capacities; they worked for and operated Cortech as a separate business. As in *Phillips* and *Cameron*, the allegations in Plaintiff's complaint reveal that Defendants are separate from Cortech, and thus do not show, at this pleading stage of the litigation, "an absolute bar to recovery due to the exclusivity provisions of the [] Act." *Id.*

B. General Release Agreement

[2] Plaintiff next argues that the release agreement does not release Defendants from liability because, when acting as owners of the Property and landlords of the Workplace, Defendants were not acting in their official capacities within the scope of their employment with Cortech.

"Releases are contractual in nature and their interpretation is governed by the same rules governing interpretation of contracts."

Chemimetals Processing, Inc. v. Schrimsher, 140 N.C. App. 135, 138 (2000) (citation omitted). "The scope and extent of the release should be governed by the intention of the parties, which must be determined by reference to the language, subject matter[,] and purpose of the release." *Id.* (citation omitted).

Here, the release agreement was "made and entered into by Erik Nelson ("Plaintiff") to resolve all current and future disputes concerning Plaintiff's employment with Cortech Solutions, Inc. along with all of its affiliates and subsidiaries (collectively, "Company")." The agreement provided, in pertinent part,

> Plaintiff . . . hereby releases and forever discharges [Cortech along with all of its affiliates and subsidiaries], and its respective officers, directors, present and former Board members, present and former employees, agents, insurance companies or risk pools, successors and assigns . . . from any and all claims, actions or causes of action, demands, damages, costs, interest, judgments, expenses, liabilities, attorneys' fees and legal costs, of any nature whatsoever, without limitation, specifically including any and all claims, known and unknown, arising out of or in any way related to or growing out of [Plaintiff's] employment with, or resignation from, [Cortech]. . . . *This release is intended to release and releases no party other than Cortech, along with all of its affiliates and subsidiaries* [], *and its officers and employees, acting in their official capacities in the course and scope of their employment for Cortech and none other.*

(emphasis added).

The plain language of the release agreement releases "no party other than Cortech, along with all of its affiliates and subsidiaries" from "all claims, actions, or causes of action" related to Plaintiff's employment with Cortech. As explained above, when engaging in the duties associated with their ownership of the Property, Defendants are separate from Cortech. Defendants do not argue that they are a subsidiary of Cortech. The question is therefore whether the allegations in Plaintiff's complaint and evidence before the trial court support a conclusion that Defendants are an affiliate of Cortech.

An affiliate is "a corporation that is related to another corporation by shareholding or other means of control: a subsidiary, parent[,] or sibling corporation." *Procar II, Inc. v. Dennis*, 218 N.C. App. 600,

601 (2012) (quoting *Affiliate*, *Black's Law Dictionary* (8th ed. 2004)). In *Procar II*, this Court concluded that two companies with the same "sole owner, director, and president" were properly classified as "sibling corporations" and therefore were considered "affiliates." *Id.* at 601-02.

Here, Plaintiff alleged,

> 10. . . .From 2011 through 2019, Plaintiff worked for Cortech Solutions, Inc. ("Cortech") which, based upon information and belief, was one of several commercial tenants that leased space in the Property owned by Defendants.
>
> 11. Based upon information and belief, Defendant Lloyd T. Smith and his wife, Defendant Jennifer G. Smith, are residents of the State of North Carolina with a principal place of residence located in New Hanover County, North Carolina. At all times relevant hereto, Defendants were the owners/landlords of the Property located at 1409 Audubon Boulevard, Unit B-1, Wilmington, North Carolina 28403. Additionally, at all times relevant hereto, Defendant Lloyd T. Smith was the President of Cortech and Defendant Jennifer G. Smith was the Secretary and Treasurer of Cortech.

These allegations essentially allege that Defendants owned the Property in their individual capacities. On appeal, Defendants argue that they "are Plaintiff's employer, and at the least, in their capacity as individuals owning the [Property], they are affiliates of Cortech." Defendants cite no authority in support of this statement, and we can find no authority to support a conclusion that an individual can be an "affiliate" of a corporation.

Additionally, the plain language of the agreement releases the officers and employees of Cortech only to the extent they were "acting in their official capacities in the course and scope of their employment for Cortech and none other." In the context of Plaintiff's negligence claim against them, Defendants were not acting within their official duties as Cortech's officers but were instead acting in their capacities as owners of the Property and landlords of the Workplace. The release agreement does not mention Defendants by name nor does it reference Cortech's landlord in the list of individuals covered by the release.

Based upon the plain language and express terms of the release agreement, viewed in the light most favorable to Plaintiff at this pleading stage of the litigation, Plaintiff is not precluded from asserting a

negligence claim against Defendants in their capacities as owners of the Property and landlords of the Workplace.

C. Insurmountable Bar

[3] Finally, Plaintiff argues that, under Rule 12(b)(6), there was no insurmountable bar to Plaintiff's recovery based upon the allegations made in his complaint.

To properly 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). However, "[i]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." *Id.*

Here, although Defendants filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), the trial court granted Defendants' motion pursuant only to Rule 12(b)(1). As there is no ruling upon Defendants' motion to dismiss pursuant to Rule 12(b)(6), any argument on appeal pertaining to such rule is not properly before us and is dismissed.

III. Conclusion

Because Cortech and Defendants are separate entities, neither the exclusivity provision of the Act nor the parties' release agreement bars Plaintiff's negligence claim against Defendants. Accordingly, the trial court erred by granting Defendants' motion to dismiss.

REVERSED.

Judges ZACHARY and GORE concur.

PALMETTO RTC, LLC, PLAINTIFF
v.
BETH FIELDEN, BRUCE FIELDEN, & THE ESTATE OF JOE FIELDEN
WITH BETH FIELDEN AND BRUCE FIELDEN AS CO-EXECUTORS, DEFENDANTS

No. COA24-911

Filed 21 May 2025

1. Unjust Enrichment—express contract—claim barred—motion to dismiss properly denied—motion for judgment notwithstanding the verdict properly denied

In a lawsuit arising from the failed sale of defendants' real property to plaintiff—which resulted in plaintiff filing a notice of *lis pendens* concerning the property with the clerk of superior court and defendants asserting a counterclaim for slander of title—where the parties stipulated to the existence of an express contract for the purchase and sale of the property for development purposes, the trial court did not err in dismissing plaintiff's claim for unjust enrichment and denying plaintiff's motion for judgment notwithstanding the verdict (filed after the jury returned verdicts in favor of defendants and awarded damages), because an express contract totally excludes any claim arising under an implied contract, such as a claim for unjust enrichment.

2. Real Property—slander of title—common law—Real Property Marketable Title Act not implicated—jury instructions prejudicial—new trial required

In a lawsuit arising from the failed sale of defendants' real property to plaintiff—which resulted in plaintiff filing an unjust enrichment claim (which was properly dismissed) and a notice of *lis pendens* with the clerk of superior court and defendants asserting a counterclaim for slander of title—defendants sufficiently pled their counterclaim, but the trial court committed prejudicial error in instructing the jury on slander of title pursuant to the Real Property Marketable Title Act (rather than common law slander of title). The statutory scheme was not implicated where plaintiff never filed any notice of *lis pendens* with the register of deeds in the relevant county. Moreover, the jury instruction as given eliminated the burden of proof on two key elements of the common law claim: falsity and malice. Accordingly, the trial court's denial of plaintiff's motion for a new trial was reversed and the matter was remanded for further proceedings.

Appeal by plaintiff from judgment entered 12 January 2024 by Judge Jonathan W. Perry in Union County Superior Court. Heard in the Court of Appeals 30 April 2025, sitting in the historic Cumberland County Courthouse, Fayetteville.

Rayburn Cooper & Durham, PA, by Ashley B. Oldfield, and G. Kirkland Hardymon, for the plaintiff-appellant.

Wilder Pantazis Law Group, by Raboteau Wilder, Jr., for the plaintiff-appellant.

Thurman, Wilson, Boutwell & Galvin, P.A., by W. David Thurman, for the defendant-appellees.

TYSON, Judge.

Palmetto RTC, LLC ("Palmetto") appeals the trial court's dismissal of its unjust enrichment claim and denial of its motion for judgment notwithstanding the verdict and alternatively for a new trial. We affirm the trial court's dismissal of the unjust enrichment claim and the denial of Palmetto's motion for judgment notwithstanding the verdict. We reverse the trial court's judgment in part, award a new trial on Defendants' slander of title counterclaim, and remand.

I. Background

Beth and Bruce Fielden individually, and as executors of the Estate of Joe Fielden (collectively, the "Fieldens"), own approximately sixty-one acres of undeveloped land on Secrest Shortcut Road in Union County as tenants in common. They sought to sell the property, while retaining a life estate for their father, Joe Fielden, on a small portion of the property.

Palmetto engages in the business of entitling and enhancing raw land for resale to third-party developers, structuring the transactions to close and re-sell the property on the same day. Beth Fielden met with an associate of Palmetto, who told her Palmetto was interested in buying the property.

The parties entered into a series of four contracts for the purchase and sale of the property, providing for a closing date of 30 June 2021 and a contract expiration date of 15 July 2021. The Fieldens informed Palmetto the closing date would not be extended again. Palmetto had entered into a purchase agreement with American Homes for Rent

to sell the property to them, combined with a neighboring parcel, for approximately $4.5 million. Palmetto claimed it was ready, willing, and able to close; however, the record reflects American Homes for Rent, Palmetto's purchaser, did not provide authorization to close and performance was never tendered.

The closing and expiration dates passed. The Fieldens notified Palmetto of the contract's expiration on 4 August 2021 and reiterated the contract's termination on 19 August 2021. The Fieldens signed a letter of intent to sell their property to Meritage, a different developer, on 22 September 2021, and they also explored a sale of the timber.

Palmetto filed suit against the Fieldens asserting claims arising from the failed real estate transaction. Palmetto also filed a notice of *lis pendens* concerning the Fieldens' property in the Union County Clerk of Superior Court on 28 September 2021. The Fieldens answered and asserted a counterclaim for, *inter alia*, slander of title.

The trial court granted the Fieldens' motion to dismiss Palmetto's unjust enrichment claim based upon the parties' stipulation to the existence of an express contract. The jury found in favor of the Fieldens on the validity and Palmetto's breach of the express contract claim with default of the earnest money, and for their slander of title counterclaim with an award of $152,001 in damages. The trial court denied Palmetto's motion for JNOV or, in the alternative, for a new trial. Palmetto appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Issues

Palmetto argues the trial court erred by dismissing its unjust enrichment claim, submitting the statutory slander of title claim under the Real Property Marketable Title Act to the jury, and denying its motion for JNOV, and alternatively, for a new trial. *See* N.C. Gen. Stat. § 47B-6 (2023).

IV. Unjust Enrichment

[1] The trial court granted the Fieldens' motion to dismiss Palmetto's *quantum meruit*/unjust enrichment claim because the parties had stipulated to the existence of an express contract. Palmetto objected to the ruling and now contends the dismissal was erroneous because the express contract did not cover the same subject matter as its claim for *quantum meruit* or unjust enrichment.

A. Standard of Review

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013) (citation omitted).

B. Analysis

When an enforceable express contract covering the same subject matter exists between the parties, *quantum meruit* recovery is barred. *Veto Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (an express contract precludes an implied contract with reference to the same matter). This canon is well-established in case law:

> An express contract, executory in its provisions, must totally exclude any such implication [recovery under an implied contract is available]. One party agreed, in consideration of the other to pay, to render the service; the other, in consideration of the promise to render the service, agrees to pay. One is the consideration and motive for the other, and each equally excludes any other consideration, motive, or promise.

Id. at. 715, 124 S.E.2d at 909 (citation omitted).

Here, the parties stipulated the existence of an express contract for the purchase and sale of the property. The parties' contract further contemplated the development of the property. Section 3(a) states, "It is recognized by both Buyer and Seller that there is located on the property a cemetery . . . which shall be isolated from *development*." (emphasis supplied). Section 5 of the contract states, "It is understood that the Seller has granted the Buyer proper time for the property to be rezoned and approved and permitted for *development* by the City Council of Monroe, NC," and the contract reserves a life estate for Joe Fielden to remain "undisturbed during *development*." (emphasis supplied).

Palmetto's planned entitlement and development of the property was clearly contemplated by the contract and constituted part of its consideration and performance, rather than a separate and unrelated service. The Fieldens entered into the contract with the understanding Palmetto would seek to entitle and further develop the property, and they cooperated with Palmetto during the entitlement process. The planned development of the property falls squarely within the subject matter of the express contract and precludes any claim under an implied

contract. *Id.* We affirm the trial court's dismissal of Palmetto's *quantum meruit* or unjust enrichment claim.

V. Statutory Slander of Title

[2] The trial court, over Palmetto's objection, submitted a claim of statutory slander of title to the jury. N.C. Gen. Stat. § 47B-6 (2023). Palmetto had moved for a directed verdict, contending the Fieldens' counterclaim had pled common law slander of title rather than the statutory claim. *Id.* The trial court denied their motion for directed verdict.

Palmetto subsequently filed a motion for JNOV or, alternatively, a new trial after return of the jury's verdict. The trial court denied Palmetto's motion for JNOV and for new trial on the grounds that the statutory slander of title was adequately pled.

A. Standard of Review

A trial court's denial of a motion for JNOV is reviewed *de novo* to determine "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Chisum v. Campagna*, 376 N.C. 680, 699, 855 S.E.2d 173, 186 (2021) (citation omitted). A trial court's ruling on a motion for a new trial is reviewed for abuse of discretion. *In re Will of Buck*, 350 N.C. 621, 625, 516 S.E.2d 858, 861 (1999).

"A trial court's conclusions of law are reviewed *de novo*, including legal conclusions contained in jury instructions." *Chappell v. N.C. DOT*, 374 N.C. 273, 281, 841 S.E.2d 513, 520 (2020) (citation omitted). Jury instructions must "present[] the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed." *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (internal quotation marks and citation omitted). "The burden of proof is upon the party assigning error to demonstrate the jury instruction misled the jury or otherwise affected the verdict." *Lail v. Tuck*, 296 N.C. App. 185, 188, 908 S.E.2d 842, 845 (2024). "Questions of statutory interpretation are questions of law and are reviewed de novo." *In re Custodial Law Enf't Agency Recordings*, 287 N.C. App. 566, 570, 884 S.E.2d 455, 458 (2023) (citation omitted).

1. Motion for JNOV

Palmetto contends the trial court erred by denying its motion for JNOV. The Fieldens argue Palmetto failed to preserve the slander of title issue for review. To preserve an issue for appellate review, a party must make "a timely request, objection, or motion to the trial court, stating

the specific grounds for the desired ruling. . . .” N.C. R. App. P. 10(a)(1). Here, Palmetto made a timely motion for directed verdict at the close of evidence, raising two issues: (1) the Fieldens had pled a common law claim of slander of title, not a statutory claim; and (2) the Fieldens had failed to prove special damages.

A motion for JNOV must be based on grounds previously raised in the movant's motion for directed verdict. N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) (2023); *Munie v. Tangle Oaks Corp.*, 109 N.C. App. 336, 342, 427 S.E.2d 149, 152 (1993) (citing *Carter v. Parsons*, 61 N.C. App. 412, 418, 301 S.E.2d 405, 409 (1983)). In its motion for JNOV, Palmetto argued: (1) it did not “register[] a notice” claiming the property under the Real Property Marketable Title Act; (2) Section 47B-6 of that statute is not applicable to the facts of this case; (3) the Fieldens did not prove the notice was false; (4) the Fieldens failed to prove they suffered a monetary loss because of the filing, as required; and, (5) slander of title claims must be pled with particularity, which the Fieldens failed to do.

Of these arguments, only the fourth and fifth were properly preserved at the motion for directed verdict. Therefore, Palmetto is limited to these arguments on review of the JNOV. Palmetto argues a claim under N.C. Gen. Stat. § 47B-6 was not asserted or mentioned in the counterclaim and no allegations support special damages that accompany the statute.

North Carolina is a notice pleading jurisdiction. A pleading is sufficient if it gives “ ‘notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and . . . to get additional information he may need to prepare for trial.’ ” *N. Carolina State Bar v. Merrell*, 243 N.C. App. 356, 362, 777 S.E.2d 103, 108-09 (2015) (quoting *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d, 161, 167 (1970)). “It is not necessary to plead the law. The law arises upon the facts alleged.” *Tharpe v. Brewer*, 7 N.C. App. 432, 436, 172 S.E.2d 919, 923 (1970).

The Fieldens' counterclaim alleged sufficient facts to put Palmetto on notice by including facts supporting the substantive elements of a slander of title claim: (1) registration of a notice, (2) for the purpose of asserting false or fictitious claims, and (3) damages suffered. The Fieldens were neither required to specifically reference N.C. Gen. Stat. § 47B-6 (2023) in its counterclaim, nor does the statute require them to specifically plead special damages. *Id.*

The Fieldens' counterclaim was sufficiently pled and Palmetto's arguments for JNOV were not raised and preserved in its motion for

directed verdict. We affirm the trial court's denial of Palmetto's motion for JNOV.

2. Jury Instructions

Jury instructions must address substantive features of a case arising from the evidence, so as "to leave no reasonable cause to believe the jury was misled or misinformed." *Lail*, 296 N.C. App. at 188, 908 S.E.2d at 845 (citation and internal quotation marks omitted). Palmetto objected to the omission of the Fieldens' evidence tending to prove the elements of malice and falsity to show slander of title. The trial court overruled the objection, reasoning N.C. Gen. Stat. § 47B-6 refers to intent, not malice, and acknowledged the lack of clear guidance on the amalgamation of common law and the statutory slander of title claim. N.C. Gen. Stat. § 47B-6 (2023).

The jury was asked: "Did the Defendants suffer a monetary loss as a result of a false or fictitious notice registered by the Plaintiff on the Defendants' property? (referred to as 'slander of title')." It answered the issue on the verdict sheet "yes", and awarded the Fieldens $152,001 as damages.

The elements of statutory slander of title are: (1) the registration of a notice affecting real property; (2) for the purpose of asserting a false or fictitious claim; and (3) special damages. *Id.* Upon a showing of ill intentionality, a claimant may recover attorney's fees and treble damages, provided such damages are alleged. *Burns v. Kingdon Impact Glob. Ministries, Inc.*, 261 N.C. App. 115, 817 S.E.2d 626 (2018) (unpublished).

Instructing the jury on the statutory slander of title claim, rather than on the common law claim, eliminated proof of two key elements: falsity and malice. This reduced the burden of proof on the Fieldens and likely affected the verdict. The omission of malice allows the proponent to show the 'claim' was made with ill intent. Likewise, the Fieldens did not need to prove the statutory claim was actually false, only to show it was registered "*for the purpose of asserting*" a false claim. N.C. Gen. Stat. § 47B-6 (2023).

To construe the statutory claim to require proof of both malice and intent would render the General Assembly's explicit reference to "intent" as superfluous. Our Courts have defined malice in this context as the "malicious intent to injure." *Whyburn v. Norwood*, 47 N.C. App. 310, 315, 267 S.E.2d 374, 377 (1980) (citing *Cardon v. McConnell*, 120 N.C. 461, 462-63, 27 S.E. 109 (1897)). Proof of malice inherently includes proof of intent. If the General Assembly had intended to retain malice as

a separate and necessary element of a statutory slander of title claim, it would not have expressly authorized damages upon a showing of intent, independent of establishing the claim itself. *Id.*

3. Motion for New Trial

North Carolina's Real Property Marketable Title Act exists to promote the free and efficient transfer of real property by extinguishing ancient or nonpossessory claims that may cloud title. The statute provides a 30-year unbroken chain of title is *prima facie* evidence of ownership. Its goal is to reduce litigation and simplify the title examination process. N.C. Gen. Stat. § 47B-1 et seq. (2023).

Palmetto contends the trial court erred in denying its motion for a new trial because the facts of this case, reviewed in the light most favorable to the non-moving party, do not support submission of the statutory slander of title claim. N.C. Gen. Stat. §§ 1A-1, Rule 59(a)(8); 47B-6 (2023). We agree.

a. Statutory Construction

The first step of statutory construction is to review the plain language of the statute:

> "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, and in addition thereto may award to the prevailing party treble the damages that he may have sustained as a result of the registration of such notice of claim."

N.C. Gen. Stat. § 47B-6 (2023) (emphasis supplied).

> *All such parts of the common law* as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, *are hereby declared to be in full force within this State.*

N.C. Gen. Stat. § 4-1 (2023) (emphasis supplied).

Statutes in derogation of the common law are strictly construed. *Stone v. North Carolina Dept. of Labor*, 347 N.C. 473, 479, 495 S.E.2d 711, 715 (1998). Section 47B-9 provides: "This Chapter shall be liberally construed to effect the legislative *purpose of simplifying and facilitating real property title transactions* by allowing persons to rely on *a record chain of title* of 30 years as described in G.S. 47B-2, subject only to such limitations as appear in G.S. 47B-3." (emphasis supplied). N.C. Gen. Stat. § 47B-3 (2023) lists fourteen exceptions, including six subsections.

Section 47B-6's use of "*registering notices hereunder*" indicates its provisions refer to facts and claims arising under this statute. It refers to procedures established within the broader Marketable Title statutory framework to reduce litigation and simplify the title examination process. N.C. Gen. Stat. § 47B-1-9 (2023).

b. Real Property Marketable Title Act – Lis Pendens

Section 47B-4 outlines the requirements for "registering . . . a notice" under the Real Property Marketable Title Act. N.C. Gen. Stat. § 47B-4 (2023). To preserve a claim to property, a person must file a written, acknowledged notice in the register of deeds' office in the county where the property is located within the 30-year period, specifying the nature of the claimed right or interest. *Id.*

A notice of *lis pendens* is defined under and is controlled by a wholly separate statute and does not qualify as "registering notice" under § 47B-4, as it is not indexed by the Register of Deeds and is not a "claim to property." *Id.* Under N.C. Gen. Stat. § 1-116(a), "Any person desiring the *benefit of constructive notice of pending litigation* must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117" with the clerk of superior court. N.C. Gen. Stat. § 1-116 (a)-(d) (2023) (emphasis supplied).

A *lis pendens* is a procedural device filed with the clerk of superior court in the county where the real estate is located when a party seeks to give the public constructive notice of pending litigation, which may impact ownership, rights or claims. *Id.* The *lis pendens* itself is not a substantive claim to property; rather, it is a "Filing of notice of suit" and serves to preserve *status quo* notice to third parties of an underlying lawsuit, which *may* assert a substantive claim affecting property at some point in the future.

Lis pendens serves to protect third parties and to promote judicial efficiency. *Id.* As filing a *lis pendens* with the clerk of superior court does

not constitute "registering notice" for the purpose of invoking § 47B-6, it cannot be a "false or fictitious *claim*[] to real property," if it is not a claim at all. N.C. Gen. Stat. §§ 1-116; 47B-6 (2023). Section 47B-6 supplements, rather than displaces, the common law slander of title cause of action. *See* James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 25.04 fn.45.1 (Patrick K. Hetrick & James B. McLaughlin, J. eds., 6th ed. 2022). N.C. Gen. Stat. § 47B-6 (2023). The common law remains in effect unless explicitly abrogated by statute. N.C. Gen. Stat. § 4-1 (2023). If individuals with potentially valid claims become fearful that filing a *lis pendens* might expose them to tort liability for "false claims," they may be deterred from filing a *lis pendens* to protect *status quo* altogether.

VI. Conclusion

Palmetto filed a *lis pendens* with the clerk of superior court in Union County, but never filed any notice with the register of deeds in Union County asserting any claim of an ownership interest. As a result, Section 47B-6 is inapplicable to the facts of this case. N.C. Gen. Stat. § 47B-6 (2023). The trial court erred by denying Palmetto's motion for a new trial. *Id.*

We affirm the trial court's dismissal of Palmetto's unjust enrichment claim and its denial of Palmetto's motion for JNOV. We reverse the trial court's denial of Palmetto's motion for a new trial and remand for further proceedings consistent with this opinion. *It is so ordered.*

AFFIRMED IN PART; NEW TRIAL IN PART; AND REMANDED.

Judges WOOD and GORE concur.

STATE BD. OF EXAM'RS OF PLUMBING, HEATING & FIRE SPRINKLER CONTRACTORS v. HUDSON

[299 N.C. App. 71 (2025)]

STATE BOARD OF EXAMINERS OF PLUMBING HEATING AND FIRE SPRINKLER CONTRACTORS, PLAINTIFF
v.
NEEL HUDSON, INDIVIDUAL AND D/B/A HUDSON PLUMBING AND ELECTRIC, DEFENDANT

No. COA24-136

Filed 21 May 2025

1. Contempt—criminal—indirect—violation of injunction—denial of motion to dismiss—standard of review

In an appeal from the trial court's order finding defendant in contempt after a hearing on a motion for order to show cause filed by plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors)—in which plaintiff alleged that defendant had violated a permanent injunction by performing HVAC work without a license—the appellate court reviewed the trial court's denial of defendant's motion to dismiss de novo and determined that, since the case involved indirect criminal contempt, the appropriate standard of review was the substantial evidence standard. Thus, the question was whether plaintiff presented substantial evidence, viewed in the light most favorable to plaintiff, that defendant installed a new HVAC system or that he removed and replaced the duct work of an old HVAC system, either one of which would allow a trier of fact to find a violation of the injunction.

2. Contempt—criminal—violation of injunction—installation of new HVAC unit without a license—circumstantial evidence

In a case in which plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors) filed a motion for order to show cause alleging that defendant violated a permanent injunction by performing HVAC work without a license, plaintiff presented substantial evidence from which a trier of fact could conclude that defendant installed a new HVAC system (one of two violations alleged). The evidence, despite being circumstantial, was sufficient to survive defendant's motion to dismiss, and included: an invoice prepared by defendant stating in two places that he had "Replaced unit"; defendant's inconsistent statements regarding whether "unit" referred to just one part or the whole HVAC system and whether he meant to say "repair" instead of "replace"; defendant's prior violations of the injunction; and a payment defendant made to the homeowner for $600.00 to cover a bill by another service provider who worked on the new HVAC system after it was installed, which

defendant explained he did "to be released from anything to do with" the unit.

3. Contempt—criminal—violation of injunction—HVAC repair performed without a license—carve out exception inapplicable

In a case in which plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors) filed a motion to show cause alleging that defendant violated a permanent injunction by performing HVAC work without a license, plaintiff presented substantial evidence from which a trier of fact could conclude that defendant's duct work repair on an old HVAC system constituted a violation of the injunction (one of two violations alleged). Contrary to defendant's argument, the work he performed—removing a section of duct board and replacing it—did not qualify under the "carve out exception" contained in N.C.G.S. § 87-21(c) (exempting certain minor repairs to an existing HVAC system from the license requirement).

4. Jurisdiction—trial court—entry of contempt order—no divestment of jurisdiction by prior notice of appeal

The trial court properly exercised its jurisdiction when it entered a criminal contempt order after defendant had entered notice of appeal from a form document in which the trial court checked off a box finding defendant in indirect criminal contempt (albeit for circumstances other than those pertaining to defendant) and which indicated defendant's sentence and fine for the contempt. The form document was not file stamped and was neither a final judgment nor an appealable interlocutory order; therefore, defendant's notice of appeal from that instrument did not divest the trial court of its jurisdiction to memorialize its oral rulings at the contempt hearing in a final written order of contempt.

5. Contempt—criminal—plumbing work performed in violation of injunction—findings of fact—sufficiency of evidence

In an appeal from the trial court's order finding defendant in criminal contempt for violating a permanent injunction by performing HVAC work without a license, several findings of fact challenged by defendant as being improper or unsupported by the evidence were upheld on appeal, including findings derived from an investigator's observations that an HVAC unit installed by defendant was installed improperly and an ultimate finding of fact that plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors) presented sufficient circumstantial evidence that defendant

installed a new HVAC unit and made replacement repairs to an old HVAC unit. Competent evidence supported each finding and, moreover, even if the findings regarding the investigator's opinion were improper—assuming defendant's position that the investigator was not tendered as an expert witness—any error was not prejudicial because plaintiff only needed to prove that defendant installed an HVAC system, regardless of whether it was installed properly.

6. Contempt—criminal—not a misdemeanor—no applicable statute of limitations

The trial court's order finding defendant in criminal contempt for violating a permanent injunction by performing HVAC work without a license was not entered in violation of any statute of limitations. Although an indirect criminal contempt proceeding resembles a conventional criminal bench trial, criminal contempt does not come within the "[a]ny other crime" language in N.C.G.S. § 14-1 (delineating felonies and misdemeanors). Moreover, a criminal contempt determination is not a misdemeanor in North Carolina; therefore, the contempt proceeding was not subject to the two-year statute of limitations set forth in N.C.G.S. § 15-1(a).

Appeal by Defendant from judgment entered 17 August 2023 by Judge Reggie E. McKnight in Burke County Superior Court. Heard in the Court of Appeals 25 September 2024.

Wesley E. Starnes, PC, by Wesley E. Starnes, for Defendant-Appellant.

Young Moore & Henderson, P.A., by Reed N. Fountain and John N. Hutson, III, for Plaintiff-Appellee.

CARPENTER, Judge.

Neel Hudson ("Defendant") appeals from the trial court's 18 July 2023 "Order in Indirect Criminal Proceeding" and the 17 August 2023 "Order of Contempt and Order of Arrest." After careful review, we affirm.

I. Factual & Procedural Background

On 8 June 2001, the State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors ("Plaintiff") filed a complaint alleging Defendant violated sections 87-21(a)(1) and (5) of our General Statutes by engaging in the business of plumbing contracting without a valid license. Defendant did not respond to the complaint. On 30 June 2001,

Plaintiff filed a motion for entry of default. On 2 August 2001, the Burke County Clerk of Court entered default judgment against Defendant. On 15 August 2001, the trial court entered a judgment of permanent injunction (the "Injunction") which prohibited Defendant from "engaging in business as a plumbing, heating, or fire sprinkler contractor at all such times as he is not licensed to do so pursuant to Article 2, Chapter 87, of the General Statutes of North Carolina."

On 23 January 2009, Plaintiff filed a motion for order to show cause alleging Defendant violated the Injunction on four separate occasions between September 2001 and April 2005. On 27 March 2009, the trial court entered an order of contempt, finding beyond a reasonable doubt that Defendant committed the violations alleged by Plaintiff. The trial court sentenced Defendant to 120 days in the Burke-Catawba District Confinement Facility, but Plaintiff consented to Defendant serving a lesser sentence of ten days in confinement consisting of twenty overnight sessions.

On 6 April 2021, after receiving a new complaint concerning Defendant, Thomas Johnston, a field investigator for Plaintiff, travelled to 2107 Woodside Terrace (the "Home") to investigate. Upon his arrival at the Home, Johnston met with Sharon Eller, the homeowner, and took her statement. In the basement of the Home, Johnston observed a gas-fired heating unit (the "new HVAC system") and determined it was installed incorrectly. Johnston also concluded that only someone with a valid license would be authorized to install the new HVAC System.

On 22 April 2021, Jonathan Yerkes, another field investigator for Plaintiff, met with Defendant to discuss the complaint and obtain a statement. In Defendant's statement he acknowledged that he knew Gary Eller, Sharon Eller's late husband, and that he had been "fixing and servicing" the Eller's previous HVAC system (the "old HVAC system") for quite some time. Defendant told Yerkes that the old HVAC system would freeze up and thaw out, which resulted in water draining into the duct board of the plenum and onto the basement floor. To address this problem, Defendant "repaired a 12-inch section of duct board that was soaked from water." Defendant explained this work consisted of "removing [that] section of duct board and replacing it due to it being soaked."

Defendant also told Yerkes that while he was at the Home servicing the old HVAC system, the Ellers asked him if he would replace the old HVAC system with a new one. Defendant told the Ellers he was not authorized to install a new system. According to Defendant, he did

not install the new HVAC system but rather procured the equipment for the Ellers on or about 30 May 2019 for someone else to install. Defendant could not identify the person the Ellers hired to install the new HVAC system. In response to Defendant's remarks, Yerkes informed Defendant that the work he performed on the old HVAC system—replacing and altering duct work—also required a license, but Defendant disagreed, stating he believed the work he performed on the old HVAC system was merely "repair work."

Yerkes and Defendant next discussed an invoice (the "Invoice") Defendant issued to the Ellers on 30 May 2019 for a total of $7,543.56. The Invoice included a $6,278.50 charge for parts and $700.00 charge for labor. Defendant told Yerkes that the $700.00 labor charge was for the duct work repairs he performed on the old HVAC system and the $6,278.50 parts charge was for his procurement of the new HVAC system. On the Invoice, in the section entitled "description of service work," there were four entries: "(1) Replaced unit bad compressor 30y/o unit; (2) Found unit frozen – Replaced unit; (3) Replaced section of ductboard; (4) Return air suction Flooded water." When Yerkes questioned Defendant regarding the first entry—"Replaced unit bad compressor 30y/o unit"—Defendant explained he mistakenly wrote "replaced" and that he meant to write the word "repaired." According to Yerkes, Defendant was "adamant" it was a word mix-up.

On 26 May 2022, Plaintiff filed a motion for order to show cause alleging that on or about 30 May 2019, Defendant, again, violated the Injunction. On 18 July 2023, Defendant appeared before the trial court for a contempt hearing. At the outset, Plaintiff moved to continue because Sharon Eller was not present to testify. The trial court denied Plaintiff's motion. At the close of Plaintiff's evidence, Defendant moved to dismiss, arguing Plaintiff's evidence was insufficient to establish he violated the Injunction since there was no direct evidence he installed the new HVAC system. The trial court denied Defendant's motion stating, "there is, at this point, substantial evidence reasonably necessary to persuade what would be reasonable jury or a trier of fact in this case." At the close of all the evidence, Defendant renewed his motion. The trial court denied the motion and informed Defendant he was being held in criminal contempt for violating the Injunction. The trial court sentenced Defendant to thirty days of active imprisonment and a $250.00 fine. The trial court also informed the parties that it was required, pursuant to section 5A-15(f), to issue written findings in relation to its finding of contempt beyond a reasonable doubt.

That same day, the trial court filled out and signed a form document entitled: "Order in Indirect Criminal Contempt Proceeding" (the "Form"). The check boxes on the Form did not directly correspond to the specific circumstances of Defendant's contempt. The trial court checked a box on the Form stating, "Defendant was able to comply with the subpoena or take reasonable measures to comply and failed to do so without any lawful excuse for failing to appear and testify; and therefore is in indirect criminal contempt[.]" The Form also reflected Defendant's fine of $250.00 and sentence of thirty days of active imprisonment, which was to begin on 7 August 2023.

Also on 18 July 2023, Defendant filed two written notices of appeal: one from the trial court's oral ruling and another concerning the Form. Each notice specified the file number, 01 CVS 952. On 26 July 2023, Defendant filed an amended notice of appeal stating the notices were signed before the file number 23 CRS 703 "had been assigned or was known" to Defendant.

On 17 August 2023, the trial court entered the "Order of Contempt and Order of Arrest" (the "Order") which included thirty-two detailed findings of fact and six conclusions of law. On 7 September 2023, Defendant gave written notice of appeal from the Order.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(4) (2023).

III. Issues

The issues are whether: (1) the trial court erred by denying Defendant's motion to dismiss; (2) the trial court had jurisdiction to enter the Order; (3) findings of fact 13, 14, 15, 28, 31, and 32 are supported by competent evidence; and (4) the criminal contempt proceeding was barred by a two-year statute of limitations.

IV. Analysis

A. Motion to Dismiss

First, Defendant argues the trial court erred by denying his motion to dismiss. Specifically, Defendant asserts that Plaintiff's evidence was insufficient because Plaintiff presented no direct evidence that Defendant installed the new HVAC system and his conduct regarding the duct work fell within the carve-out exception.

1. Standard of Review

[1] As a threshold matter, we consider which standard of review applies to a trial court's denial of a motion to dismiss during an indirect criminal contempt proceeding. Our consideration necessitates a brief discussion of contempt in its various forms.

We begin with the principle that contempt is " '*sui generis*,' meaning '[o]f its own kind or class.' " *State v. Burrow*, 248 N.C. App. 663, 670, 789 S.E.2d 923, 928 (2016) (quoting *sui generis*, Black's Law Dictionary 1475 (8th ed. 2004)). In other words, contempt generally is not wholly civil or wholly criminal.

There are two "kinds" of contempt: civil and criminal. *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985). Although "the demarcation between the two may be hazy at best," *id.* at 434, 329 S.E.2d at 372, the distinction becomes apparent when considering the "purpose for which the power is exercised" and the potential range of consequences, *id.* at 434, 329 S.E.2d at 372. If the goal is to punish for a past-act that "interfere[d] with the administration of justice," the contempt is criminal in nature. *Id.* at 434, 329 S.E.2d at 372. On the other hand, if the intention is to "preserve the rights of private parties and to compel obedience," the contempt is civil in nature. *Id.* at 434, 329 S.E.2d at 372. To distinguish between the two, the question is whether the contemnor is subject to punishment for previously disobeying an order of the court or is forewarned to comply in the future with an order of the court.

Complicating matters, there are two "divisions" of contempt: direct and indirect. *State v. Wendorf*, 274 N.C. App. 480, 483, 852 S.E.2d 898, 902 (2020) (citation omitted). Put simply, direct contempt occurs in the presence of the court while indirect contempt occurs outside of the presence of the court. *Id.* at 483, 852 S.E.2d at 902.

Additionally, there are two kinds of criminal contempt proceedings: "summary proceedings, which are for direct criminal contempt, and plenary proceedings, which are for indirect criminal contempt." *Wendorf*, 274 N.C. App. at 486, 852 S.E.2d at 904; *but see O'Briant*, 313 N.C. at 436, 329 S.E.2d at 373 (explaining that summary proceedings are not appropriate for direct criminal contempt "where a court does not act *immediately* to punish acts constituting a direct contempt . . .") (emphasis added).

An indirect criminal contempt proceeding functions similarly to an ordinary criminal trial. For example, in an indirect criminal contempt

proceeding the moving party has the burden of proving the defendant committed the contemptuous acts beyond a reasonable doubt. *State v. Coleman*, 188 N.C. App. 144, 150, 655 S.E.2d 450, 453–54 (2008). Additionally, a show-cause order in a criminal contempt proceeding, while not "equivalent" to a criminal indictment, *Wendorf*, 274 N.C. App. at 486, 852 S.E.2d at 904, is "akin" to one, *Coleman*, 188 N.C. App. at 150, 655 S.E.2d at 453. Further, indirect criminal contempt proceedings trigger certain "constitutional safeguards," including reasonable notice and an opportunity to be heard. *O'Briant*, 313 N.C. at 435, 329 S.E.2d at 373 (citation omitted).

Based on these similarities, we conclude the substantial evidence standard is the appropriate standard to apply here. *See State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). Accordingly, we review the trial court's denial of Defendant's motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " '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, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

On a motion to dismiss, the question is whether "there is substantial evidence (1) of each essential element of the offense charged . . . , and (2) of defendant's being the perpetrator of such offense." *Powell*, 299 N.C. at 98, 261 S.E.2d at 117 (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980); *see State v. Beck*, 385 N.C. 435, 438, 894 S.E.2d 729, 732 (2023) ("Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion.") (internal quotation marks and citation omitted). Substantial evidence can be direct, circumstantial, or both. *State v. Shelton*, 293 N.C. App. 154, 157, 899 S.E.2d 894, 897 (2024); *State v. Parker*, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001) (explaining "[c]ircumstantial evidence and direct evidence are subject to the same test for sufficiency") (citing *State v. Sokolowski*, 351 N.C. 137, 143, 522 S.E.2d 65, 69 (1999)). The distinction can be explained as follows:

> Direct evidence is that which is immediately applied to the fact to be proved, while circumstantial evidence is that which is indirectly applied, by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred. In other words

> . . . circumstantial evidence is merely direct evidence indirectly applied.

Shelton, 293 N.C. App. at 157, 899 S.E.2d at 897 (quoting *State v. Wright*, 275 N.C. 242, 249–50, 166 S.E.2d 681, 686 (1969) (citation 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." *State v. Fritsch*, 351 N.C. 373, 378–79, 526 S.E.2d 451, 455 (2000) (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)).

Here, under the terms of the Injunction, Defendant was "permanently enjoined from . . . engaging in business as a plumbing, heating or fire sprinkler contractor at all such times as he is not properly licensed to do so[.]" In this proceeding, Plaintiff alleged Defendant violated the Injunction by performing two distinct acts: installing the new HVAC system and removing and replacing the duct work of the old HVAC system. Therefore, to survive Defendant's motion to dismiss, Plaintiff was required to present substantial evidence that Defendant engaged in at least one of these acts. *See Coleman*, 188 N.C. App. at 150, 655 S.E.2d at 453–54 (explaining it is the State's burden to establish that the alleged contemptuous act occurred).

2. New HVAC System Installation

[2] Defendant asserts Plaintiff's evidence was insufficient to establish that he installed the new HVAC system. We disagree.

At the contempt proceeding, Plaintiff presented the following evidence tending to show Defendant installed the new HVAC system: the Invoice, Defendant's written statement, and testimony from Johnston and Yerkes, Plaintiff's field investigators. Plaintiff also introduced evidence that Defendant previously violated the Injunction. Additionally, Defendant testified on direct that he gave Sharon Eller approximately $600.00 to cover a bill from another service provider who worked on the new HVAC system after it was installed. Although there was no direct evidence that Defendant installed the new HVAC system, the circumstantial evidence, when viewed in the light most favorable to Plaintiff, was sufficient to persuade a rational juror that Defendant installed the new HVAC system. *See Shelton*, 293 N.C. App. at 157, 899 S.E.2d at 897.

First, the Invoice prepared by Defendant states Defendant "Replaced unit bad compressor 30y/o unit," and "Found unit frozen – Replaced unit." Although Defendant contends the word "unit" in

"replaced unit" refers only to the "compressor unit"—a component within the old HVAC system—a rational juror, examining the plain language of the Invoice, could interpret the word "unit" to mean the entire system.

Second, Defendant's statements regarding the Invoice and the work performed were inconsistent. For example, during his interview with Yerkes, Defendant explained he meant to write the word "repair[ed]" instead of "replac[ed]" on the Invoice. But when Defendant testified at the contempt hearing, he stated that the first Invoice entry was for his replacement of the compressor "unit" within the old HVAC system, not the "unit" as a whole. Similarly, Defendant's testimony regarding the duct work was also at odds with his prior statement. In his statement, Defendant stated he removed and replaced a 12-inch section of duct work "due to it being soaked." When he testified, however, Defendant stated the duct board was not soaked and that he removed the 12-inch section, allowed it to thaw, and then reinstalled that same section.

Finally, there was additional circumstantial evidence tending to show Defendant installed the new HVAC system, including Defendant's previous violations of the Injunction and his $600.00 payment to Sharon Eller to cover a bill she acquired from another service provider who worked on the new HVAC system after it was installed. When asked why he paid Sharon Eller this money, Defendant testified that he "wanted to be released from anything to do with this unit whatsoever." Defendant's testimony tends to show he did more than just procure equipment for the Ellers.

In sum, although there was no direct evidence that Defendant installed the new HVAC system, the circumstantial evidence was more than sufficient to survive Defendant's motion to dismiss. A rational juror could reasonably infer from the evidence that Defendant installed the new HVAC system. *See Smith*, 300 N.C. at 78-79, 265 S.E.2d at 169. Accordingly, the trial court properly denied Defendant's motion to dismiss.

3. Duct Work Repair

[3] Defendant further argues that the evidence was insufficient to establish the duct work "repair" he performed on the old HVAC system constituted a violation of the Injunction. Specifically, Defendant argues this work falls within the "carve out exception" of section 87-21(c). We disagree.

A license is not required to "make minor repairs or minor replacements to an already installed system of . . . heating or air conditioning[.]" N.C. Gen. Stat. § 87-21(c) (2023). A minor replacement or repair is defined as the "replacement of *parts* in an installed system which do not require any change in energy source, fuel type, or routing or sizing of venting or piping." *Id.* (emphasis added). Section 87-21(c) defines "parts" as "a compressor, coil, contactor, motor, or capacitor." *Id.*

In his statement prepared for Yerkes, Defendant stated the following in regard to the duct work: "[P]rior to the new install I repaired a 12-inch section of duct board that was soaked from water. I state that this work consisted of me removing the section of duct board and replacing it due to it being soaked."

Because the "carve out exception" identifies specific "parts" for which a minor repair or replacement is permissible without a license, and duct work is not included in this list, Defendant's conduct does not fall within the "carve out exception." *See* N.C. Gen. Stat. § 87-21(c). Therefore, Defendant's admission that he "remov[ed] the section of duct board and replac[ed] it" was substantial evidence upon which a rational juror could conclude that Defendant violated the Injunction. *See Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169. Accordingly, the trial court properly denied Defendant's motion to dismiss for insufficient evidence.

B. Jurisdiction

[4] Next, Defendant argues the trial court lacked jurisdiction to enter the Order because he gave notice of appeal before the trial court entered the Order. We disagree.

"Whether the trial court had jurisdiction is a question of law that [this Court] review[s] de novo." *State v. Lebeau*, 271 N.C. App. 111, 113, 843 S.E.2d 317, 319 (2020). " 'Under a *de novo* review, [this 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 (quoting *In re Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319).

Generally, "when a party gives notice of appeal, the trial court is divested of jurisdiction until the appellate court returns a mandate in the case." *SED Holdings, LLC v. 3 Star Properties, LLC*, 250 N.C. App. 215, 219, 791 S.E.2d 914, 919 (2016). When a party gives notice of appeal, "the trial judge becomes *functus officio*." *RPR & Assocs. Inc. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 346–47, 570 S.E.2d 510, 513 (2002) (citing *Bowen v. Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748,

749 (1977)). "*Functus officio*, which translates from Latin as 'having performed his [or] her office,' is defined as being 'without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.' " *Id.* at 347, 570 S.E.2d at 513 (quoting *functus officio*, Black's Law Dictionary 682 (7th ed.1999)).

This general rule, however, is less straightforward than its language suggests. Indeed, while final judgments are "always appealable," *see SED Holdings, LLC*, 250 N.C. App. at 220, 791 S.E.2d at 919 (citation omitted), "a litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a nonappealable interlocutory order of the trial court," *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 114 N.C. App. 589, 591, 551 S.E.2d 873, 875 (2001). In other words, a party's notice of appeal does not automatically divest the trial court of jurisdiction and trigger our jurisdiction if no final judgment or appealable interlocutory order has been entered by the trial court. *See id.* at 591, 551 S.E.2d at 875. Moreover, "the trial court maintains jurisdiction to enter a written order after notice of appeal has been given where the order does not '*affect*[] *the merits*, but rather is a chronicle of the findings and conclusions' decided at a prior hearing." *State v. Fields*, 268 N.C. App. 561, 565, 836 S.E.2d 886, 889 (2019) (quoting *State v. Walker*, 255 N.C. App. 828, 830, 806 S.E.2d 326, 329 (2017)) (emphasis and alteration in original).

In the instant case, the trial court conducted the contempt proceeding on 18 July 2023. At the conclusion of the hearing, the trial court made multiple oral findings of fact to support its determination that Defendant was being held in criminal contempt for violating the Injunction. The trial court also informed the parties that it was required, pursuant to section 5A-15(f), to issue written findings in relation to its finding of contempt beyond a reasonable doubt. That same day, the trial court filled out and signed the Form. On the Form, the trial court checked a box indicating that, Defendant "was able to comply with the subpoena or take reasonable measures to comply and failed to do so without any lawful excuse for failing to appear and testify; and therefore is in indirect criminal contempt[.]" The Form also indicated Defendant's sentence of thirty days of active imprisonment and his $250.00 fine. The Form was not file-stamped.

On 18 July 2023, Defendant filed two notices of appeal. On 26 July 2023, Defendant filed an amended notice of appeal reflecting the correct docket number. On 17 August 2023, thirty days after the contempt proceeding, the trial court entered the Order which included thirty-two

detailed findings of fact and six conclusions of law. Unlike the Form, the Order was file-stamped. On 7 September 2023, Defendant entered written notice of appeal from the Order.

The Order was the trial court's final judgment in this matter. Not only was the Order file-stamped, *see* N.C. Gen. Stat. § 1A-1, Rule 58 (2023) ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5."), it also included the trial court's findings of fact and conclusions of law pursuant to section 5A-15(f), *see* N.C. Gen. Stat. § 5A-15(f) (2023) ("If the person is found to be in contempt, the judge must make findings of fact and enter judgment."). Thus, Defendant's notice of appeal from the Form did not divest the trial court of jurisdiction because the Form was neither a final judgment nor an appealable interlocutory order. *See SED Holdings, LLC*, 250 N.C. App. at 220, 791 S.E.2d at 919. Accordingly, the trial court had jurisdiction to enter the Order.

C. Challenged Findings of Fact

[5] In his next argument, Defendant asserts the following findings of fact are not supported by competent evidence: 13, 14, 15, 28, 31, and 32. We disagree.

"In general, 'our standard of review for contempt cases is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Wendorf*, 274 N.C. App. at 483, 852 S.E.2d at 902 (quoting *State v. Phair*, 193 N.C. App. 591, 593, 668 S.E.2d 110, 111 (2008)). " 'Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary . . . .' " *Id.* at 483, 852 S.E.2d at 902 (quoting *State v. Salter*, 264 N.C. App. 724, 732, 826 S.E.2d 803, 809 (2019)). "Meanwhile, conclusions of law are reviewed de novo and are subject to full review." *State v. Aguilar*, 287 N.C. App. 248, 252, 882 S.E.2d 411, 415 (2022) (internal quotation marks and citations omitted). The trial court, sitting as the trier of fact, "is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of witnesses." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000).

1. Findings of Fact 13, 14, and 15

Defendant asserts the trial court's findings of fact 13, 14, and 15 are not supported by competent evidence. Defendant contends these findings, which all relate to Johnston's observations regarding the condition

of the new HVAC system—a system Defendant denies installing—were not supported by competent evidence because Johnston's testimony was improper as he was not qualified as an expert.

Rule 701 provides that a non-expert witness can testify in the form of an opinion or inference so long as his opinion or inference is "rationally based on [his] perception . . . and 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).

In the instant case, Johnston testified that the new HVAC system was installed incorrectly. Specifically, Johnston testified that because the new HVAC system's "venting [was] backwards," the new HVAC system was "exhausting [] carbon monoxide into the occupied space where [Sharon Eller] resides." Defendant objected to Johnston's testimony, arguing Johnston was not qualified to testify regarding the proper installation of the new HVAC system. In essence, Defendant asserted Johnston needed to be admitted as an expert to testify as to the propriety of the installation. The trial court overruled Defendant's objections.

Based on Johnston's testimony, the trial court found that:

> 13. The unit was improperly installed in that the exhaust of the heating system was venting into the basement as opposed to venting outside the home.
>
> 14. As a result of the improper venting of the unit, whenever it was operational, carbon monoxide would vent into the basement. The Court takes notice of the dangers posed by improperly vented carbon monoxide gas into an occupied residence.
>
> 15. Photographs taken by Mr. Johnston and admitted into evidence depict the unit and show its improper ventilation.

Even if we were to assume Johnston's testimony was improper and conclude the trial court erred by making findings of fact 13, 14, and 15, these findings have no bearing on the trial court's ultimate determination that Defendant violated the Injunction. As Johnston explained during the contempt proceeding, different standards apply to licensed and unlicensed service providers. For an unlicensed provider, like Defendant, the only concern is whether the provider did or did not perform the installation. In other words, Plaintiff was not required to demonstrate that Defendant installed the new HVAC system incorrectly to establish he violated the Injunction. Instead, Plaintiff only had to demonstrate

Defendant installed the new HVAC system. Put simply, even if we were to agree with Defendant and set aside these findings, the trial court's remaining findings support the conclusion that Defendant willfully violated the Injunction. Accordingly, even assuming the trial court erred by making findings of fact 13, 14, and 15, any error was not prejudicial.

2. Findings of Fact 28, 31, and 32

Defendant also asserts the trial court's findings of fact 28, 31, and 32 are not supported by competent evidence. Defendant, however, has not provided any supporting argument for his assertion in this section of his brief. Rather he "incorporates . . . by reference" his arguments from the first section of his brief regarding the trial court's denial of his motion to dismiss. Because Defendant makes no mention of findings of fact 28 and 32 in his fourteen pages of motion to dismiss argument, we deem these challenges as abandoned and binding. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). It is not the duty of this Court to craft an appellant's arguments for them. *See Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, (2005); *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

We will, however, review ultimate finding 31 since Defendant indirectly challenged this finding in the context of his motion to dismiss argument. *See In re G.C.*, 384 N.C. 62, 65 n.3, 884 S.E.2d 658, 661 (2023); *State v. Johnson*, 246 N.C. App. 677, 683, 783 S.E.2d 753, 758–59 (2016) ("[W]e do not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion.").

Ultimate finding 31 states:

> 31. The Court acknowledges that Plaintiff did not present direct testimony that Defendant installed the unit; however, Plaintiff presented sufficient circumstantial evidence to lead the court to believe – beyond a reasonable doubt – that Defendant did in fact install the unit and replaced duct board for the unit.

Similar to our reasoning outlined above, ultimate finding 31 is supported by the evidentiary findings which are supported by competent evidence. The trial court found that the plain language of the Invoice contradicted Defendant's statement that he did not install the new HVAC

system and found that the Invoice and Defendant's statement established Defendant replaced the ductwork on the old HVAC system. Further, the trial court found that Defendant's testimony at the contempt hearing contradicted his statement prepared for Yerkes and that Defendant was not a credible witness. These findings are supported by competent evidence, including the Invoice, Johnston and Yerkes' testimony, and circumstantial evidence including, Defendant's previous violations of the Injunction, $600.00 payment to Sharon Eller, and inconsistent statements regarding the Invoice and the work performed. Accordingly, the evidence was adequate to support the trial court's evidentiary findings which support ultimate finding 31 that the circumstantial evidence was sufficient to establish that Defendant installed the new HVAC system and replaced the duct work on the old HVAC system in violation of the Injunction. Thus, ultimate finding 31 is supported by the evidentiary findings which are supported by competent evidence.

D. Statute of Limitations

[6] Finally, Defendant asserts the trial court erred by finding him in criminal contempt because criminal contempt is a misdemeanor subject to a two-year statute of limitations. According to Defendant, the statute of limitations had run because the alleged violations occurred prior to 30 May 2019 and Plaintiff's motion for order to show cause was filed on 26 May 2022, more than two years later. We disagree.

In support of his proposition, Defendant directs our attention to two North Carolina statutes. *See* N.C. Gen. Stat. §§ 15-1(a) and 14-1 (2023). Section 15-1 provides the two-year statute of limitations period for misdemeanors stating, "crimes of deceit and malicious mischief, and the crime of petit larceny . . . , and all misdemeanors except malicious misdemeanors, shall be charged within two years after the commission of the same, and not afterwards[.]" N.C. Gen. Stat. § 15-1(a). According to section 14-1:

> A felony is a crime which: (1) Was a felony at common law; (2) Is or may be punishable by death; (3) Is or may be punishable by imprisonment in the State's prison; or (4) Is denominated as a felony by statute. *Any other crime is a misdemeanor*.

N.C. Gen. Stat. § 14-1 (emphasis added).

Defendant attempts to harmonize these statutes as follows: because criminal contempt is not a felony, it must be a misdemeanor

subject to a two-year statute of limitations. We are not persuaded by Defendant's argument.

First, Defendant's assertion presumes that criminal contempt is, by nature, a "crime" and is therefore encompassed by the "*Any other crime*" language of section 14-1. *See* N.C. Gen. Stat. § 14-1 (emphasis added). Although an indirect criminal contempt proceeding is "punitive or 'criminal in . . . *nature*,' " *State v. Reaves*, 142 N.C. App. 629, 633, 544 S.E.2d 253, 256 (2001) (emphasis in original), contempt itself remains "of its own kind or class," *see Burrow*, 248 N.C. App. at 670, 789 S.E.2d at 928 (citation omitted). Indeed, criminal contempt is not tantamount to a traditional "crime."

To justify affording contemnors the same "constitutional safeguards" as those provided to ordinary criminal defendants, our courts have treated criminal contempts as "crimes." *See O'Briant*, 313 N.C. at 435, 329 S.E.2d at 373. However, in other instances, criminal contempt receives different treatment. For example, criminal contempt has been defined as a "petty offense with no constitutional right to a jury trial," *Blue Jeans Corp. v. Amalgamated Clothing Workers of Am.*, *AFL-CIO*, 275 N.C. 503, 511, 169 S.E.2d 867, 872 (1969), and prior adjudications for criminal contempt do not "constitute [] 'prior conviction[s]' for purposes of the [Structured Sentencing] Act," *Reaves*, 142 N.C. App. at 633, 544 S.E.2d at 256. Thus, despite an indirect criminal contempt proceeding resembling a conventional criminal bench trial, it cannot be said that criminal contempt is encompassed by the "*Any other crime*" language of section 14-1.

Second, Defendant's argument overlooks the fact that this Court has expressly rejected the notion that criminal contempt is a misdemeanor. *See Burrow*, 248 N.C. App. at 669–70, 789 S.E.2d at 928–29. The defendant in *Burrow* advanced a similar argument to the one Defendant presents here. *Id.* at 669, 789 S.E.2d at 928. There, the defendant argued his six consecutive thirty-day terms of imprisonment based on six findings of direct criminal contempt was improper because criminal contempt is a Class 3 misdemeanor for which consecutive sentences are impermissible. *Id.* at 669, 789 S.E.2d at 928. We rejected this argument, noting that it "fail[ed] to take into account the entirety of [section] 14-3, which dictates that the offense *actually be a misdemeanor* before labeling it a Class 3 misdemeanor." *Id.* at 670, 789 S.E.2d at 928 (emphasis added). Ultimately, we determined the defendant's sentences could run consecutively because "a criminal contempt adjudication is *not a misdemeanor* in North Carolina." *Id.* at 670, 789 S.E.2d at 929

(emphasis added) (quoting *State v. Luke*, 207 N.C. App. 749, 701 S.E.2d 403 (2010) (unpublished)).

Finally, the statutory provisions governing contempt are confined to their own chapter of our General Statutes—Chapter 5A. *See* N.C. Gen. Stat. § 5A (2023). Conversely, "the General Assembly has confined provisions of our 'penal law,' . . . primarily to Chapter 14 of the General Statutes." *Reaves*, 142 N.C. App. at 633, 544 S.E.2d at 256. There is no mention of a statute of limitations period in Chapter 5A. *See* N.C. Gen. Stat. § 5A. It is the role of the General Assembly, not this Court to prescribe such a limitation. *See State v. Scoggin*, 236 N.C. 19, 23, 72 S.E.2d 54, 57 (1952) ("It is our duty to interpret and apply the law as it is written, but it is the function and prerogative of the Legislature to make the law.").

Accordingly, because a criminal contempt adjudication is not a misdemeanor and there is no applicable statute of limitations period for criminal contempt, Defendant's statute of limitations argument fails.

V. Conclusion

In sum, the trial court properly denied Defendant's motion to dismiss for insufficient evidence and had jurisdiction to enter the Order. Ultimate finding 31 is supported and the criminal contempt adjudication was not barred by a two-year statute of limitations period. Accordingly, we affirm the Order.

AFFIRMED.

Judges ARROWOOD and STADING concur.

STATE OF NORTH CAROLINA
v.
MICHAEL ANTHONY ASPIOTE

No. COA24-298

Filed 21 May 2025

Contempt—direct criminal contempt—admitted ingestion of impairing substance before hearing—delay of urine sample

After a hearing where defendant—who was there to plead guilty to criminal charges—admitted to consuming an unspecified impairing substance earlier that morning and then provided a urine sample that tested positive for methamphetamine, the trial court erred in holding defendant in direct criminal contempt, since the record did not support the court's finding that defendant falsely claimed that he would not test positive for an impairing substance. Rather, defendant merely represented that he was of clear mind and understood the nature of the proceedings despite having previously ingested the unspecified substance. Further, although the proceedings were delayed a few hours because defendant could not provide a urine sample quicker, this could not serve as the basis for direct contempt, since defendant provided the sample outside the presence of the court.

Appeal by defendant from judgment entered 20 July 2023 by Judge Bob R. Cherry in Carteret County Superior Court. Heard in the Court of Appeals 25 February 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Dilcy Burton, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

DILLON, Chief Judge.

Defendant Michael Anthony Aspiote challenges the trial court's judgment holding him in direct criminal contempt. For the reasoning below, we reverse.

I. Background

Defendant was found to be in direct criminal contempt by the trial court during a hearing in which he was appearing to plead guilty to

unrelated charges. During the hearing, Defendant admitted to consuming an unspecified substance earlier that morning, he went into a bathroom in the courthouse and provided a urine sample, and the sample tested positive for methamphetamine.

The record shows as follows: Defendant appeared in Carteret County Superior Court to plead to charges arising from an April 2022 crime.

In the written Transcript of Plea form tendered to the trial court, Defendant responded "Yes" as to whether he was "now using or consuming alcohol, drugs, narcotics, medicines, pills, or any other substances," and he indicated that he had done so sometime that morning.

During the colloquy, Defendant responded "Yes" when the trial judge asked if he was "now using or consuming alcohol, drugs, narcotics, medicines, pills, or any other substance," and Defendant responded that he had done so "[f]irst thing [that] morning." Defendant told the trial judge that he knew how the substance(s) he had taken affected his body and that he believed that his mind was clear and that he understood the nature of the hearing. However, during the colloquy the trial judge never asked, nor did Defendant volunteer, *the type* of substance Defendant had consumed that morning.

The trial judge continued the colloquy with Defendant for several minutes, during which Defendant responded "Yes, sir" to over twenty questions regarding his understanding of the hearing and the plea he was entering. During this portion of the hearing, the trial judge did not express any concern that Defendant did not understand the nature of the hearing or the plea agreement, nor does the transcript show Defendant did not comprehend the nature of the hearing or his plea.

In any event, following the colloquy the prosecutor provided the court with the factual basis of the charges against Defendant to which he was pleading. The trial judge then allowed the victim to speak at length uninterrupted (approximately six pages of the transcript), who painted Defendant in a negative light.

After hearing from the victim, the trial judge announced he would require Defendant to be screened for drug use before deciding whether to accept the plea. At about noon, Defendant was led out of the courtroom to provide a urine sample, during which time the hearing stood at ease. When Defendant failed to provide a urine sample by 1:21 p.m., the trial judge announced a lunch break. At 2:31 p.m., the probation officer notified the trial judge Defendant had provided a sample during the break and that the sample tested positive for methamphetamine.

The trial judge then announced he was not going to accept Defendant's plea, explaining that "the plea was not understandingly, knowingly and intelligently entered into because [Defendant had just tested] positive for an impairing substance."

The trial court then found Defendant in direct criminal contempt for delaying the court's proceedings and sentenced Defendant to twenty days in jail.

II. Analysis

On appeal, Defendant argues the trial court erred in holding him in direct criminal contempt. We agree.

"[O]ur standard of review for contempt cases is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *State v. Phair*, 193 N.C. App. 591, 593 (2008) (quotations and citations omitted). Conclusions of law are reviewed *de novo*. *See State v. Biber*, 365 N.C. 162, 168 (2011).

Under our General Statutes, a defendant may be held in criminal contempt based on "[w]illful behavior committed during the sitting of a court and directly tending to interrupt its proceedings[,]" and "[w]illful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court." N.C.G.S. §§ 5A-11(a)(1), (7).

Criminal contempt may be either "direct" or "indirect." N.C.G.S. § 5A-13. "Direct" criminal contempt occurs where the defendant's contemptuous act delaying or interfering with court proceedings was committed "within the sight or hearing of a presiding judicial officer" *and* within or in the immediate proximity of the courtroom. *Id. See also O'Briant v. O'Briant*, 313 N.C. 432, 435-36 (1985). A trial judge who observes an act of direct criminal contempt may himself punish the defendant summarily. N.C.G.S. § 5A-13.

"Indirect" criminal contempt occurs where a defendant violates a court order outside the presence of a court proceeding. *Id.* A trial judge may not proceed summarily against a defendant suspected of indirect criminal contempt, but rather a hearing may only be held after the defendant is afforded "a reasonable time" to prepare. *Id.* § 5A-15(a).

In his order, the trial judge held Defendant in *direct* criminal contempt in a summary proceeding based on the following finding:

> Defendant tested positive for methamphetamine, and [the] court inquired whether defendant would test positive and defendant said he would not. This inquiry occurred after the plea was taken but before sentence was given. After waiting more than 2 hours, [Defendant tested positive] for methamphetamine, so plea was stricken.

It appears the trial court held Defendant in direct criminal contempt for lying that he would not test positive for a controlled substance, thus wasting the court's time having to wait for Defendant to complete a drug test.

However, nowhere in the record does it show that Defendant ever represented to the trial judge he would not test positive for a controlling substance. He was never asked that question. Rather, the record shows Defendant *admitted* to ingesting a substance earlier that morning. He never was asked or stated the type of substance he ingested. During the colloquy, he did state his mind was clear and that, even though he had ingested a substance, he understood the nature of the proceedings and the effect of his "no contest" plea to certain criminal charges. Further, though Defendant tested positive for methamphetamine, there is nothing in the record to indicate that Defendant was under the influence of that drug during the hearing.

Our Supreme Court has held that the fact that one has tested positive for an impairing substance—in that case, cocaine and marijuana—is not conclusive proof the individual was under the influence of that substance at the time of the test. *Willey v. Williamson Produce*, 357 N.C. 41, 42 (2003) (adopting dissenting opinion from our Court at 149 N.C. App. 74 (2002)). *See also State v. Royall*, 14 N.C. App. 214, 219 (1972) (concluding trial court properly instructed jury it could find a defendant was not under the influence of alcohol despite a positive breathalyzer result).

We reiterate the record does not show *the type* of substance Defendant ingested *on the morning of the hearing*. *See Willey*, 357 N.C. at 42 (recognizing that one can test positive well after its impairing effects have subsided).

In sum, there is no evidence in the record to support the trial court's finding that Defendant represented he would not test positive for an impairing substance. He merely represented he was of clear mind and understood the nature of the proceedings, notwithstanding that he had previously ingested a substance.

We note the trial judge also referenced in his order that Defendant caused the trial proceedings to be delayed a few hours waiting for

Defendant to complete his urine sample. However, Defendant's failure to provide a urine sample quicker cannot be the basis of *direct* criminal contempt, as Defendant's act in providing the sample took place outside the presence of the court. Also, there was no finding that Defendant acted willfully in failing to provide the sample quicker than he did. *See Bank of Zebulon v. Chamblee*, 188 N.C. 417, 418 (1924) (holding that an act is not contemptuous unless it is done willfully).

III. Conclusion

We conclude the record does not support the order holding Defendant in *direct* criminal contempt. Accordingly, we reverse that judgment and remand for further proceedings.

REVERSED.

Judges HAMPSON and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
TERRENCE TERRELL JOYNER

No. COA24-438

Filed 21 May 2025

1. Judges—impartiality—numerous references to sheriff—no prejudicial error

In defendant's trial for first-degree murder, the trial judge's comments introducing the county sheriff as the "High Sheriff" to the prospective jurors during jury selection and repeatedly thanking the jurors "on behalf of the [s]heriff" throughout the trial did not amount to an improper expression of opinion in violation of N.C.G.S. §§ 15A-1222 and 15A-1232; further, even had any error occurred, defendant could not show prejudicial error in light of the overwhelming evidence of his guilt.

2. Evidence—murder trial—victim's bloody clothing—probative value not substantially outweighed by danger of unfair prejudice

In defendant's trial for first-degree murder arising from a fatal shooting, the trial court did not abuse its discretion by allowing the State to introduce into evidence the victim's bloody clothing

because the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The evidence was used by the State to demonstrate how and where the victim was shot and was not excessively displayed.

3. Evidence—authentication—forensic download of defendant's phone—testimony confirming contents

In defendant's trial for first-degree murder, the trial court did not err, much less plainly err, by allowing the State to introduce into evidence a forensic download of defendant's cell phone. The data extracted, including text messages and call logs, was properly authenticated pursuant to Evidence Rule 901 by the testimony of the sheriff's department sergeant who had examined defendant's phone and its contents prior to initiating the download and therefore had knowledge that the extracted data was what the State claimed it to be.

4. Criminal Law—prosecutor's closing statement—murder trial—no improper assumption of facts not in evidence

In defendant's trial for first-degree murder, the trial court was not required to intervene ex mero motu during the prosecutor's closing argument during which, contrary to defendant's assertion on appeal, the prosecutor argued facts that were properly admitted into evidence—including contents downloaded from defendant's phone—and all reasonable inferences drawn therefrom. Further, the prosecutor's suggestion in closing that defendant learned from a concealed carry class that he could assert self-defense by claiming to be in fear for his life did not constitute reliance on improperly admitted hearsay; therefore, the prosecutor did not violate ethics rules governing attorney conduct.

Appeal by Defendant from judgment entered 22 September 2023 by Judge J. Carlton Cole in Hertford County Superior Court. Heard in the Court of Appeals 26 February 2025.

Attorney General Jeff Jackson, by Senior Deputy Attorney General Amar Majmundar, for the State-Appellee.

The Sweet Law Firm, PLLC, by Kaelyn N. Sweet, for Defendant-Appellant.

COLLINS, Judge.

Defendant Terrence Terrell Joyner appeals from a judgment entered upon a jury's guilty verdict of first-degree murder. Defendant argues that the trial court erred by improperly expressing its alignment with the Hertford County Sheriff's Office in the presence of the jury, admitting the victim's bloody clothing into evidence, admitting a forensic download of Defendant's cell phone into evidence, and failing to intervene ex mero motu during the State's closing remarks. For the following reasons, we find no error.

I. Background

Defendant was charged with first-degree murder for a shooting that occurred on 26 February 2021. The State's evidence at trial tended to show the following:

Defendant and Chyna Swain engaged in a romantic relationship for nearly four years, beginning in 2017 when Chyna was a senior in high school. During this time, they also worked together. Chyna ended the relationship in December 2020; approximately one month later, Chyna met and began a romantic relationship with Vashuan Smith. Despite having limited communication after their break-up, Defendant often told Chyna that he wanted to get back together.

At approximately 4:00 p.m. on 26 February 2021, when Chyna was on her way home from work, Defendant called Chyna and asked if she could return one of his personal belongings to him. Chyna agreed and met Defendant at a hotel with the item. When Chyna returned home, she realized that Defendant had been in her room and laid out on her bed various items she had given him during their relationship. Defendant had not told Chyna about his plans to go to her home or return these items.

Soon after, Vashuan invited Chyna to his house for dinner. A few minutes after arriving at Vashuan's house, Chyna and Vashuan decided to drive to Chyna's aunt's house. Chyna drove, and Vashuan sat in the passenger seat. As they approached Chyna's aunt's house, Chyna received a call from Defendant. Vashuan answered the call. He told Defendant that Chyna was unavailable and hung up the phone. Defendant attempted to call Chyna several more times, but Chyna did not answer.

Chyna visited with her aunt for a short time. As Chyna and Vashuan were driving back to Vashuan's house, Defendant again called Chyna. She answered, and Defendant asked her where she was. When she refused to tell him, Defendant became irritated and said, "Don't worry about it. . . . I know where you're at." Defendant then asked to speak to Vashuan; Vashuan, listening to the conversation on speakerphone, took

the phone and told Defendant, "I'm with my girl." Chyna hung up, but Defendant continued to call.

A few minutes later, as Chyna was stopped at a red light, she saw Defendant's car behind her car. With Defendant following them, Chyna continued driving toward Vashuan's house. At one point, Defendant quickly passed Chyna's car and immediately stopped his car in front of hers. Chyna had to slam her brakes to avoid hitting Defendant's car from behind. Chyna went around Defendant's car and continued to drive toward Vashuan's house. When they arrived at Vashuan's house, Chyna drove her car into the driveway; Defendant stopped his car on the street in front of the house. Vashuan immediately got out of the car and ran toward Defendant's car. Defendant got out of his car and approached Chyna, who was standing in the driveway. Defendant grabbed Chyna by the arm and attempted to lead her back to his car.

Vashuan's mother, Shannon Bell-Harrell, arrived home at this point. Bell-Harrell approached Chyna, Defendant, and Vashuan. Positioned between Defendant and Vashuan, she told Defendant to leave. Defendant pushed Bell-Harrell to the side, and Vashuan hit Defendant in response. Vashuan and Defendant then began to fight.

As they fought, they moved away from the driveway and into the front yard. Chyna, still standing in the driveway, watched the fight. She saw Vashuan suddenly retreat from Defendant by walking backwards. She then saw Defendant fire multiple shots at Vashuan, causing him to fall face-forward on the ground. Defendant fired several more shots at Vashuan, ran to his car, and drove away. Chyna called 911. Vashuan's parents rushed him to the hospital, where he was declared deceased. Eight shell casings from Defendant's gun were found at the scene.

Defendant testified on his own behalf. According to Defendant, he called Chyna multiple times on the night of the shooting because he wanted to return Chyna's belongings to her. When Chyna told him over the phone that she was at her aunt's house, Defendant asked if he could meet her there and began driving in that direction. When he arrived at her aunt's house, however, Chyna had already left. Defendant, who testified that he "was being stubborn," called Chyna and asked if she could pull over somewhere. Stopped at a red light, Defendant realized he was behind Chyna's car, and he flashed his lights and called Chyna in an attempt to get her to pull over. Chyna, however, continued to drive. Defendant began following her, and at one point, he pulled around Chyna's car and slammed his brakes—another attempt to get Chyna to pull over.

After arriving at Vashuan's house, Defendant testified that Vashuan immediately ran to Defendant's car, banged on his windows, and told Defendant to "get out." Vashuan then ran around the back of the house, and Defendant grabbed his gun for safety before he got out of his car. According to Defendant, while he was standing with Chyna in the driveway, Vashuan suddenly ran toward Defendant and attacked him. Vashuan threatened to kill Defendant and repeatedly hit him. Defendant then saw Vashuan reach for something. Not knowing what it was and fearing for his life, Defendant took his gun out of his pocket and shot Vashuan.

Despite fleeing, Defendant also called 911. The dispatcher instructed Defendant to go to the Sheriff's Department, and Defendant remained on the phone with dispatch until he pulled into the Sheriff's Department parking lot. He left his gun on the dashboard of his car before being escorted into the Sheriff's Department by law enforcement.

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. Trial Court's Remarks to the Jury

[1] Defendant first argues that the trial court erred by improperly expressing its alignment with the Hertford County Sheriff in violation of N.C. Gen. Stat. §§ 15A-1222 and 15A-1232.

1. Standard of Review

"The statutory prohibitions against expressions of opinion by the trial court contained in [N.C. Gen. Stat.] § 15A-1222 and [N.C. Gen. Stat.] § 15A-1232 are mandatory." *State v. Young*, 324 N.C. 489, 494 (1989). "A defendant's failure to object to alleged expressions of opinion by the trial court in violation of those statutes does not preclude his raising the issue on appeal." *Id.* (citations omitted). We review this alleged statutory violation for prejudicial error under N.C. Gen. Stat. § 15A-1443(a). *State v. Austin*, 378 N.C. 272, 276-77 (2021). Prejudicial error occurs "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2023). The defendant bears the burden of showing prejudice. *Id.*

Under this standard of review, we first consider the totality of the circumstances "to determine whether the trial court's comments crossed into the realm of impermissible opinion." *Austin*, 378 N.C. at

277 (cleaned up). If so, we then determine whether "the comments had such a prejudicial effect that there is a reasonable possibility of a different result absent the error." *Id.*; N.C. Gen. Stat. § 15A-1443(a).

2. Analysis

Sections 15A-1222 and 15A-1232 "prohibit a trial court judge from expressing an opinion during trial and when instructing the jury." *Id.* at 276; N.C. Gen. Stat. §§ 15A-1222, 15A-1232 (2023). These statutes impose upon the trial court a strict duty of absolute impartiality, "and this is so even when such expression of opinion is inadvertent." *State v. Hudson*, 295 N.C. 427, 435 (1978) (citation omitted); *Austin*, 378 N.C. at 278. The trial court "may not express an opinion as to the guilt or innocence of a criminal defendant, the credibility of a witness, or any other matter which lies in the province of the jury." *Hudson*, 295 N.C. at 434-35 (citations omitted). "[A]n alleged improper statement will not be reviewed in isolation, but will be considered in light of the circumstances in which it was made." *State v. Jones*, 358 N.C. 330, 355 (2004) (citation omitted).

Here, at the end of the first day of jury selection, the trial court introduced the Sheriff of Hertford County to the potential jurors: "Before y'all leave, the High Sheriff has come to the courtroom. Sheriff, stand up. This is Dexter Hayes. I'm sure all of you know him." Throughout the rest of the five-day trial, the trial court thanked the jurors for their service "on behalf of the Sheriff" approximately sixteen times.

The State called three deputies from the Hertford County Sheriff's Office to testify on behalf of the State against Defendant. Although introducing the Sheriff to the jury and repeatedly thanking the jury for their service "on behalf of the Sheriff" was more than usual in this case, we cannot say that the trial court made an improper "expression of judicial leaning." *Hudson*, 295 N.C. at 434-35.

Furthermore, even had the remarks been erroneous, Defendant is unable to show prejudicial error. The evidence of Defendant's guilt was overwhelming: the State called a total of eleven witnesses, two of whom personally witnessed Defendant shoot the victim, and also introduced physical evidence. The trial court also instructed the jury as follows:

> The law requires that the presiding judge be impartial. You should not infer from anything that I've done or said that the evidence is to be believed or disbelieved, that a fact has been proved, or what your findings ought to be. It is your duty to find the facts and render a verdict reflecting the truth.

Considering the trial court's comments "in light of the circumstances in which [they were] made," *Jones*, 358 N.C. at 355, Defendant has failed to show that the trial court's improper comments "had such a prejudicial effect that there is a reasonable possibility of a different result absent the error." *Austin*, 378 N.C. at 277-78 (citations omitted).

B. Evidence of the Victim's Clothing

[2] Defendant next contends that the admission of Vashuan's bloody clothing into evidence violated Rule 403 because the evidence's probative value was substantially outweighed by the danger of unfair prejudice. This argument is without merit.

This Court reviews Rule 403 rulings for abuse of discretion. *State v. Hennis*, 323 N.C. 279, 285 (1988). "An abuse of discretion results when 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. Whaley*, 362 N.C. 156, 160 (2008) (quotation marks and citation omitted). A defendant advancing such an argument must also prove "that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307 (2001) (citation omitted).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2023). All probative evidence offered against a defendant by the State has some prejudicial effect; however, "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) (emphasis added and citations omitted). "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) (citation omitted).

Here, the bloody shirt, shorts, and pants that Vashuan was wearing at the time of the shooting were admitted into evidence to illustrate the testimony of Major Scott Cofield of the Hertford County Sheriff's Office. This clothing was "not excessively displayed or discussed at trial," and the State used this evidence to show how and where Vashuan was shot. *State v. Knight*, 340 N.C. 531, 560 (1995) (admission of the victim's bloody shirt did not violate Rule 403 where it "was not excessively displayed or discussed at trial and was used to illustrate the testimony of the doctor who performed the autopsy on the victim's body"); *see State v. Holder*, 331 N.C. 462, 485-86 (1992) (admission of the victim's

bloody shirt did not violate Rule 403). We agree with the trial court that the probative value of Vashuan's bloody clothing was not substantially outweighed by the danger of unfair prejudice and conclude that the trial court did not abuse its discretion by admitting this clothing into evidence at trial.

C. Forensic Download of Defendant's Cell Phone

[3] Defendant next argues that the trial court plainly erred by admitting a forensic download of Defendant's cell phone. Specifically, Defendant contends that the State failed to lay a proper foundation for the admission of this evidence, in violation of Rule 901. This argument lacks merit.

We review an unpreserved issue regarding an error in the admissibility of evidence for plain error. *State v. Cummings*, 346 N.C. 291, 313-14 (1997); N.C. R. App. P. 10(a)(4). For a trial court's error to amount to 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).

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2023). Various means may be used to authenticate evidence, including "testimony of a witness with knowledge that a matter is what it is claimed to be." *State v. Taylor*, 178 N.C. App. 395, 413 (2006) (quotation marks omitted); N.C. Gen. Stat. § 8C-1, Rule 901(b) (2023). Therefore, it is not error under Rule 901 for a trial court to admit evidence so long as it can "reasonably determine that there was sufficient evidence to support a finding that the matter in question is what its proponent claims." *State v. Wiggins*, 334 N.C. 18, 34 (1993) (citation omitted).

Here, the forensic download of Defendant's cell phone was admitted into evidence through the testimony of William Keith Lassiter, Sergeant

of Investigations for the Hertford County Sheriff's Office. Sergeant Lassiter testified that he himself examined Defendant's phone and performed the forensic extraction of the phone. Sergeant Lassiter then testified as to what was found on Defendant's phone, which included text messages and call logs. Sergeant Lassiter, having been the person who examined the phone and performed its data extraction, sufficiently showed that he had "knowledge that [the] matter is what it is claimed to be" and therefore properly authenticated the evidence before the trial court admitted it. *Taylor*, 178 N.C. App. at 413; N.C. Gen. Stat. § 8C-1, Rule 901.

Defendant argues that the evidence was not properly authenticated because Sergeant Lassiter never testified as to when he conducted the forensic download and what particular method was used. This argument, however, fails to accurately reflect the law. All that is required under Rule 901 is that a witness with knowledge about the evidence in question testifies that "the matter in question is what its proponent claims." *Wiggins*, 334 N.C. at 34 (citation omitted) (noting that the defendant is free to introduce any competent evidence of his own relevant to the weight or credibility of the properly authenticated evidence in question). Accordingly, the trial court did not err, much less plainly err, by admitting the forensic download of Defendant's cell phone into evidence.

D. State's Closing Remarks

[4] Defendant finally argues that the trial court erred by failing to intervene ex mero motu during the State's closing remarks. Specifically, Defendant argues that the State's closing remarks improperly assumed facts not in evidence in violation of N.C. Gen. Stat. § 15A-1230 and the Rules of Professional Conduct. These arguments lack merit.

Because Defendant failed to object at trial to this portion of the State's closing argument, the proper 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. Mitchell*, 353 N.C. 309, 324 (2001). "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." *State v. Anthony*, 354 N.C. 372, 423 (2001) (citation omitted). "[T]he 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 closing argument to the jury an attorney may not . . . 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). Nevertheless, "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).

Defendant argues that the State's closing remarks were improper for several reasons. First, Defendant contends that the State argued in favor of premeditation and deliberation based on the forensic download of Defendant's cell phone that was improperly admitted into evidence. As we have determined that the forensic download of Defendant's cell phone was properly authenticated and admitted, this argument lacks merit.

Second, Defendant contends that the State relied on improperly admitted hearsay to argue in its closing remarks that Defendant's assertion of self-defense was a "calculated ruse." During the State's cross-examination of Defendant, Defendant answered "yes" when the State asked, "And in your carrying a concealed weapon class they told you that if you were in fear for your life you could shoot?" Subsequently, in its closing remarks, the State argued, "[Defendant] was told in that class: If you're in fear of your life you can use your weapon. So he knew all he had to do was say he was in fear for his life. . . . [H]e created the situation so he could say that."

Defendant did not object at trial to the statement he now asserts is erroneously-admitted hearsay, and Defendant has failed to argue on appeal that the admission of the statement amounts to plain error. Accordingly, the statement was properly admitted, and the State properly argued "the facts in evidence[] and all reasonable inferences drawn therefrom." *Phillips*, 365 N.C. at 135 (quotation marks and citations omitted).

Furthermore, Rule 3.4(e) of the Rules of Professional conduct prohibits an attorney from alluding to any matter that "the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." N.C. R. Prof. Conduct 3.4(e). Because the State did not rely on improperly admitted hearsay during its closing remarks, the State did not violate Rule 3.4(e). Accordingly, the trial court did not abuse its discretion by failing to intervene ex mero motu during the State's closing remarks.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges ZACHARY and GORE concur.

STATE OF NORTH CAROLINA
v.
DANA ALDEN LATTA, JR., DEFENDANT

No. COA24-407

Filed 21 May 2025

Criminal Law—motion to withdraw guilty plea—twenty-year delay—properly denied before sentencing—greater sentence improperly imposed

In a criminal case that was reinstated twenty years after defendant had gone missing, where defendant had pleaded guilty to multiple charges (including robbery with a dangerous weapon) with the condition that he would receive an active sentence of 61 to 83 months, the trial court did not err in denying defendant's motion to withdraw his plea agreement prior to sentencing, since several factors—particularly the twenty-year time span between his plea agreement and his motion to withdraw—weighed heavily against a finding that he had a fair and just reason for withdrawing his guilty plea. However, because the court failed to inform defendant of his statutory right (under N.C.G.S. § 15A-1024) to withdraw his plea after it imposed a greater sentence than what defendant had agreed to in his plea agreement, the court's judgment was vacated and the case was remanded for a new sentencing hearing.

Appeal by defendant from order entered 18 January 2024 by Judge Michael O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 12 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Arneatha James, for the State.

Darren Jackson for defendant-appellant.

DILLON, Chief Judge.

Defendant Dana Latta appeals from an order denying his motion to withdraw his plea. We vacate and remand.

I. Background

In November 2001, Defendant Dana Latta was indicted in Durham County for three counts of robbery with a dangerous weapon, two counts of attempted robbery with a dangerous weapon, and second-degree kidnapping.

In June 2002, Defendant entered into a plea agreement with the condition that he would testify against his co-defendant and receive an active sentence of 61 to 83 months. Defendant was a prior record level (PRL) I at the time of the plea agreement.

When Defendant failed to appear at his sentencing hearing in November 2002, the trial court issued a warrant for his arrest. Defendant's co-defendant, though, did plead guilty at a probationary hearing. The charges against Defendant were ultimately dismissed.

Defendant went missing from North Carolina for twenty years, during which he gained multiple criminal convictions in other states. In March 2022, Defendant was arrested in Vance County for possession of a Schedule II substance and was served with his Order for Arrest issued in the 2002 Durham County cases.

In May 2022, Defendant was transferred to the Durham County Detention Center, and all his previously dismissed cases were reinstated.

In January 2024, Defendant filed a motion to set aside his 2002 plea agreement and/or dismiss those charges. After a hearing on the matter, the trial court denied Defendant's motion. Upon this guilty plea, Defendant was sentenced as a PRL IV in the mitigated range of 71 to 95 months. Defendant timely appealed.

II. Analysis

Defendant makes two arguments on appeal. The first argument concerns the trial court's failure *before pronouncing sentence* to grant Defendant's motion to withdraw from the 2002 plea agreement based on Defendant's change of heart regarding that agreement. Defendant's second argument concerns the trial court's failure *after pronouncing sentence* to inform Defendant of his right to withdraw from the 2002 plea agreement, a right which sprang from the trial court's imposition of a sentence greater than Defendant had agreed to. We address each issue in turn.

A. Motion to vacate plea agreement

Defendant argues that the trial court erred in denying his motion to set aside his 2002 plea agreement or otherwise dismiss the matter prior to the trial court pronouncing sentence.

"In reviewing a trial court's denial of a defendant's motion to withdraw a guilty plea made before sentencing, the appellate court does not apply an abuse of discretion standard but instead makes an independent review of the record." *State v. Chery*, 203 N.C. App. 310, 312 (2010) (internal quotation omitted). There is no absolute right to withdraw a guilty plea. *Id*. However, a defendant may seek to withdraw a guilty plea prior to sentencing and is "generally accorded that right if he can show any fair and just reason." *State v. Handy*, 326 N.C. 532, 536 (1990). When a defendant files a motion to withdraw a guilty plea, he has the burden to show it is supported by a "fair and just reason." *State v. Meyer*, 330 N.C. 738, 743 (1992).

Our Supreme Court in *State v. Handy* set forth (non-exclusive) factors to consider when determining whether there is a fair and just reason to withdraw a guilty plea:

> whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

326 N.C. 532, 539 (1990).

Here, Defendant fails to address any of these factors. Instead, his only argument is that he fully cooperated with the investigation and aided in the apprehension of another felon. Our Supreme Court has stated that when a defendant fails to show any fair or just reason for the withdrawal of a guilty plea, the trial court may deny the motion for withdrawal. *See State v. Taylor*, 374 N.C. 710, 725 (2020). Based on an independent review of the record, we conclude there is no evidence to indicate that Defendant ever asserted legal innocence, nor was there evidence of incompetent counsel or misunderstanding of what a guilty plea entails.

Additionally, the twenty-year time span between his agreement and the motion to withdraw the plea weighs heavily against Defendant. When reviewing a motion to withdraw a guilty plea, our Court "place[s] heavy reliance on the length of time between a defendant's entry of the

guilty plea and motion to withdraw the plea." *State v. Robinson*, 177 N.C. App. 225, 229 (2006). The reasoning is that:

> A swift change of heart is itself strong indication that the plea was entered in haste and confusion; furthermore, withdrawal shortly after the event will rarely prejudice the Government's legitimate interests. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

Handy, 326 N.C. at 539. In *Handy*, the defendant requested to withdraw his guilty plea less than twenty-four hours after its entry. *Id.* at 540. Here, twenty years passed between Defendant's plea and his motion to withdraw. During this time, there was no indication that he wavered on his decision. Therefore, this factor weighs heavily against Defendant.

The remaining factor, whether there is prejudice to the State, is only addressed if "defendant has carried his burden of proof that 'fair and just' reason supports his motion to withdraw." *State v. Hatley*, 185 N.C. App. 93, 101 (2007). Here, Defendant failed to provide any fair and just reason to withdraw the guilty plea. Therefore, this factor is not addressed.

Because there was no fair or just reason provided to support the motion to withdraw the guilty plea, we hold the trial court did not err in denying the motion.

B. Failure to comply with N.C.G.S. § 15A-1024

In his second argument, Defendant contends the trial court erred by failing to comply with N.C.G.S. § 15A-1024, specifically by failing to allow him to withdraw from the 2002 plea agreement after the trial court decided to impose a sentence greater than that which Defendant had agreed to.

"A question of statutory interpretation is ultimately a question of law," *Brown v. Flowe*, 349 N.C. 520, 523 (1998), which we review de novo, *see Blue v. Bhiro*, 381 N.C. 1, 5 (2022).

Section 15A-1024 reads as follows:

> If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

"Under the express provisions of this statute a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term." *State v. Williams*, 291 N.C. 442, 446-47 (1976). *See also State v. Puckett*, 299 N.C. 727, 730-31 (1980). "[A]ny change by the trial judge in the sentence that was agreed upon by the defendant and the State. . . requires the judge to give the defendant an opportunity to withdraw his guilty plea." *State v. Marsh*, 265 N.C. App. 652, 655 (2019).

Defendant contends that the judge failed to inform Defendant of his right to withdraw his plea when the judge decided to impose a sentence other than that agreed to in Defendant's 2002 plea agreement. Specifically, in the original plea agreement, Defendant agreed to a term of 61 to 83 months. At the time of sentencing in 2022, the trial court sentenced Defendant to a minimum term of 71 to 95 months. Although the sentencing occurred during the same hearing that Defendant separately moved to withdraw the guilty plea, the trial judge did not inform Defendant that he may withdraw his plea because the sentencing would be different than that which he agreed to. Therefore, we conclude the trial court failed to comply with N.C.G.S. § 15A-1024. Accordingly, we vacate the judgment and remand for further proceedings.

III. Conclusion

We hold that the trial court did not err in denying Defendant's motion to withdraw his plea prior to sentencing or otherwise to dismiss the charges altogether, as Defendant failed to meet his burden of showing the existence of a fair and just reason to allow him to withdraw his plea.

However, because the trial court decided later in the hearing to impose a sentence greater than that agreed to by Defendant in his plea agreement, we conclude the court erred by failing to inform Defendant of Defendant's *right* under Section 15A-1024 of our General Statutes to then withdraw his plea. We, therefore, must vacate the judgment sentencing Defendant to 71 to 95 months.

We, therefore, vacate and remand the matter for a new sentencing hearing. On remand, the trial court may reconsider and sentence Defendant to a term not to exceed that which Defendant agreed on in the 2002 plea agreement. Or, if the trial court maintains that a greater sentence is warranted, Defendant shall be afforded the opportunity to withdraw his plea and proceed under Section 15A-1024.

VACATED AND REMANDED.

Judges COLLINS and FLOOD concur.

STATE v. MANEY

[299 N.C. App. 108 (2025)]

STATE OF NORTH CAROLINA
v.
JOHNATHON MICAH MANEY, DEFENDANT

No. COA24-894

Filed 21 May 2025

1. Evidence—against a child—Evidence Rule 404(b)—no error—Evidence Rule 403—no abuse of discretion

In a prosecution for numerous sexual offenses against a child—defendant's daughter, whose abuse by defendant from an early age escalated until she had a panic attack in high school and disclosed defendant's behavior—the trial court did not err, let alone plainly err, in admitting evidence from defendant's ex-wife about defendant's abusive, erratic, and threatening behavior against her where that evidence met the criteria for admission under Evidence Rule 404(b) because it was: (1) temporally proximate to charged offenses against defendant's daughter; (2) probative of why defendant's ex-wife did not report an incident in which defendant sexually assaulted both his daughter and his then-wife and why his daughter did not initially report being abused; and (3) sufficiently similar to the charged offenses, in that both involved sexual abuse against family members, sometimes took place in the same locations, often involved force and threats, and included vaginal rape. Further, the trial court did not abuse its discretion in admitting the testimony under Evidence Rule 403 after reviewing the ex-wife's testimony outside the presence of the jury, hearing opposing arguments from counsel, and explaining the reasons for admitting the evidence.

2. Criminal Law—prosecutor's argument—urging jurors to "walk in the victim's shoes"—remarks improper but not prejudicial

In a prosecution for numerous sexual offenses against a child—defendant's daughter, whose abuse by defendant from an early age escalated until she had a panic attack in high school and disclosed defendant's behavior—the trial court did not reversibly err in failing to intervene, in the absence of an objection by defendant, during closing arguments when the prosecutor urged the jurors to "walk in [the victim's] shoes." Although those remarks were improper, they did not prejudice defendant given the overwhelming evidence of his guilt.

3. Constitutional Law—right to speedy trial—Barker factors—nineteen-month delay in signing appellate entries—no violation

After being convicted of numerous sexual offenses against a child, the trial court's nineteen-month delay in signing defendant's appellate entries did not violate defendant's right to a speedy trial where, although the length of the delay was presumptively prejudicial, the balance of the other factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), did not establish the right to a new trial: the reason for the delay (related to the retirement of the trial judge) was not the sort of deliberate act to weigh in favor of a defendant; defendant did not assert the right during the delay; and defendant could not show that he was prejudiced by his post-judgment, pre-appeal incarceration (which he alleged was a result of the delay) where he did not assert that his appeal was hampered by the delay and where his appellate arguments all proved to be without merit.

Judge ARROWOOD concurring in result only.

Appeal by Defendant from judgments entered 23 August 2022 by Judge William H. Coward in Jackson County Superior Court. Heard in the Court of Appeals 22 April 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Kristin Cook McCrary, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant.

GRIFFIN, Judge.

Defendant Johnathon Micah Maney appeals from judgments entered upon jury verdicts finding him guilty of numerous sexual offenses against a child. Defendant contends he is entitled to a new trial because: (1) the trial court plainly erred in admitting improper evidence under Rule 404(b) of the North Carolina Rules of Evidence; (2) the State made improper prejudicial statements throughout his trial; and (3) the trial court failed to sign documents requisite to this appeal in a timely manner. We disagree and hold Defendant received a fair trial, free from error and prejudice.

I. Factual and Procedural Background

This case arises from Defendant's repeated sexual abuse of his minor daughter, Rebecca.[1] Evidence presented at trial tended to show the following:

Rebecca was born in 2004. Her mother was absent from her life and, because of Defendant's inability to maintain a stable lifestyle, she moved in with her paternal grandparents and her aunt at age four. Growing up, she maintained a relationship with her father by visiting him whenever he had a place to live. Defendant sexually abused her during these visits. Rebecca was young when the abuse began—Defendant forced her to watch sexually explicit videos involving fathers and daughters. As she got older, Defendant's abuse towards her and others in their family escalated.

In 2013, Defendant met Sarinna Parish, a missionary at their church. The two married in the summer of 2014 and moved into her parent's trailer in Jackson County. Their marriage began normally, but things changed when Sarinna became pregnant. Defendant began pressuring Sarinna to abort their child and, when she refused out of her moral and religious convictions, he became violent. Defendant began physically abusing Sarinna, sexually assaulting her, threatening to kill her if she left him, and pointing loaded firearms at her and their child's head. Defendant would also frequently stay out until late at night and return home with hypodermic needles in his pockets, which Sarinna found when doing their laundry.

Shortly after Sarinna gave birth to their child in 2015, she and Defendant moved into their own trailer near her parents. During this period, Defendant's behavior became more erratic and paranoid. Friends of Defendant would often come back to the trailer after long nights out and stay there for extended periods of time. He painted the walls of their trailer colors he called "Joker Purple" and "Joker Green" in reference to the villain from Batman. Frequently, he would pace around their apartment carrying a loaded AR-15 because he feared he was being watched by the "Mexican Mafia." At one point, Defendant hung blackout curtains over the windows to prevent the mafia from watching them. Defendant also nailed boards over the trailer's doorframes and confined Sarinna to their bedroom whenever she was not attending school or making him meals.

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

While living in this trailer, Defendant began raping Sarinna. He would force her into sexual acts by threatening to make her watch him kill their child before killing her. In the winter of 2015, while Rebecca was visiting at Sarinna's parents' trailer, Defendant sexually assaulted her and Sarinna together. Sarinna failed to report the assault because of Defendant's continuous threats to hurt her, her child, and Rebecca. Eventually, in 2019, Sarinna escaped the trailer with the help of the Department of Social Services.

Rebecca, however, continued to suffer from Defendant's abuse. She developed depression and anxiety, began harming herself, and started having panic attacks. During her freshman year of high school, while in gym class, Rebecca had a panic attack prompting her to disclose Defendant's abusive behaviors to her teacher, after which she discussed the abuse with her principal as well. Her school conveyed the report to law enforcement, resulting in further interviews at the Heart-to-Heart Child Advocacy Center and with medical examiners. Law enforcement also interviewed Sarinna in South Carolina to corroborate Rebecca's account.

On 18 June 2020, a Jackson County grand jury indicted Defendant on: (1) two counts of statutory rape of a child by an adult; (2) four counts of statutory sex offense; and (3) seven counts of taking indecent liberties with a minor. Prior to trial, Defendant filed a motion in limine seeking to exclude portions of Sarinna's testimony. Defendant's matter came on for trial on 15 August 2022 in Jackson County Superior Court. Following trial, on 23 August 2022, the jury returned verdicts finding Defendant guilty on: (1) one count of statutory rape of a child; (2) two counts of statutory sex offense with a child; and (3) four counts of taking indecent liberties with a child.

After being convicted, Defendant filed a notice of appeal and an affidavit of indigency. The trial judge failed to sign Defendant's appellate entries. On 20 March 2024, the Senior Resident Superior Court Judge for Jackson County entered an order finding that the trial judge refused to sign the entries and signing them himself—initiating Defendant's appeal.

II. Analysis

Defendant argues the trial court plainly erred in admitting Rule 404(b) evidence. Defendant also contends the trial court committed reversible error by failing to intervene *ex mero motu* when the State made multiple statements about "walking in Rebecca's shoes." Finally, Defendant alleges his right to a speedy appeal was violated by the trial court's nineteen-month delay in signing forms necessary for this appeal. We discern no error in allowing the 404(b) evidence, no prejudice caused

by the trial court's failure to intervene in the State's remarks, and no violation of Defendant's rights to a speedy appeal.

A. 404(b) Evidence

[1] Defendant asserts the trial court plainly erred by allowing Rule 404(b) evidence at trial. Specifically, Defendant argues his ex-wife's testimony about his acts: (1) urging her to abort her pregnancy; (2) threatening to physically harm, and even kill her, if she tried to leave; (3) holding a knife and gun to her head; (4) throwing a sword at her; (5) raping her; (6) holding a gun to their baby's head; (7) staying out and allowing others to live in their trailer; (8) acting paranoid; and (9) boarding up and locking her within their trailer bedroom was inadmissible.

Defendant contends these acts were irrelevant and unfairly prejudicial because they were not similar to the crimes he was on trial for. Defendant concedes he failed to preserve this issue for appeal.

1. Plain Error

A defendant who files a motion in limine to exclude evidence at trial, but fails to object to the testimony during trial, leaves the issue unpreserved for appellate review. *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (citations omitted). We review an unpreserved issue for plain error. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012); N.C. R. App. P. 10(a)(4). The plain error rule necessitates a three step analysis:

> 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 seriously affects "the fairness, integrity or public reputation of judicial proceedings."

State v. Reber, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024) (cleaned up). This is a high standard and "should be applied cautiously and only in the exceptional case" where the error "amounts to a denial of a fundamental right of the accused" resulting "in a miscarriage of justice or the denial of a fair trial." *Id.* (citations and internal marks omitted).

2. Rule 404(b)

We review a trial court's "legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)" de novo. *State v. Jones*, 288 N.C.

App. 175, 179, 884 S.E.2d 782, 788 (2023) (citation and internal marks omitted). Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. R. Evid. 404(b) (2023). However, evidence of other crimes, wrongs, or acts is "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* It is also admissible "if it forms part of the history of the event or serves to enhance the natural development of the facts." *State v. Agee*, 326 N.C. 542, 547–48, 391 S.E.2d 171, 174 (1990) (citations and internal marks omitted). "Rule 404(b) is a general rule of inclusion of relevant evidence[,]" but safeguards exist to ensure the propriety of admitting the evidence. *State v. Gillard*, 386 N.C. 797, 811, 909 S.E.2d 226, 245 (2024) (citations and internal marks omitted). "Specifically, 404(b) evidence is constrained by the requirements of similarity and temporal proximity[,]" *Id.* (citation and internal marks omitted), but our courts "have been 'markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b)[,]' " *State v. Houseright*, 220 N.C. App. 495, 498, 725 S.E.2d 445, 447 (2012) (quoting *State v. Thaggard*, 168 N.C. App. 263, 270, 608 S.E.2d 774, 780 (2005)). Acts need not "rise to the level of the unique and bizarre" to be sufficiently similar for purposes of Rule 404(b). *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012) (citation and internal marks omitted). Instead, the "[p]rior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them." *Id.* (citation and internal marks omitted). Additionally, we focus not on the differences between the two acts but the similarities. *State v. Pickens*, 385 N.C. 351, 359, 893 S.E.2d 194, 200 (2023) (citing *Beckelheimer*, 366 N.C. at 131–32, 726 S.E.2d at 159–60). Rule 404(b) evidence "is admissible unless the only reason that the evidence is introduced is to show the defendant's propensity for committing a crime like the act charged." *Id.*

In sum, three requirements must be met for the admission of Rule 404(b) evidence. *Jones*, 288 N.C. App. at 181, 884 S.E.2d at 789. "First, relevant evidence of the past acts by a defendant must have probative value beyond showing the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Id.* (cleaned up). Next, "the past act must be similar enough to the charged crime to distinguish the acts from any generalized commission of the crime." *Id.* (cleaned up). Finally, "the past act must be temporally proximate to the presently charged act." *Id.* (citation omitted).

Returning to the merits here, admission of Sarinna's testimony was not error; much less does its admission rise to the level of plain error. As a threshold matter, Defendant conceded at trial, and does not contest on appeal, that Sarinna's testimony was temporally proximate to the crimes for which he was charged. Thus, we only address whether Sarinna's testimony of past acts by Defendant had probative value beyond showing Defendant's propensity or disposition to commit the crimes against his daughter for which he was charged and whether those acts were similar enough to the crime charged. *Pickens*, 385 N.C. at 359, 893 S.E.2d at 200.

Despite Defendant's argument, Sarinna's testimony had substantial probative value, and was similar enough to the crime charged, to be admissible under Rule 404(b). Specifically, Sarinna's testimony was probative of numerous aspects of the State's case because it added context and illustrated Defendant's state of mind when victimizing members of his family.

Sarinna testified that Defendant engaged in a pattern of threatening behaviors, such as using weapons and verbal threats and barricading her inside of their room, to coerce her into sexual acts and remaining silent about him raping both her and Rebecca. Sarinna also testified to Defendant allowing people to stay with them, against her will, and his erratic and paranoid behavior which prompted him to paint their house strange colors, hang blackout curtains over all the windows, and pace around with a loaded gun. This testimony was probative of the context surrounding Sarinna's failure to report the rape she witnessed—she was afraid Defendant would follow through on his past threats of physically harming her, her child, and Rebecca. In the same vein, Sarinna's testimony about Defendant's erratic behavior—painting their trailer walls purple and hanging blackout curtains, allowing people to stay with them despite her protests, finding needles in his pockets, and pacing around their house with a gun because of his fear of the "Mexican Mafia"— helped explain her fear by providing concrete examples of times where he acted violent for no reason and imposed his will on her. *See Agee*, 326 N.C. at 548, 391 S.E.2d at 174 (holding evidence admissible if it "forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury" (citation and internal marks omitted)). Sarinna's testimony about Defendant urging her to obtain an abortion after learning of her pregnancy was similarly probative of Defendant's state of mind when coercing her into taking actions she resisted.

Further, a rational jury could have questioned why Sarinna failed to report the abuse, thereby undermining her testimony about the rape, but the State utilized the challenged testimony to illustrate Defendant's

erratic, violent, and threatening behavior to explain Sarinna's failure to report the abuse. This testimony also helped explain why Rebecca did not report her father's abuse earlier. She witnessed acts of violence committed by Defendant towards Sarinna and stated that she did not tell anybody because she was "afraid that [she] would get hurt in some way." Thus, the Rule 404(b) evidence had probative value beyond showing Defendant's propensity or disposition to commit the crimes against his daughter—it provided the context in which Defendant committed the crimes and was integral to the story of why Rebecca did not report her abuse. Moreover, the testimony explained Defendant's erratic state of mind during the time period he was committing the crimes. Simply put, Sarinna's testimony painted the broader picture illustrating the context in which Defendant committed the crimes against his daughter and the aftermath of those crimes.

Next, we must address whether the acts testified to were sufficiently similar to the crimes for which Defendant was on trial. *Jones*, 288 N.C. App. at 181, 884 S.E.2d at 789. To reiterate, the similarities do not need to "rise to the level of unique and bizarre" and are sufficiently similar "if there are some unusual facts present in both crimes that would indicate that the same person committed them." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (citations and internal marks omitted); *see also Pickens*, 385 N.C. at 359, 893 S.E.2d at 200 ("Our Rule 404(b) standard does not require identical or even near-identical circumstances between the charged offense and the prior bad act for evidence of the prior bad act to be admissible." (citation omitted)).

Defendant relies on this Court's opinion in *State v. Dunston*, 161 N.C. App. 468, 588 S.E.2d 540 (2003), to argue "a defendant's sexual behavior with other adults is not similar under Rule 404(b) to sexual abuse of children." This assertion misapprehends and unduly broadens the scope of the holding in *Dunston*. There, the State elicited testimony of a specific sexual act which the defendant and his wife consensually engaged in. *Id.* at 473, 588 S.E.2d at 545–55. We concluded, however, that the testimony referring to the act "*by itself*" was not sufficiently similar to engaging in the act "with an underage victim beyond characteristics inherent to both, i.e., they both involve [the same sexual act], to be admissible under Rule 404(b)." *Id.* (emphasis added). As explained below, the repeated rapes Defendant committed here on his wife and child share more commonalities than just simply "the characteristics inherent to both" rapes. *Id.*

Here, there are enough similarities between the acts Sarinna testified to and the crimes Defendant committed against his daughter to

warrant admission of Sarinna's testimony. Specifically, the acts testified to by both Sarinna and Rebecca occurred in the trailer, and in the room, that Defendant and Sarinna lived in with Sarinna's parents and in the trailer they moved into after leaving Sarinna's parents' home. Rebecca also remembered the "purpled wall trailer," which Sarinna's testimony helped to explain. *See Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (holding "the location of the occurrence" to be a key similarity). Both victims were also members of Defendant's family. *See State v. Frazier*, 344 N.C. 611, 616, 476 S.E.2d 297, 300 (1996) ("All of the victims were related to [the] defendant[.]").

Defendant also "exerted control over both victims during the assaults despite their protests [] and resistance." *Pickens*, 385 N.C. at 359, 893 S.E.2d at 200. Rebecca, on one hand, testified that she told him she was in pain during the rape and that she did not like it. She also testified Defendant used force when making her use a sexual device and while attempting to make her perform certain sexual acts. Sarinna, on the other hand, similarly testified Defendant would use force by holding weapons to her head when forcing her into sexual acts. Finally, the acts referred to also included vaginal intercourse with both victims. *See id.* ("[The d]efendant engaged in vaginal intercourse or tried to engage in vaginal intercourse with both victims.").

These similarities support the trial court's finding that the acts were sufficiently similar to be admitted under Rule 404(b). *See Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 ("Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them." (citation and internal marks omitted)). Consequently, admission was also consistent with this State's liberal policy of " 'admitting evidence of similar sex offenses by a defendant.' " *Id.* at 130–31, 726 S.E.2d at 159 (quoting *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987)).

Even if the Rule 404(b) evidence was not sufficiently similar, it did not prejudice Defendant to the extent necessary to show plain error because there was additional, overwhelming evidence of Defendant's guilt. *See Reber*, 386 N.C. at 158–59, 900 S.E.2d at 786–87 ("[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." (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334) (internal marks omitted)). The jury heard testimony from Rebecca describing the sexual assaults and Defendant forcing her to watch explicit, adult materials in gross detail. Sarinna also provided non-404(b) testimony about witnessing one of the rapes. Rebecca herself provided

Rule 404(b) evidence, which Defendant does not contest, of a different time Defendant sexually assaulted her while living on the Cherokee Reservation, providing further evidence of the context in which Defendant continuously assaulted her. A forensic interviewer also testified about interviewing Rebecca after her disclosure, a recording of which was submitted into evidence and published to the jury. The jury heard additional testimony from a pediatrician who examined Rebecca and determined "her characteristics were consistent with a child who had experienced sexual abuse."

This additional, overwhelming evidence provides ample basis for the jury to have returned guilty verdicts even if Rule 404(b) evidence had been excluded. As such, we cannot say the jury probably would have returned a different verdict had the challenged testimony been excluded. Accordingly, we hold the trial court did not commit error, much less plain error, in admitting Sarinna's testimony.

3. Rule 403

If the requirements of Rule 404(b) are met, the trial court must " 'balance the danger of unfair prejudice against the probative value of the evidence, pursuant to Rule 403.' " *State v. Carpenter*, 361 N.C. 382, 388–89, 646 S.E.2d 105, 110 (2007). Rule 403 states in part that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. R. Evid. 403 (2023). Evidence probative of the State's case "will have a prejudicial effect on the defendant; the question is one of degree." *State v. Cagle*, 346 N.C. 497, 506, 488 S.E.2d 535, 542 (1997) (citation and internal marks omitted). Unfair prejudice, in the Rule 403 context, "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Id.* (cleaned up).

We review a "trial court's Rule 403 determination for an abuse of discretion." *Jones*, 288 N.C. App. at 179, 884 S.E.2d at 788 (citation and internal marks omitted). An abuse of discretion occurs when "the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Robinson*, 383 N.C. 512, 521, 881 S.E.2d 260, 266 (2022) (citation and internal marks omitted). But, "[w]hether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990) (citation omitted).

Here, "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to [D]efendant and was careful to give a proper limiting instruction to the jury." *Beckelheimer*, 366 N.C.

at 133, 726 S.E.2d at 160 (quoting *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998) (internal marks omitted)). Like in *Beckelheimer*, the trial court also reviewed Sarinna's testimony during voir dire, heard opposing arguments from counsel and questioned counsel about the evidence, and provided its reasoning for denying Defendant's motion in limine. 366 N.C. at 133, 726 S.E.2d at 160. Having done so, the trial court's decision was the result of balancing the potential of unfair prejudice against the probative value of the evidence and is therefore not an abuse of discretion.

Accordingly, we hold the trial court did not abuse its discretion in admitting the contested 404(b) evidence. Consequently, Defendant has failed to carry his burden in showing plain error occurred at trial and is therefore not entitled to a new trial on this issue.

B. Prosecutor's Statements

[2] Next, Defendant contends the trial court committed reversible error by failing to intervene *ex mero motu* during the closing arguments whenever the prosecutor urged the jury to "walk in Rebecca's shoes." Specifically, Defendant argues these statements inflamed the passion of the jury to the point of prejudice.

Defendant concedes he did not object to these statements, so our review addresses "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (quoting *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002)). This standard requires us to engage in a two-step analysis and address whether: (1) "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." *Id.* In doing so, we remain cognizant that our State gives prosecutors "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, 711 S.E.2d 122, 145 (2011) (citations and internal marks omitted). It is, however, improper for a prosecutor to become "abusive, inject their personal experiences, express their personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant." *State v. Hembree*, 368 N.C. 2, 18, 770 S.E.2d 77, 88 (2015) (cleaned up).

A defendant is prejudiced by improper statements only if there is "extreme impropriety on the part of the prosecutor[.]" *Huey*, 370 N.C. at 180, 804 S.E.2d at 470 (citations and internal marks omitted). To determine if the statements rise to this high level, we look at "whether the

prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (cleaned up). Like the plain error standard, if we determine there was overwhelming evidence against a defendant, we will not reverse the judgment entered upon a duly given jury verdict. *Id.* at 181, 804 S.E.2d at 470.

At the first step, whether the prosecutor's statements were improper, we have binding precedent compelling the conclusion that they were. In *State v. McCollum*, the prosecutor asked jurors to imagine the juvenile victim was their child numerous times. 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993). When addressing whether these statements were improper, our Supreme Court stated "[a]n argument asking the jurors to put themselves in place of the victim[] will not be condoned[.]" *Id.* (citations and internal marks omitted); *see also State v. Prevatte*, 356 N.C. 178, 244, 570 S.E.2d 440, 476 (2002) ("Arguments that ask the jurors to place themselves in the victim's shoes are improper." (citing *McCollum*, 334 N.C. at 224, 433 S.E.2d at 152)). The Court then held the statements did not prejudice the defendant because of the overwhelming evidence presented against him. *McCollum*, 334 N.C. at 224–25, 433 S.E.2d at 152–53.

Here, the record reflects the prosecutor asked jurors to place themselves in Rebecca's shoes throughout the closing argument. We conclude these statements were improper. *Prevatte*, 356 N.C. at 244, 570 S.E.2d at 476; *McCollum*, 334 N.C. at 224, 433 S.E.2d at 152. Although improper, they did not rise to the level of extreme impropriety to so infect "the trial with unfairness as to make the resulting conviction a denial of due process." *Huey*, 370 N.C. at 180, 804 S.E.2d at 470 (citations and internal marks omitted). For the reasons stated above in our analysis of the contested Rule 404(b) evidence, there was overwhelming evidence of Defendant's guilt. As such, we will not reverse the judgment entered upon the jury's unanimous verdicts finding Defendant guilty.

Accordingly, while the prosecutor's statements asking the jury to "walk in Rebecca's shoes" were improper, they did not prejudice Defendant to the level necessary to warrant a new trial.

C. Delay in Signing Appeal

[3] Defendant argues the trial court's nineteen-month delay in signing his appellate entries violated his Sixth Amendment right to a speedy trial.

"We review alleged violations of constitutional rights de novo." *State v. Neal*, 280 N.C. App. 101, 112, 866 S.E.2d 311, 319 (2021) (citing *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009)).

An "undue delay in processing an appeal *may* rise to the level of a due process violation." *State v. Hammonds*, 141 N.C. App. 152, 164, 541 S.E.2d 166, 176 (2000) (citations and internal marks omitted). The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend VI. The right to speedy appeals in state criminal proceedings are not guaranteed under the Sixth Amendment or any other provision of the Constitution; they are a product of statute. *See State v. Berryman*, 360 N.C. 209, 213–14, 624 S.E.2d 350, 354–55 (2006) (collecting cases standing for the proposition that criminal appeals are provided for by state authority). Where a state has adopted an appellate process, the procedures "must comport with the demands of the Due Process and Equal Protection Clauses of the [United States] Constitution." *Id.* at 213, 624 S.E.2d at 354 (quoting *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)) (internal marks omitted).

Our State has adopted the four-factor test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), "to address issues concerning whether an individual's rights to an appeal were violated." *Berryman*, 360 N.C. at 218, 624 S.E.2d at 357. The *Barker* factors require analysis of: " '(1) the length of the delay, (2) the reason for the delay. (3) the defendant's assertion of the right to a speedy [appeal], and (4) prejudice resulting from the delay.' " *State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994) (quoting *State v. Willis*, 332 N.C. 151, 164, 420 S.E.2d 158, 163 (1992)). The first factor, the length of delay, also acts as a trigger for analysis of the latter three factors—if the length of delay is not presumptively prejudicial, then there is no need to analyze the remaining factors. *Doggett v. U.S.*, 505 U.S. 647, 651–52 (1992); *see also State v. Kivett*, 321 N.C. 404, 410, 364 S.E.2d 404, 408 (1988) (" 'This Court has held that a delay of twenty-two months is not of great significance but is merely the "triggering mechanism" that precipitates the speedy trial issue.' " (quoting *State v. Jones*, 310 N.C. 716, 721, 314 S.E.2d 529, 533 (1984))).

After determining presumptive prejudice exists, none of the factors are dispositive and we analyze each as part of a "difficult and sensitive balancing process below." *State v. Spinks*, 277 N.C. App. 554, 562, 860 S.E.2d 306, 315 (2021) (citation and internal marks omitted).

1. Length of Delay

Our Courts have consistently held delays exceeding one year to be presumptively prejudicial, thus triggering analysis of the remaining *Barker* factors. *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003). *See Webster*, 337 N.C. at 679, 447 S.E.2d at 351 ("While not

enough in itself to conclude that a constitutional speedy trial violation has occurred, this delay [of sixteen months] is clearly enough to cause concern and to trigger examination of the other factors."). Here, the nineteen-month delay exceeds the threshold of one year as well as the sixteen-month delay triggering analysis in *Webster*. Being so, we hold the delay was presumptively prejudicial and proceed with the rest of the analysis.

2. Reason for the Delay

A "defendant has the burden of showing that the delay was caused by the *neglect or willfulness* of the prosecution." *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255. This "proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort." *Hammonds*, 141 N.C. App. at 160, 541 S.E.2d at 173 (citing *State v. Johnson*, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969)). Here, Defendant argues delay resulted from the trial court's intentional failure to sign the required documents. The record, however, is not clear that this was an intentional act of the trial court judge.

The judge presiding over Defendant's trial retired approximately one year and five months after Defendant entered his notice of appeal, but did not take any action on Defendant's filings. The Senior Resident Superior Court Judge then entered an order on 20 March 2024, around one month after the presiding judge's retirement, finding as fact that the presiding judge refused to rule on this matter. Without more, we cannot consider this the sort of "deliberate delay" which weighs heavily against the government. *Barker*, 407 U.S. at 531. Instead, as the focus of this factor is on the State's conduct in the prosecutorial capacity, we conclude this is more akin to neutral reasons, like negligence or overcrowding, which should be weighed less heavily. *Id.*; *see also Neal*, 280 N.C. App. at 113, 866 S.E.2d at 319 ("Even if none of the delay is attributable to [the] defendant, that does not necessarily make the delay attributable to the State.").

3. Assertion of Right

"A defendant's assertion of his speedy appeal right 'is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.' " *Neal*, 280 N.C. App. at 113, 866 S.E.2d at 319 (quoting *Hammonds*, 141 N.C. App. at 162, 541 S.E.2d at 174). In contrast, failure to assert this right weighs against him. *Id.* (citation omitted).

Here, "[D]efendant's silence is deafening." *State v. China*, 150 N.C. App. 469, 474, 564 S.E.2d 64, 68 (2002). The record reflects a lack of effort on Defendant's part in asserting his right. The Clerk of Court did

forward the appellate documents to the presiding judge a second time, but the record does not show that this action was taken at Defendant's request. Moreover, the "special letter" Defendant sent to the presiding judge, which Defendant argues amounts to assertion of his rights, was sent contemporaneously with his affidavit of indigency as part of the initial appeal filing. Instead of filing his appeal and then doing nothing, Defendant could have "contacted his attorney, the trial court, or the Clerk of Court to determine the status of his appeal at any time between the time he gave notice of appeal" and when the Senior Resident Superior Court Judge entered her order while signing the filings. *Id.*

Despite Defendant's contention that he "had no additional duty under these circumstances to move his appeal forward[,]" his acquiescence in the delay weighs against him. *See id.* at 474–75, 564 S.E.2d at 68 ("[The d]efendant's failure to stay informed concerning the status of his appeal of right and to assert his rights weighs heavily against his contention that his due process rights were violated."); *Neal*, 280 N.C. App. at 113, 866 S.E.2d at 319–20 ("Nothing in the record before us indicates that [the d]efendant asserted his right to a speedy appeal prior to his brief on appeal."); *Berryman*, 360 N.C. at 221, 624 S.E.2d at 359 (holding that despite the record including "a letter, a written request, and an affidavit drafted by defense counsel which document [the] defendant's assertions of his right to an appeal[,]" the factor weighed against him because "[n]one of defense counsel's efforts were directed to the State, to the trial court, to the clerk of superior court or to the clerk of the Court of Appeals[]").

4. Prejudice

The same factors we use when addressing prejudice resulting from an alleged violation of the right to a speedy trial are applicable here: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired. *Berryman*, 360 N.C. at 222, 624 S.E.2d at 359. We do not presume that a delay necessarily results in prejudice to a defendant; the defendant shoulders this burden as well. *Neal*, 280 N.C. App. at 114, 866 S.E.2d at 320 (citing *State v. Hughes*, 54 N.C. App. 117, 120, 282 S.E.2d 504, 506 (1981)).

As we do not find merit in Defendant's other arguments on appeal, his concern about post-judgment but pre-appeal incarceration is frivolous. *Berryman*, 360 N.C. at 212, 624 S.E.2d 353 ("The Court of Appeals' majority opinion held that [the] defendant's assignments of error aside from his right to a timely appeal were without merit. Accordingly, the first interest or concern cited above, prevention of oppressive pretrial incarceration, is not applicable to the case at bar.").

Similarly, Defendant states in his brief that "the factors of anxiety and uncertainty are present for anyone whose case remains on appeal." We agree, but that is insufficient. *See China*, 150 N.C. App. at 475, 564 S.E.2d at 69 ("Defendant has failed to show that he suffered any more anxiety than any other appellant."); *see also Berryman*, 360 N.C. at 222, 624 S.E.2d at 359–60 ("We agree with the Court of Appeals' majority opinion that a review of the record does not divulge any evidence to support [the] defendant's allegation of experiencing 'maximum anxiety.' ").

Lastly, Defendant does not argue his appeal was hampered in any way by the presiding judge's failure to sign his appellate entries. *See id.* at 223, 624 S.E.2d at 360 ("[A]lthough a defendant's failure to assert his right to a speedy trial earlier in the process does not preclude the argument later, such failure is considered when determining whether the defendant was prejudiced."). He only argues his "case presents a serious issue about a remedy for a vindictive or capricious trial judge." The record contains no facts supporting these accusations. Moreover, in contradiction of Defendant's argument, the United States Supreme Court made apparent in *Barker* that the remedy for a violation of the right to a speedy trial, the standards for which have been adapted for an alleged violation of the right to a speedy appeal, is the "unsatisfactorily severe remedy of dismissal[.]" *Barker*, 407 U.S. at 522.

In sum, the above analysis does not weigh in favor of the unsatisfactorily severe remedy of dismissal. Accordingly, Defendant's argument that his Due Process and Equal Protection rights were violated is meritless.

III. Conclusion

For the aforementioned reasons, we hold the trial court did not commit plain error by admitting Rule 404(b) evidence of Defendant's prior bad acts. We also hold Defendant was not prejudiced by the prosector's improper remarks during trial or by the trial court's failure to sign his appellant entries.

NO ERROR.

Judge ZACHARY concurs.

Judge ARROWOOD concurs in result only.

STATE OF NORTH CAROLINA
v.
NATHAN TYLER MONTGOMERY

No. COA24-291

Filed 21 May 2025

1. Motor Vehicles—felonious operation of a motor vehicle to elude arrest—reckless driving—evidence sufficient

In a prosecution for felonious operation of a motor vehicle to elude arrest, the State presented evidence of reckless driving (a statutory aggravating factor, two of which are required to elevate the offense to a felony) sufficient to send the charge to the jury: defendant drove into a lane closed to regular traffic where multiple construction workers were working on foot and paving was underway, disregarded the commands of a uniformed police officer who initiated a traffic stop, drove his truck in reverse and in the wrong direction through the construction zone, increased his speed, ran over the officer's foot, struck the officer's hip and thigh, and knocked the officer to the ground. Taken in the light most favorable to the State, that evidence indicated that defendant drove his truck in willful disregard of the safety of others and/or in a manner likely to endanger others.

2. Motor Vehicles—felonious operation of a motor vehicle to elude arrest—jury instructions—plain error not shown

In a prosecution for felonious operation of a motor vehicle to elude arrest—which requires the State to prove the existence of two or more statutory aggravating factors to elevate the offense to a felony—where defendant stipulated to the existence of one factor (driving while license revoked) and the State offered evidence of another (reckless driving), the trial court gave instructions regarding the State's burden of proof for the felony versus misdemeanor levels of the offense that were correct as a matter of law and clearly informed the jury that the State still bore the burden to prove beyond a reasonable doubt that defendant drove recklessly; the jury's request, during deliberations, for clarification of the difference between the misdemeanor and felony levels of the offense did not render the instructions erroneous, let alone demonstrate plain error by the trial court.

Appeal by Defendant from judgment entered 16 June 2022 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 18 March 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Eric. R. Hunt, for the State-Appellee.

MK Mann Law, by Mikayla Mann, for Defendant-Appellant.

COLLINS, Judge.

Defendant Nathan T. Montgomery appeals from a judgment entered upon a jury's guilty verdict of felonious operation of a motor vehicle to elude arrest and his plea of guilty to attaining habitual felon status. Defendant argues that the trial court erred by denying his motion to dismiss for insufficient evidence and plainly erred because its charge to the jury was confusing. Because the State presented sufficient evidence of each essential element of the offense, and because the trial court's jury instruction as a whole was correct, we find no error.

I. Background

Defendant was indicted on 7 June 2021 for felonious operation of a motor vehicle to elude arrest and assault with a deadly weapon on a government officer. The case came for trial on 13 June 2022, and the State's evidence at trial tended to show the following:

On the evening of 8 August 2020, Officer Scott Wallace of the Winston-Salem Police Department was working off-duty at a construction site. The construction workers were re-paving a portion of Peters Creek Parkway, located in Winston-Salem. Officer Wallace, in uniform and in his marked patrol vehicle, was assigned to help with lane closures and security.

The construction workers had placed several signs leading up to and around the construction zone indicating that the right lane of Peters Creek Parkway was closed to regular traffic. Other indicators included Officer Wallace's patrol vehicle, which had its blue lights activated; construction workers working on foot; orange cones; and flashing orange lights from various construction vehicles. At the time of the incident, there were approximately five construction workers out on foot. Another construction worker was operating a paving machine, actively paving the road.

At approximately 1:40 a.m., Officer Wallace was sitting in his patrol vehicle when he heard yelling from the construction workers and saw Defendant drive a red pickup truck into the closed lane. Officer Wallace drove toward the truck and initiated a traffic stop. As he exited his patrol vehicle to approach the driver's side of the truck, Defendant began slowly driving the truck forward. Officer Wallace ran to keep up with Defendant and shined his flashlight into the truck to get Defendant's attention. Once he caught up with Defendant, Officer Wallace asked Defendant to provide his driver's license. Defendant refused and stated that "he was just going to back out of the situation." Officer Wallace ordered Defendant not to move his truck, but Defendant began driving his truck in reverse.

Officer Wallace ran alongside Defendant's truck and ordered him to stop driving. Defendant ignored Officer Wallace's commands. In an attempt to get Defendant to stop the truck, Officer Wallace reached into the open driver's side window and struck Defendant in the face. Defendant, however, continued driving in reverse, slowly increasing his speed as he drove. As he accelerated, Defendant ran over Officer Wallace's foot with his truck's front tire. The front panel of Defendant's truck struck Officer Wallace in the hip and thigh, causing Officer Wallace to fall to the ground.

Defendant continued driving in reverse, in the wrong direction and in the lane closed to regular traffic. As he approached the entrance to the construction zone, Defendant quickly made a "J-turn" and fled the scene. Officer Wallace estimated that while backing out of the construction zone, Defendant's speed increased from around five miles per hour to approximately fifteen miles per hour.

After Defendant fled, a construction worker gave Officer Wallace a photograph he had taken of the license plate on Defendant's truck. Officer Wallace used the license plate to identify and locate Defendant.

The jury convicted Defendant of felonious operation of a motor vehicle to elude arrest and found him not guilty of assault with a deadly weapon on a government officer. Defendant pled guilty to attaining habitual felon status, and the trial court sentenced him to 67 to 93 months in prison. 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 felonious operation of a motor vehicle

to elude arrest because the State failed to present sufficient evidence that Defendant engaged in reckless driving at the time of the offense. This argument lacks merit.

When reviewing a motion to dismiss for insufficient evidence, we must determine "whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215 (1990) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Bradshaw*, 366 N.C. 90, 93 (2012) (citation omitted). Evidence is to be viewed "in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98 (2009) (citation omitted). "[S]o long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence." *Id.* at 99 (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." *State v. Tucker*, 380 N.C. 234, 236 (2022) (citation omitted). Under a de novo review, "the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. McVay*, 287 N.C. App. 293, 296 (2022) (citation omitted).

It is a misdemeanor "for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties." N.C. Gen. Stat. § 20-141.5(a) (2023). The crime is upgraded to a felony if two or more aggravating factors "are present at the time the violation occurs." N.C. Gen. Stat. § 20-141.5(b) (2023). Several aggravating factors are enumerated in the statute, including "[r]eckless driving as proscribed by [N.G. Gen. Stat. §] 20-140" and "[d]riving when the person's drivers license is revoked." *Id.* Reckless driving is defined as driving any vehicle on a highway or public vehicular area "carelessly and heedlessly in willful or wanton disregard of the rights or safety of others" or "without due caution and . . . in a manner so as to endanger or be likely to endanger any person or property[.]" N.C. Gen. Stat. § 20-140 (2023).

Here, viewing the evidence in the light most favorable to the State, sufficient evidence of reckless driving was presented. The evidence

indicates that Defendant drove into a lane closed to regular traffic where multiple construction workers were working on foot and another worker was actively operating a paving machine. Defendant repeatedly disregarded Officer Wallace's commands after Officer Wallace initiated a traffic stop. Defendant then drove his truck in reverse in the construction zone, going the wrong direction, increasing his speed as he drove. In doing so, Defendant ran over Officer Wallace's foot with the front tire of his truck and struck Officer Wallace in the hip and thigh with the front panel of his truck. When viewed in the light most favorable to the State, this evidence indicates that Defendant operated his vehicle carelessly in a willful "disregard of the rights or safety of others" and "in a manner so as to endanger or be likely to endanger any person or property." *Id.*

Accordingly, as the State presented sufficient evidence of each element of felonious operation of a motor vehicle to elude arrest, the trial court did not err by denying Defendant's motion to dismiss.

B. Jury Instructions

[2] Defendant next argues that the trial court plainly erred "by providing confusing jury instructions" that "failed to adequately convey the difference between the aggravating factor that was stipulated to and the one that had to be proven during trial."

Defendant failed to object to the trial court's jury instructions, and his argument is therefore unpreserved. *See* N.C. R. App. P. 10(a)(1). However, "unpreserved issues related to jury instructions are reviewed under a plain error standard" so long as the defendant "specifically and distinctly" argues plain error on appeal. *State v. Collington*, 375 N.C. 401, 410 (2020) (citations omitted); N.C. R. App. P. 10(a)(4). Because Defendant specifically argues that the jury instructions here were plainly erroneous, we will review the trial court's jury instructions for plain error.

Under the plain error standard of review,

> 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 a 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). A trial court's instruction is to be viewed in its entirety; this Court "will not hold a portion of the charge prejudicial if the charge as a whole is correct." *State v. Fowler*, 353 N.C. 599, 624 (2001) (citation omitted). So long as the trial court's instruction "presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal." *State v. Rich*, 351 N.C. 386, 393-94 (2000) (citation omitted). "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." *Fowler*, 353 N.C. at 624 (citation omitted).

As explained above, operation of a motor vehicle to elude arrest is upgraded from a misdemeanor to a felony if the State proves the existence of two or more aggravating factors. N.C. Gen. Stat. § 20-141.5(b). Two of the enumerated aggravating factors include "[r]eckless driving as proscribed by [N.C. Gen. Stat. §] 20-140" and "[d]riving when the person's drivers license is revoked." *Id.*

Here, because Defendant stipulated that his license was revoked, the State only had to prove beyond a reasonable doubt that Defendant was driving recklessly at the time of the incident for the offense to get upgraded to a felony. At the beginning of its charge to the jury, the trial court explained,

> You're going to be determining whether the defendant is guilty of felony flee to elude arrest. . . . But, [] if certain elements have not been proven, you will be determining whether the defendant is guilty of a misdemeanor of flee to elude arrest[.]
>
> . . . .
>
> As far as the flee to elude arrest, if the defendant is operating a vehicle while his license is revoked, if his driving is reckless, then that rises it to the level of a felony . . . .
>
> . . . And as far as the flee to elude arrest, ladies and gentlemen, *the State has no burden of proving to you that the*

> *defendant's license was revoked*. That element has been deemed proven because the defense and the State have agreed, the defendant agreed that his license was revoked, so the State doesn't have to prove that particular element beyond a reasonable doubt because it's already deemed proven, but the circumstance as it concerns the driving, whether it was reckless, *the burden is still on the State to prove to you beyond a reasonable doubt that the defendant's driving was reckless* as it concerns the charge of flee to elude arrest.

(emphasis added).

After explaining this to the jury, the trial court utilized the Pattern Jury Instructions for the offense of felonious operation of a motor vehicle to elude arrest and instructed the jury as follows:

> The defendant has been charged with felonious operation of a motor vehicle to elude arrest. For you to find the defendant guilty of this offense, the State must prove four things beyond a reasonable doubt.
>
> First, that the defendant was operating a motor vehicle.
>
> Second, that the defendant was operating that motor vehicle on a street, highway, a public vehicular area in Forsyth County.
>
> Third, that the defendant was fleeing and attempting to elude a law enforcement officer who was in lawful performance of his duties. . . .
>
> And four, that two or more of the following factors were present at that time: That the defendant's driving was reckless; that the defendant drove the vehicle in a reckless manner, and that in doing so, he acted carelessly and heedlessly in willful or wanton disregard of the rights and safety of others. And what is deemed to have already been proven, what the defendant has agreed to, his license was in a state of revocation. The State does not have to prove that element beyond a reasonable doubt because it is agreed and is stipulated that the defendant was driving that vehicle while his license was in a state of revocation.

The trial court's instructions are correct as a matter of law and clearly explain that the State had the burden of proving reckless driving

beyond a reasonable doubt. The trial court properly instructed that Defendant will be guilty of a felony "if the defendant is operating a vehicle while his license is revoked, [and] if his driving is reckless." The trial court explained that if one of those two factors cannot be established, Defendant would be convicted of "only misdemeanor flee to elude arrest." The trial court then clearly articulated that "the State has no burden of proving to you that the defendant's license was revoked," but that "the burden is still on the State to prove to you beyond a reasonable doubt that the defendant's driving was reckless[.]" The trial court instructed the jury several times on this issue, and at each point the instruction clearly articulated what the jury would have to find in order to convict Defendant of felonious operation of a motor vehicle to elude arrest.

Although the jury asked for clarification regarding "the differences between felony and misdemeanors for each charge," its inquiry does not render the trial court's instructions erroneous. In response to the jury's question, the trial court further clarified the requirements for felony flee to elude arrest in this case:

> For it to be a felony flee to elude arrest, the State also has the burden of proving beyond a reasonable doubt that at the time the defendant was operating the vehicle, his license was revoked. Now, that already been deemed proven. The State doesn't have to put on evidence. The defendant, his counsel, they agreed, yes, my license was revoked. They don't have to put on evidence as to that element. It's deemed already proven. There's an agreement. There's a stipulation, yes, my license was revoked.
>
> But they have to prove 2, and the second one is that his license -- that his driving was reckless. So they have proven one. His license was revoked by a stipulation by agreement. The other that the State has to prove beyond a reasonable doubt, that the manner in which the defendant was operating his vehicle was careless and reckless.

The trial court then repeated its instruction for the charge of felonious operation of a motor vehicle to elude arrest, again utilizing the Pattern Jury Instructions.

Taken as a whole, the trial court's instruction to the jury on felonious operation of a motor vehicle to elude arrest is correct. It accurately and fairly articulated the legal standard for the offense and explained that while the State did have the burden of proving that Defendant was

driving recklessly, it did not have to prove that Defendant's license was revoked. Accordingly, the trial court did not err, much less plainly err, in its instructions to the jury.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judge STROUD and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
J'MAL RASHAD TOWNSEND

No. COA24-431

Filed 21 May 2025

1. Criminal Law—murder trial—jury instructions—self-defense—disqualifying felonious conduct—causal nexus established

The trial court did not commit plain error in defendant's trial for second-degree murder (which arose from the fatal shooting of a man from whom defendant sought to buy marijuana) by instructing the jury that if it found an immediate causal nexus between defendant's use of force and the attempt to commit, commission of, or escape after the commission of a felony, defendant would be disqualified from asserting self-defense. Despite defendant's argument to the contrary, the contemporaneous criminal conduct engaged in by defendant in this case, attempting to possess two ounces of marijuana and attempting to possess any amount of marijuana with the intent to sell or deliver, were felonies that could negate a claim of self-defense upon a showing by the State that, but for defendant's felonious conduct, the fatal confrontation with the victim would not have occurred.

2. Evidence—lay opinion testimony—admissibility—bullet trajectory—detective not qualified as ballistics expert—no abuse of discretion

In defendant's trial for second-degree murder (which arose from the fatal shooting of a man from whom defendant sought to buy marijuana), the trial court did not abuse its discretion by allowing

testimony from a detective regarding the trajectory of bullets based on dowel rods that he had placed in bullet holes at the crime scene. In addressing this issue of first impression, the appellate court noted that, although the detective was not qualified as an expert in ballistics or projectiles, his testimony was properly admitted as lay opinion testimony pursuant to Evidence Rule 701, since his opinion was based on his own personal observations, training, and experience.

3. Evidence—lay opinion testimony—bullet trajectory—detective not qualified as ballistics expert—not subject to statutory disclosure requirement

In defendant's trial for second-degree murder (which arose from the shooting of a man from whom defendant sought to buy marijuana), where a detective's testimony regarding bullet trajectories was properly admitted as lay opinion testimony and where the detective was not qualified as an expert witness at the trial, the disclosure requirements in N.C.G.S. § 15A-903(a)(2) (requiring the State to provide expert witness materials to defendants prior to trial) did not apply.

Appeal by Defendant from Judgment entered 28 December 2022 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 25 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Zachary K. Dunn, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon Mayes, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

J'Mal Rashad Townsend (Defendant) appeals from a Judgment entered upon a jury verdict finding him guilty of Second-Degree Murder. The Record before us, including evidence presented at trial, tends to reflect the following:

On 3 October 2017, Brandon Frye, the victim in this case, received a phone call informing him someone was "on the way" to buy marijuana from him. Frye was in his apartment with his roommate, Nolan Clarke. Frye then went to the kitchen to weigh an ounce of marijuana for sale. Frye answered a knock at the door and Defendant entered the

apartment. Defendant asked Frye if he could buy more than the one ounce of marijuana Frye had prepared. Frye went to prepare another ounce, and Defendant left the apartment to get more money.

During this exchange, Clarke also left the apartment through the back door to take their dog out. While outside, Clarke "heard multiple gun shots" fired "in rapid succession." Clarke entered the apartment and heard Frye "in the bathroom moaning" and saw "dust from a bullet that went through the wall." Clarke observed the front door was open, found Frye injured in the bathroom, and called 911. First responders attempted to render aid, but they were unable to revive Frye. It was later determined Frye died of a gunshot wound to the chest.

Detective Jarrod Waddell of the Greensboro Police Department investigated the scene. Detective Waddell used dowel rods placed in the bullet holes to determine the trajectory of the gunshots.

Defendant was indicted for First-Degree Murder and Robbery with a Dangerous Weapon in connection with this incident on 22 January 2018. This matter came on for trial on 28 November 2022. At trial, Detective Waddell testified about his investigation and specifically about certain bullet holes and the trajectories of the bullets that caused them. The State repeatedly questioned Detective Waddell about the "significance" of different photographs of bullet holes from the crime scene. In one such exchange, for example, the State asked about State's Exhibit 118—a photograph from the scene. Detective Waddell explained:

> [Detective Waddell]: That is the dowel rod with the through and through of the front door from the perspective inside the hallway you can see where it creates an angle as it[']s coming from the bathroom from the right side to the left to the closet door.
>
> [The State]: All right. So the door was in – is this door lined up if we were to do a – if you were to do a line?
>
> [Detective Waddell]: Yes, our – our attempt was to position the door wherever the door had been at what position of open would it have been, our closest proximity to open to achieve that angle.

Detective Waddell acknowledged he is not an expert in ballistics nor bullet trajectory. Counsel for Defendant objected repeatedly to Detective Waddell's testimony regarding the trajectory of the bullets on the basis that he is not an expert in projectiles or ballistics. The trial court overruled these objections, stating: "Ladies and gentlemen, the Court is

going to allow this individual to testify. He's not been qualified as an expert witness, but based upon his training and experience he may be able to give some explanation, some testimony of these photographs."

During the charge conference, the parties and trial court discussed a possible self-defense instruction at length. The parties specifically discussed the North Carolina Supreme Court's holding in *State v. McLymore*, 380 N.C. 185, 868 S.E.2d 67 (2022) and its impact on the State's burden of proof with respect to self-defense. Defense counsel ultimately agreed with the jury instruction on self-defense as the trial court gave it, which included an instruction self-defense is not available to a person "who used defensive force and who was attempting to commit or committing a felony." The trial court further instructed the jury the State must prove "an immediate causal nexus between the Defendant's use of force and felony conduct used to disqualify the Defendant from use of defensive force." The trial court also informed the jury, among other things, that attempting to possess two ounces of marijuana and attempting to possess any amount of marijuana with the intent to sell or deliver are felonies.

On 8 December 2022, the jury returned a verdict finding Defendant not guilty of Robbery with a Dangerous Weapon and First-Degree Murder; however, the jury found Defendant guilty of Second-Degree Murder. The trial court sentenced Defendant to 300 to 372 months of imprisonment. Defendant gave oral Notice of Appeal in open court on 8 December 2022.

Issues

The issues on appeal are whether the trial court erred by (I) instructing the jury as to the causal nexus requirement and (II) admitting Detective Waddell's testimony; and whether (III) Detective Waddell's testimony was subject to statutory disclosure requirements.

Analysis

I. Jury Instruction

[1] Defendant contends the trial court erred in instructing the jury on the issue of self-defense because, in his view, felony possession of marijuana could not serve as a disqualifying felony to negate his self-defense claim. We disagree.

As Defendant acknowledges, he did not object to the jury instructions at trial. Thus, our review is limited to plain error. N.C. R. App. P. 10(a)(4) (2024) ("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 (emphasis in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

"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." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted)). "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010), *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010). "This Court reviews jury instructions contextually and in [their] entirety." *State v. Blizzard*, 169 N.C. App. 285, 296, 610 S.E.2d 245, 253 (2005) (citation omitted). "[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a)).

In certain circumstances, a person "is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be[,]" including if that person "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." N.C. Gen. Stat. § 14-51.3(a)(1) (2023).

The affirmative defense of self-defense is not available, however, to a defendant who used defensive force and "[w]as attempting to commit, committing, or escaping after the commission of a felony." N.C. Gen. Stat. § 14-51.4(1) (2023). The North Carolina Supreme Court clarified in *State v. McLymore*, 380 N.C. 185, 868 S.E.2d 67 (2022), that Section 14-51.4(1) incorporates a causal nexus requirement. There, the Court held "in order to disqualify a defendant from justifying the use of force as self-defense pursuant to N.C.G.S. § 14-51.4(1), the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force." *Id.* at 197, 868 S.E.2d at 77. "The State must introduce evidence that 'but for the defendant' attempting to commit, committing, or escaping after the commission of a felony, 'the confrontation resulting in injury to the victim would not have occurred.' " *Id.* at 197-98, 868 S.E.2d at 77 (quoting *Mayes v. State*, 744 N.E.2d 390 (Ind. 2001)).

During the charge conference, counsel for both parties discussed a potential self-defense instruction. After hearing arguments from both parties, the trial court gave a proposed instruction to which each side agreed.

Defendant contends there was no causal nexus between Defendant's felony possession of marijuana and the circumstances leading to Frye's death. In *McLymore*, however, our Supreme Court noted "whether or not a defendant was engaged in disqualifying conduct bearing an immediate causal nexus to the circumstances giving rise to his or her use of force" is ordinarily a jury question. 380 N.C. at 198, 868 S.E.2d at 77 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 2356, 147 L. Ed. 2d 435 (2000)). Indeed, this Court has stated "Where the State introduces such evidence, the existence of a causal nexus is a jury determination[.]" *State v. Vaughn*, 293 N.C. App. 770, 777, 901 S.E.2d 260, 266 (2024).

Here, the trial court properly instructed the jury on the causal nexus requirement:

> Additionally, self-defense is not available to a person who used defensive force and who was attempting to commit or committing a felony. *The law requires an immediate causal nexus between the Defendant's use of force and felony conduct used to disqualify the Defendant from use of defensive force.* The State of North Carolina must prove beyond a reasonable doubt that the existence of an immediate causal nexus between the Defendant's disqualifying

> conduct, i.e., attempting to commit a felony or committing a felony, and the confrontation during which the Defendant used force. *The State must prove beyond a reasonable doubt that but for the Defendant attempting to commit or committing a felony, the confrontation resulting in the injury to the victim would not have occurred.* There would be an immediate causal nexus between the felony of robbery with a dangerous weapon and the Defendant's use of force, and therefore, the Defendant would be disqualified from using defensive force if he was committing or attempting to commit robbery with a dangerous weapon. Attempting to possess two ounces of marijuana, attempting to possess any amount of marijuana with the intent to sell or deliver are all felonies.
>
> . . . .
>
> [S]elf-defense is not available to a person who used defensive force and who was attempting to commit or committing a felony. The law in the State of North Carolina requires an immediate causal nexus between the Defendant's use of force and felony conduct used to disqualify the Defendant from the use of defensive force. The State of North Carolina must prove beyond a reasonable doubt the existence of an immediate causal nexus between the Defendant's disqualifying conduct, i.e., attempting to commit a felony or committing a felony and the confrontation during which the Defendant used force. The State must prove beyond a reasonable doubt that, but for the Defendant attempting to commit or committing a felony, the confrontation resulting in injury to the victim would not have occurred.

(emphasis added). The trial court also instructed the jury that "[a]ttempting to possess two ounces of marijuana, attempting to possess any amount of marijuana with the intent to sell or deliver are felonies."

These instructions closely follow the guidance set forth in *McLymore* regarding the causal nexus requirement, including expressly articulating the State's burden to prove but-for causation between Defendant's felonious conduct and the confrontation resulting in Frye's death. Thus, on the Record before us, the trial court's instruction on the causal nexus requirement does not rise to the level of plain error.

II. Detective Waddell's Testimony

[2] Generally, a trial court's evidentiary rulings are reviewed for abuse of discretion. *See State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 739 (2009) ("The standard of review for this Court assessing evidentiary rulings is abuse of discretion." (citations and quotation marks omitted)). However, "[w]hen the issue is whether 'the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*.' " *State v. Phillips*, 268 N.C. App. 623, 634, 836 S.E.2d 866, 873 (2019) (quoting *State v. Parks*, 265 N.C. App. 555, 563, 828 S.E.2d 719, 725 (2019)). Here, Defendant contends the trial court erred in admitting portions of Detective Waddell's testimony regarding the trajectory of the bullets under Rule 701 because, in his view, Detective Waddell offered expert opinions where he had not been qualified as an expert and his testimony did not satisfy the requirements for expert testimony under Rule of Evidence 702.

Under Rule 701, a witness may offer lay opinion testimony so long as it 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). Our courts have consistently held "the testimony of an investigating officer was properly admitted at trial where it was 'based on his personal observations' and 'helpful to a clear understanding of his testimony' concerning the facts in question." *State v. Delau*, 381 N.C. 226, 237, 872 S.E.2d 41, 48 (2022) (citing *State v. Dickens*, 346 N.C. 26, 46, 484 S.E.2d 553, 564 (1997) and *State v. Lloyd*, 354 N.C. 76, 109, 552 S.E.2d 596, 620 (2001)).

Neither party has presented, nor have we found, any North Carolina case addressing whether bullet trajectory testimony is admissible under Rule 701. Thus, whether a law enforcement officer may offer lay opinion testimony on the use of dowel rods to determine bullet trajectory is a matter of first impression before this Court. In reaching our conclusion, we consider how courts in other jurisdictions have treated such bullet trajectory evidence under similar or identical rules of evidence.

Notably, the Superior Court of Pennsylvania addressed precisely this issue in *Commonwealth v. Kennedy*, 151 A.3d 1117 (Pa. Super. Ct. 2016). There, the court considered several cases with similar facts to the case before us and ultimately concluded the testimony at issue was admissible. *Id*. at 1127. First, the *Kennedy* court identified *United States v. Beckford*, 211 F.3d 1266 (4th Cir. 2000) (per curiam) (unpublished). In

Beckford, "one of the investigating detectives inserted a pencil into bullet holes found in the . . . apartment to ascertain the angle of the bullet path." *Id.* at *6. Based on those observations and crime scene photographs, the government created a computer-generated diagram showing red lines tracing the bullet path "suggested by the pencil angle." *Id.* The defendant objected, arguing this evidence required specialized knowledge under Federal Rule of Evidence 702.[1] The district court overruled the defendant's objection. The Fourth Circuit affirmed, stating "the district court reasonably concluded that the detective's testimony concerning his findings, as aided by the diagram, was rationally based on his perceptions and helpful to a clear understanding of his investigation and observations." *Id.*

Similarly, in *People v. Caldwell*, 43 P.3d 663 (Colo. App. 2001), the Colorado Court of Appeals addressed a case in which a former police officer, who was a crime scene technician at the time of the underlying shooting, testified about the trajectory of the bullets. There, the witness' testimony was based on "his own observations and the use of a dowel and string" to track the paths of the bullets. *Id.* at 667. As here, the defendant objected to the testimony, claiming the witness' testimony required an expert opinion, and the trial court overruled the objection. *Id.* On appeal, the court affirmed, reasoning:

> [T]he witness' testimony included only his observations about the entry locations of the bullets and the path they traveled inside the vehicle. Such observations could just as easily have been made by the jury from the photographs. No special expertise is required to look at the hole made by the bullet and realize that it followed a straight-line path.

Id. (citation omitted).

Likewise, the Special Court of Appeals of Maryland reached the same conclusion in a case where a police officer "examined [the victim]'s car . . . and, as part of his examination, placed 'trajectory rods' through the bullet holes in the car and photographed the rods in place." *Prince v. State*, 216 Md. App. 178, 186, 85 A.3d 334, 339 (2014). The defendant in that case challenged the admissibility of that evidence under Maryland's version of Rule 701, arguing the evidence was exclusively within the purview of expert witnesses. *Id.* at 198, 85 A.3d at 346. The court rejected

1. Federal Rule of Evidence 702 is identical to North Carolina Rule of Evidence 702.

that argument, reasoning "[a] police officer who does nothing more than observe the path of the bullet and place trajectory rods (in the same manner as any layman could) need not qualify as an expert to describe that process." *Id.* at 202, 85 A.3d at 348 (emphasis removed).

As the *Kennedy* court observed, although several courts have seemingly required expert testimony as to bullet trajectory under Rule 702, these cases are distinguishable from those above and the case at bar. For example, the First Circuit in *McGrath v. Tavares*, 757 F.3d 20 (1st Cir. 2014), concluded photographs of bullet holes in a windshield were insufficient to prove bullet trajectory absent expert testimony. There, however, there was no lay opinion testimony offered on the issues; rather, the plaintiff relied solely upon photographs of the windshield, and the only testimony offered came from an expert witness for the defense who stated the bullet trajectories could not be determined based on the photographs in that specific case. *Id.* at 26-27. Likewise, a factually similar case arising from the Fifth Circuit, *Hathaway v. Bazany*, 507 F.3d 312 (5th Cir. 2007), did not address the question of lay opinion testimony at all. There, the issue on appeal centered on whether an officer's methodology in determining bullet trajectory was sufficient under Rule 702—not whether the testimony would be admissible under Rule 701. *Id.* at 317. And, as in *McGrath*, there were no dowel rods or other type of trajectory rod placed in the bullet holes to help determine trajectory. *Id.* at 318-19.

We are persuaded by our own reading of these cases that, based on the facts of this case, Detective Waddell's testimony was properly deemed lay opinion testimony. As in *Kennedy*, *Prince*, and *Caldwell*, Detective Waddell used dowel rods at the crime scene to help him determine the trajectory of the bullets fired. And although his testimony was based on his training and experience, "[t]he mere fact that a witness is a law enforcement officer does not automatically transform his testimony into expert testimony." *Prince*, 216 Md. App. at 201, 85 A.3d at 348. Rather, Detective Waddell's testimony was based on observation appropriate for lay opinion testimony; "[h]e conducted no experiments, made no attempts at reconstruction, and 'was not conveying information that required a specialized or scientific knowledge to understand.' " *Id.* at 202, 85 A.3d at 348 (quoting *Caldwell*, 43 P.3d at 668). Indeed, our caselaw recognizes a law enforcement officer may offer lay opinion testimony based on their training and experience in other contexts. *See, e.g.*, *State v. Garnett*, 209 N.C. App. 537, 546, 706 S.E.2d 280, 286 (2011) (noting a law enforcement officer may testify to visual identification of marijuana based on their training and experience).

Thus, Detective Waddell's testimony was properly considered lay opinion testimony. Therefore, the trial court did not err in admitting this testimony under Rule 701.

III. Disclosure of Detective Waddell's Testimony

[3] Defendant contends that because, in his view, Detective Waddell's testimony was expert opinion testimony, it was subject to N.C. Gen. Stat. § 15A-903(a)(2). That statute provides, in pertinent part: "Upon motion of the defendant, the court must order . . . [t]he prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert." N.C. Gen. Stat. § 15A-903(a)(2) (2023). However, because we conclude Detective Waddell's testimony was lay opinion testimony, Section 15A-903(a)(2) does not apply.

Defendant points to *State v. Davis*, 368 N.C. 794, 785 S.E.2d 312 (2016), for the proposition that a witness' opinions may be expert opinions subject to Section § 15A-903(a)(2) even where this Court concludes they were not expert opinions. *Davis* is readily distinguishable. In *Davis*, the witness at issue had been "accepted without objection as an expert" and answered questions with "opinions based on his expertise." *Id.* at 807-08, 785 S.E.2d at 320. In contrast, Detective Waddell was not qualified as an expert witness at trial and we concluded his testimony regarding the trajectory of the bullets was lay opinion testimony. Thus, the case sub judice is materially different from *Davis*. We, therefore, conclude Detective Waddell's testimony was not subject to disclosure under Section 15A-903. Consequently, the State did not violate its disclosure requirements by failing to disclose Detective Waddell's testimony.

Conclusion

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

NO ERROR.

Chief Judge DILLON and Judge FREEMAN concur.

RICHARD THOMPSON AND TINA THOMPSON, PLAINTIFFS
v.
ROCK BARN PROPERTIES, INC., JEFF KEEVER CONSTRUCTION, INC., AND KEVIN CHEEK (RIDGELINE INSTALLATIONS), DEFENDANTS

No. COA24-958

Filed 21 May 2025

Appeal and Error—record on appeal—insufficient for meaningful review—trial court judgment affirmed

In a case arising from alleged defects in the construction of plaintiffs' home (and the efforts undertaken to remediate them), the trial court's denial of plaintiffs' motions—for directed verdict, to reconsider, for judgment notwithstanding the verdict, and for a new trial—were affirmed where plaintiffs failed to provide the record on appeal necessary to properly review (much less support) their appellate arguments and because the appellate court was unable to discern any error in the trial below.

Appeal by plaintiffs from final judgment entered 16 January 2024 by Judge Michael D. Duncan in Superior Court, Catawba County. Heard in the Court of Appeals 22 April 2025.

Matthew K. Rogers, for plaintiffs-appellants.

Bolster Rogers, PC, by Jeffrey S. Bolster and Melissa R. Monroe, for defendant-appellee Jeff Keever Construction, Inc.

Morgan Law, PLLC, by William E. Morgan, for defendant-appellee Kevin Cheek (Ridgeline Installations).

ARROWOOD, Judge.

Richard and Tina Thompson ("plaintiffs") appeal from the trial court's final judgment denying their renewed directed verdict motion, motion to reconsider, motion for judgment notwithstanding the verdict and motion for new trial. This final judgment followed the trial court granting a motion for summary judgment in favor of defendant Kevin Cheek ("Cheek") on a breach of contract claim, directed verdict in favor of Cheek and defendant Jeff Keever ("Keever") (together, "defendants")[1]

1. Defendant Rock Barn Properties, Inc. settled with plaintiffs before trial and is therefore not a party to this appeal. It is referred to as "Rock Barn" within the factual background.

on fraud claims and unfair and deceptive trade practices claims, a jury verdict in Keever's favor on all other claims, and an order granting defendants' motions for costs. For the following reasons, we affirm the judgment of the trial court.

I. Factual Background

The settled record on appeal tends to show the following. Rock Barn contracted with Keever to serve as the general contractor to construct a home in Conover, North Carolina. In March 2019, plaintiffs became interested in this home, performed two walk-throughs, and signed a purchase offer, closing on 11 April 2019.

Later that year, issues relating to moisture and flooring began to develop. Keever began working to address these issues, first subcontracting with Startown Carpet ("Startown"), and later involving Cheek to install replacement flooring. The repairs stretched over the next year and a half, resulting in multiple conflicts between the various parties involved. Keever's involvement with the home repairs ended in November 2020, and plaintiffs' relationship with Rock Barn continued to degrade into early 2021.

Plaintiffs subsequently initiated this case with a seven-claim complaint filed 4 May 2021. Their complaint alleged breaches of contract (including breaches of express and implied warranties), fraud, negligent misrepresentation, and unfair and deceptive trade practices. Defendants responded with a variety of motions to dismiss, defenses, and, in Keever's case, a third-party complaint against Startown. It appears that two years of discovery followed defendants' responses before Cheek filed a motion for summary judgment. On 26 July 2023, the trial court granted Cheek's motion for summary judgment as to the breach of contract claim, but denied it as to the claims for fraud and deceptive trade practices.[2]

The case went to trial, and a jury was empaneled 31 July 2023. At the close of plaintiffs' evidence, Cheek moved for, and the trial court granted, a directed verdict on all claims against him: fraud, unfair and deceptive trade practices, and punitive damages. At the close of Keever's evidence, plaintiffs moved for a directed verdict, which was denied. The only issues remaining for the jury were those concerning Keever; using

2. This order was amended *sua sponte* on 27 July 2023 to reflect that Cheek's motion for summary judgment on plaintiffs' claim for negligent misrepresentation was also granted.

an issue sheet, the jury, on 15 July 2023, found that there was a contract between plaintiffs and Keever, that Keever did not breach the contract or the express warranty, that there was an implied warranty of habitability created, and that Keever did not breach this warranty.

On 24 August 2023, plaintiffs renewed their motion for a directed verdict, and moved for reconsideration, JNOV, and a new trial. The trial court denied all these motions on 16 January 2024, denied defendants' motions for attorney's fees, and granted defendants' motions for costs. Plaintiffs gave notice of appeal on 15 February 2024.

II. Discussion

Plaintiffs raise five issues on appeal: (1) that the trial court erred in directing a verdict in favor of defendants on plaintiffs' claims of fraud; (2) that the trial court erred in directing a verdict in favor of defendants on plaintiffs' claims of unfair and deceptive trade practices; (3) that the trial court erred in failing to direct a verdict and enter a judgment notwithstanding the verdict that Keever breached the builder's warranty in the purchase contract and the implied warranty of habitability; (4) that the foregoing trial court errors, combined with the court's refusal to submit specific issues of fact and jury instructions, inclusion of other jury instructions, and comments made by Keever's counsel during closing arguments, confused and prejudiced the jury; and (5) that the trial court erred in awarding defendants' costs. Because plaintiffs have failed to provide this Court with the record necessary to properly review, much less support their arguments, we affirm the judgment of the trial court.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Green v. Freeman*, 367 N.C. 136, 140 (2013) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322 (1991)). "If there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for JNOV should be denied." *Id.* at 140–41 (cleaned up).

Our review of an appeal is based solely on the record and transcripts provided us by the parties. N.C. R. App. P. Rule 9(a). An appellant is not required to provide the entire transcript, but if they elect to provide only portions, "so much of the testimonial evidence must be designated as is necessary for an understanding of all issues presented on appeal." *Id.* Rule 9(c)(2).

In the case *sub judice*, plaintiffs have elected to provide us with only a portion of the transcript from the trial. The jury was empaneled

on 31 July 2023, yet the transcript in the record begins on 7 August 2023, a full week after the trial had begun. Plaintiffs have not indicated what occurred during these days. Additionally, plaintiffs have chosen to only include certain one-sided parts of testimony from critical witnesses, including both defendants and plaintiff Richard Thompson. Defendants' counsel's examination of Cheek is absent, as is the entirety of Keever's direct examination. All cross-examination of Richard Thompson is missing. These omissions clearly do not satisfy Rule 9's requirement to provide enough testimony to understand all the issues or the proceedings below.

Defendants each recognize this, and in their briefs, request the Court dismiss plaintiffs' appeal. We agree that plaintiffs' provided transcript is insufficient and ultimately fatal to their appeal, but we do not find support in our case law that dismissal is an appropriate remedy. However, plaintiffs' response to defendants' request to dismiss provides us with the appropriate framing for our disposition.

Plaintiffs engage in a blatant misstatement of our caselaw regarding the burden of creating and settling the record. Plaintiffs contend that in *Scott v. Scott*, 293 N.C. App. 639 (2024), this Court "found that Rule 9(c) of the North Carolina Rules of Appellate Procedure *places the burden on each respective party* to include in the record sufficient evidence and transcripts necessary to prevail on the issues presented." (emphasis added). That is not what *Scott* holds, and this purported interpretation of Rule 9 has no support in our jurisprudence, particularly in the context of a directed verdict.

In *Scott*, we held that the appellant's failure to provide a transcript bound us to accept the trial court's findings of fact as supported by the evidence for the simple reason that "that the *appellant* – not the appellee – has the duty to ensure that the record is complete." *Id.* at 646 (emphasis in original) (citation omitted). *Scott* is one of many cases that recognizes the burden of compiling a sufficient record rests *squarely on the appellant*, not on either "respective party." *See*, *e.g.*, *State v. Alston*, 307 N.C. 321, 341 (1983) ("It is the appellant's duty and responsibility to see that the record is in proper form and complete.").

Plaintiffs have failed to sustain their burden by neglecting to provide us with the entire transcript of the trial proceedings, leaving us with no option but to affirm the trial court decisions and the jury verdict. It is impossible to properly evaluate plaintiffs' arguments when they have omitted vital portions of the testimony, the jury charge and the closing arguments of counsel.

The central point of review on a motion for directed verdict "is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Green*, 367 N.C. at 140 (citation omitted). Plaintiffs' appellate counsel's failure to include essential and relevant record materials in asking the question of *whether the evidence is sufficient to be submitted to the jury* is difficult to understand.

In addition, while complaining about a jury charge and counsel arguments, it is impossible to show error without tendering transcripts of those portions of the trial for our review. *See State v. Deese*, 127 N.C. App. 536, 538 (1997) ("In the present case, the record does not contain a transcript of the entire jury charge. In fact, no part of the court's instructions is included in the record. Therefore, we are unable to determine whether when taken as a contextual whole, the instructions given to the jury fairly and accurately set forth the essential elements of the offenses and defenses warranted by the evidence."); *Joines v. Moffitt*, 226 N.C. App. 61, 69 (2013) ("When the closing arguments of counsel are not transcribed and included in the record, an appellate court is precluded from addressing issues relating to the content of those arguments."). Failure to include the necessary portions of the record can only lead to one result: the affirmation of the judgment below.

Any appellant's failure to properly prepare the record pursuant to Rule 9 or any attempts to present a record which only support materials favorable to the appellant is a certain path to failure. In the present case this failure is exacerbated by trying to excuse the omissions from the record by an obvious misstatement of our case law regarding Rule 9. In view of the insufficiency of the Record we are unable to discern any error in the trial below.

III. Conclusion

Plaintiffs have failed to properly prepare the Record, therefore, we affirm the trial court's judgment.

AFFIRMED.

Judges ZACHARY and GRIFFIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 MAY 2025)

AMATO v. MILLER No. 24-417-2	New Hanover (21CVS776)	Affirmed in Part Reversed in Part, and Remanded
EPIC-NRG, LLC v. RAGLE No. 24-162	Buncombe (22CVS1510)	Affirmed
HAZEN v. PETERS No. 23-488	Alamance (22CVS432)	Affirmed
IN RE B.E.R. No. 24-974	Davie (22JT000057) (22JT000058)	Affirmed
IN RE K.A.S. No. 24-776	Haywood (22JT000009) (22JT000010) (22JT000011)	Affirmed
IN RE K.B.I. No. 24-874	Caswell (23JA000025-160) (23JA000026-160) (23JA000027-160) (23JA000028-160)	Affirmed.
IN RE K.L.S-L. No. 24-1013	Henderson (17JT000190) (21JT000013) (21JT000014)	Affirmed
IN RE N.P. No. 24-908	Cumberland (21JA000039)	Affirmed
IN RE SALGADO No. 24-757	Forsyth (22JRI000004)	Vacated and Remanded.
IRA CLUB FBO MELISSA DAHLQUIST IRA 2000487 v. DANZY No. 24-480	Mecklenburg (23CVD006702-590)	REVERSED IN PART; AFFIRMED IN PART; VACATED IN PART AND REMANDED.
LITTLE v. CLAY No. 24-956	New Hanover (22CVS000353)	Affirmed
MANN v. GOSHEN MED. CTR., INC. No. 24-679	Harnett (21CVS000283)	Affirmed in Part, Vacated in Part, and Remanded

McGRAW v. MAYER No. 24-577	Forsyth (23CVD000220)	Affirmed.
SCHAEFER v. CLARKE No. 24-1099	Guilford (22CVS006664)	Affirmed
STATE v. BULLOCK No. 24-632	Pitt (22CRS050665) (22CRS050666) (22CRS051169)	Dismissed
STATE v. CLOTEZ No. 24-588	Onslow (19CRS052653) (19CRS055890)	No Error
STATE v. COOK No. 24-532	Catawba (21CR052730-170)	No Error
STATE v. DAVIS No. 24-616	Hoke (22CRS050597) (22CRS050598)	No Error.
STATE v. ELLER No. 24-819	Wilkes (22CRS051421-22) (23CRS000011) (23CRS000222) (23CRS210474) (23CRS286190) (23CRS700215) (23CRS700217)	Affirmed.
STATE v. HAWKINS No. 24-825	Columbus (21CRS052284-85)	Affirmed
STATE v. OLLIS No. 24-606	Avery (21CRS050567) (22CRS000103)	No Error
STATE v. PITTMAN No. 24-771	Gaston (21CRS54547)	No Error
STATE v. POULIN No. 24-810	Onslow (21CRS055908) (21CRS055910)	Vacated and Remanded
STATE v. ROUSE No. 24-767	Davidson (21CRS055431) (21CRS055435) (22CRS354557)	AFFIRMED; REMANDED FOR CORRECTION OF JUDGMENT.
STATE v. WATSON No. 24-828	Wake (21CR210675-910) (21CR210676-910)	No Prejudicial Error In Part, and Dismissed In Part

B.C. AND M.B., PLAINTIFFS
v.
PALMETTO WELLNESS GROUP NC, LLC D/B/A
MASSAGE ENVY – FAYETTEVILLE; AND BRYANT WHITEHEAD; DEFENDANTS

No. COA24-335

Filed 4 June 2025

1. Negligence—jury instructions—joint and several liability—assault by massage therapist—negligent hiring by employer—new trial granted on damages

In an action in which plaintiff brought intentional tort claims against a massage therapist for alleged sexual assault and negligent hiring claims against the therapist's employer, the trial court committed reversible error by failing to give plaintiff's requested jury instruction on joint and several liability, under which defendant employer could be held jointly and severally liable for its employee's intentional wrongful acts. The requested instruction was supported by the evidence and correct as a matter of law. Joint and several liability does not require a distinction between negligent and intentional acts, but may attach where independent acts committed by separate parties unite to proximately cause a single, indivisible injury. The dismissal of plaintiff's respondeat superior claim was of no effect, since liability under that doctrine would be merely derivative and, here, the jury found both defendants directly liable for plaintiff's injury. Where the trial court's given instruction did not accurately reflect the law and may have misled the jury with regard to the damages award, the judgment was reversed and the matter remanded for a new trial on damages only.

2. Civil Procedure—Rule 59 motion to amend judgment—jury instruction error of indeterminate effect—abuse of discretion analysis

In an action in which plaintiff brought intentional tort claims against a massage therapist for alleged sexual assault and negligent hiring claims against the therapist's employer, the trial court did not abuse its discretion by denying plaintiff's Rule 59 motion to amend the judgment even though the trial court erred by failing to instruct the jury properly on joint and several liability (as a result of which plaintiff was entitled to a new trial on damages). Where the jury was tasked with determining damages based on causes of action rather than plaintiff's injuries—and awarded plaintiff damages for each cause of action—and where the verdict sheet was not clear on

whether the jury awarded plaintiff duplicative damages for the same injuries or instead apportioned the damages between the defendants, the appellate court upheld the trial court's denial because it was not apparent from the record if the jury would have reached the same result even if the proper instructions had been given.

Appeal by Plaintiff M.B. from judgment entered 8 February 2023 and order entered 6 April 2023 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 28 January 2025.

Patterson Harkavy LLP, by Narendra K. Ghosh and Christopher A. Brook, and Macam Law PLLC, by Victor Macam, for Plaintiff-Appellant M.B.

Jackson Lewis P.C., by Kathleen K. Lucchesi, Denaa J. Griffin, and Jonathan R. Cavalier (pro hac vice), for Defendant-Appellee Palmetto Wellness Group NC, LLC d/b/a Massage Envy – Fayetteville.

COLLINS, Judge.

This appeal arises from a sexual assault at a massage establishment. Plaintiff M.B. argues that the trial court erred by failing to give a requested jury instruction on joint and several liability and abused its discretion by denying Plaintiff's Rule 59 motion to amend the judgment entered upon the jury's verdict. For the following reasons, we reverse the trial court's judgment and remand the matter for a new trial on damages. We affirm the trial court's order denying Plaintiff's Rule 59 motion.

I. Background

In or around June 2016, Defendant Bryant Whitehead was employed as a massage therapist at Hand & Stone Massage and Facial Spa in Fayetteville, North Carolina. While employed there, Whitehead sexually assaulted another employee, Becca.[1] Becca did not immediately report the incident to her employer and instead sought employment elsewhere. In November 2016, Becca began working at Massage Envy in Fayetteville, which was owned and operated by Defendant Palmetto Wellness Group NC, LLC.

1. "Becca" is a pseudonym. Although Becca was involved in the underlying proceeding, she is not a party to this appeal.

Not long after, Whitehead applied to work as a massage therapist at Massage Envy. Upon realizing this, Becca told her manager at Massage Envy about Whitehead assaulting her. Despite this, Palmetto hired Whitehead.

On 11 September 2017, Plaintiff arrived at Massage Envy for a massage. Massage Envy told Plaintiff that Whitehead was the only massage therapist available at the time and asked Plaintiff if she would agree to receiving a massage from a male massage therapist. Plaintiff agreed. Throughout the course of her massage, Whitehead sexually assaulted Plaintiff. Plaintiff did not immediately report being assaulted, and Whitehead remained employed at Massage Envy.

On 27 November 2017, Whitehead assaulted another female client of Massage Envy. That client immediately reported it, and as a result, the North Carolina Board of Massage and Bodywork Therapy ("Board") placed Whitehead on probation.

Plaintiff reported being assaulted by Whitehead to Massage Envy, the Board, and the police in October 2018. The Board revoked Whitehead's license to practice massage therapy in North Carolina on 10 December 2018.

Plaintiff commenced this action on 6 April 2020 by filing a complaint against a number of defendants, including Palmetto and Whitehead. Plaintiff alleged the following causes of action against Palmetto: negligence; negligent hiring, retention, and supervision ("negligent hiring"); respondeat superior; premises liability; negligent misrepresentation; unfair and deceptive trade practices; and fraudulent concealment. She alleged claims against Whitehead for battery and intentional infliction of emotional distress. In Plaintiff's prayer for relief, she asked that "judgment be entered against all Defendants, jointly and severally."

Whitehead failed to respond to the complaint or otherwise appear, and the trial court entered default against him. The case came for trial on 9 January 2023. Whitehead was not present at trial. At the close of Plaintiff's evidence, the trial court granted Palmetto's motion for a directed verdict as to Plaintiff's claims for respondeat superior, premises liability, and unfair and deceptive trade practices.

At the jury charge conference, Plaintiff requested the trial court instruct the jury on joint and several liability for all damages resulting from her claims against Whitehead and Palmetto. The trial court agreed to instruct the jury on joint and several liability for the damages resulting

from Plaintiff's negligence-based claims against Palmetto but denied the request as to Plaintiff's intentional tort claims against Whitehead.

In charging the jury, the trial court instructed that, by his default, Whitehead had admitted certain facts and thus Whitehead's liability for battery and intentional infliction of emotional distress had been established.

The trial court submitted the following issues relevant to this appeal to the jury:

- the amount of damages Plaintiff was entitled to recover from Whitehead for his battery;
- the amount of damages Plaintiff was entitled to recover from Whitehead for his intentional infliction of emotional distress;
- Plaintiff's liability for negligence, negligent hiring, and fraudulent concealment;
- the amount of damages, if any, Plaintiff was entitled to recover from Whitehead and Palmetto for Palmetto's negligence;
- the amount of damages, if any, Plaintiff was entitled to recover from Whitehead and Palmetto for Palmetto's negligent hiring; and
- the amount of damages, if any, Plaintiff was entitled to recover from Whitehead and Palmetto for Palmetto's fraudulent concealment.

The jury determined Plaintiff was entitled to recover from Whitehead $100,000 for battery; $250,000 for intentional infliction of emotional distress; and $250,000 in punitive damages. The jury found Palmetto liable for negligence and negligent hiring, but not liable for fraudulent concealment. The jury determined Plaintiff was entitled to recover jointly and severally from Whitehead and Palmetto $40,000 for Palmetto's negligence and $20,000 for Palmetto's negligent hiring.

Plaintiff filed a timely Rule 59 motion to amend the trial court's judgment, asking the trial court to "amend the judgment making the proper conclusions of law so as to apply joint and several liability to all damages awarded in Plaintiff['s] [] favor against joint tortfeasors Defendants Whitehead and [Palmetto.]" After a hearing, the trial court denied the motion by written order entered 6 April 2023. Plaintiff appeals.

II. Discussion

A. Jury Instructions

[1] Plaintiff first argues that the trial court erred by "failing to instruct the jury on joint and several liability for all damages awarded to Plaintiff." Specifically, Plaintiff contends that the trial court erred by refusing to instruct the jury that Palmetto could be held jointly and severally liable for the damages awarded to Plaintiff for Whitehead's intentional torts of battery and intentional infliction of emotional distress.

1. Standard of Review

"[This] Court reviews a trial court's decisions regarding jury instructions *de novo*." *Littleton v. Willis*, 205 N.C. App. 224, 228 (2010) (citation omitted). "Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the trial court." *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 370 (2007) (brackets and citation omitted). For an error in jury instructions to require a new trial, "it must be shown that a different result would have likely ensued had the error not occurred." *Chappell v. N.C. DOT*, 374 N.C. 273, 282 (2020) (quotation marks and citations omitted).

A requested jury instruction should be given when "(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and [] (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Outlaw v. Johnson*, 190 N.C. App. 233, 243 (2008) (citation omitted). "When a request is made for a specific jury instruction that is correct as a matter of law and is supported by the evidence, the trial court is required to give an instruction expressing at least the substance of the requested instruction." *Walker v. Town of Stoneville*, 211 N.C. App. 24, 40 (2011) (cleaned up).

2. Joint and Several Liability

"Joint and several liability is allowed [in a civil case] when (1) defendants have acted in concert to commit a wrong that caused an injury; or (2) defendants, even without acting in concert, have committed separate wrongs that still produced an indivisible injury." *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 235 (2013) (citation omitted). Under the second scenario, where "the independent wrongful acts of two or more persons unite in producing a single indivisible injury, the parties are joint tortfeasors within the meaning of the law, and the injured party may sue only one or all the tortfeasors, as he may elect." *Phillips v. Hassett Mining Co.*, 244 N.C. 17, 22 (1956) (citations omitted); *see also Denny*

v. Coleman, 245 N.C. 90, 92 (1956) ("[W]hen the acts of defendants concur to produce a single injury, thus making them joint tort-feasors, plaintiff may sue them jointly or separately.") (citation omitted).

> Where the damage complained of is the indivisible result of several causes, full recovery by a plaintiff does not depend on his ability to apportion the damages; plaintiff needs only to show that the negligence of one defendant was a proximate cause of some of the damage complained of. In order to hold defendant liable for the entire injury, it is not necessary that his negligence be the sole proximate cause of the injury, or the last act of negligence.

Casado v. Melas Corp., 69 N.C. App. 630, 635 (1984) (citations omitted).

The law on joint and several liability does not distinguish between negligent acts and intentional acts committed by defendants. Rather, the law provides that multiple defendants may be treated as joint tortfeasors if they, "independently and without concert of action or unity of purpose, commit separate acts which concur as to time and place and unite in proximately causing the injury." *Ipock v. Gilmore*, 73 N.C. App. 182, 186 (1985) (citation omitted); *see also* Restatement (Second) of Torts § 875 (1977) ("Each of two or more persons whose *tortious conduct* is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.") (emphasis added). "The focus is on the indivisibility of the injury[.]" *Id.* (citation omitted).

Our Uniform Contribution Among Tort-Feasors Act, which codifies the right of contribution among joint tortfeasors, also supports this determination. *See* N.C. Gen. Stat. §§ 1B-1–1B-6 (2023). The Act specifically denies the right of contribution "in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death." *Id.* § 1B-1(c). In doing so, the statute implicitly acknowledges that defendants who "intentionally caused" an injury may be considered joint tort-feasors under the law. *Id.* Accordingly, if the "independent wrongful acts of two or more persons unite in producing a single indivisible injury," whether the wrongful acts were intentional or negligent, the injured party may recover damages from the defendants, jointly and severally. *See Phillips*, 244 N.C. at 22 (citations omitted); *see also Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 87 (Tenn. 2001) (concluding that "where the intentional actor and the negligent actor are both named defendants and each are found to be responsible for the plaintiff's injuries, then each defendant will be jointly and severally responsible for the plaintiff's total damages") (citation omitted).

An indivisible injury is one that "renders apportionment of damages among the individual tort-feasors impossible." *Ipock*, 73 N.C. App. at 186 (citation omitted); *see also* Restatement (Second) of Torts § 879 (1977) ("If the tortious conduct of each of two or more persons is a legal cause of harm that cannot be apportioned, each is subject to liability for the entire harm, irrespective of whether their conduct is concurring or consecutive."). Apportionment of damages is only feasible where "(a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A (1965). It is for the trial court to determine whether a plaintiff's injury is indivisible. *See Casado*, 69 N.C. App. at 635.

3. Requested Jury Instruction

The North Carolina Pattern Jury Instructions provide the following instruction on joint and several liability for concurring acts of negligence:

> People may be held jointly and severally liable for their separate acts of negligence.
>
> In defining proximate cause I explained that there may be two or more proximate causes of [an injury] [damage]. This occurs when separate and independent acts or omissions of different people concur, that is, combine, to produce a single result. Thus, if the negligent acts or omissions of two (or more) people concur to produce the [injury] [damage] complained of, the conduct of each person is a proximate cause. Each person is jointly and severally liable for the [injury] [damage] that results, even though one person may have been more or less negligent than another.

N.C.P.I.—Civil 102.60 (2005).

In this case, Plaintiff submitted the following proposed instruction that modified N.C.P.I. 102.60 to include intentional acts:

> People may be held jointly and severally liable for their separate *intentional and/or* negligent acts.
>
> In defining proximate cause I explained that there may be two or more proximate causes of [an injury] [damage]. This occurs when separate and independent acts or omissions of different people concur, that is, combine, to produce a single result. Thus, if the *intentional and/or* negligent acts or omissions of two (or more) people concur to produce the [injury] [damage] complained of, the

> conduct of each person is a proximate cause. Each person is jointly and severally liable for the [injury] [damage] that results, even though one person may have been more or less *intentional and/or* negligent than another.

(emphasis added).

Plaintiff's requested instruction is "a correct statement of law." *Outlaw*, 190 N.C. App. at 243 (citation omitted). As explained above, joint and several liability does not apply only to negligence-based claims; rather, it applies to wrongful acts, whether negligent or intentional, that have united in causing a single, indivisible injury. *See Phillips*, 244 N.C. at 22. Plaintiff's proposed instruction clarifies that multiple defendants may be held jointly and severally liable "for their separate *intentional and/or* negligent acts." (emphasis added).

Plaintiff's requested instruction also "was supported by the evidence." *Outlaw*, 190 N.C. App. at 243 (citation omitted). Here, the evidence shows that Whitehead's intentional conduct was a foreseeable risk created by Palmetto's negligent conduct. Palmetto's negligence and negligent hiring combined with Whitehead's battery to produce a single, indivisible injury to Plaintiff. Likewise, Palmetto's negligence and negligent hiring combined with Whitehead's intentional infliction of emotional distress to produce a single, indivisible injury to Plaintiff. Furthermore, because the trial court instructed the jury on joint and several liability for damages caused by Palmetto's negligence and negligent hiring, the trial court implicitly—and correctly—determined that Plaintiff's injuries were indivisible. This instruction necessarily required Whitehead's intentional torts and Palmetto's negligent acts to have produced the same, indivisible injuries.

By failing to give Plaintiff's requested instruction and instead instructing the jury that joint and several liability may apply to injury that results only from concurring negligent acts or omissions, the trial court's given instruction "failed to encompass the substance of the law requested." *Id.*

Finally, "such failure likely misled the jury" because the jury could not award all damages jointly and severally. *Id.*

Accordingly, the trial court reversibly erred by failing to instruct the jury on joint and several liability for all damages awarded to Plaintiff.

4. Respondeat Superior

Palmetto argues that the dismissal of Plaintiff's respondeat superior claim shows that joint and several liability cannot apply in this case.

This argument is misguided; joint and several liability and respondeat superior are separate and independent doctrines.

Under the doctrine of joint and several liability, "although there is a single damage done, there are several wrongdoers. The act inflicting injury may be single, but [behind] that, and essential to liability, lies some wrong done by each tort-feasor contributing in some way to the wrong complained of." *Bowen v. Iowa Nat'l Mut. Ins. Co.*, 270 N.C. 486, 491-92 (1967).

Under the doctrine of respondeat superior, on the other hand, "employers are liable for torts committed by their employees who are acting within the scope of their employment[.]" *Hendrix v. Town of W. Jefferson*, 273 N.C. App. 27, 32 (2020) (citation omitted). The doctrine relies upon agency principles where "the principal is responsible for the tort of his agent[.]" *Bowen*, 270 N.C. at 492 (citations omitted). The principle's liability is not based on any fault of its own; instead the principle's liability is derivative, based on the agency relationship between the principle and its tortious agent. *Id.* at 491-92.

Here, despite the agency relationship between Palmetto and Whitehead, Palmetto's liability was not merely derivative; rather, Palmetto's liability was based on its own negligence and negligent hiring that combined with Whitehead's wrongs to cause Plaintiff's injuries. *See id.* Accordingly, dismissal of Plaintiff's respondeat superior claim does not defeat the application of joint and several liability in this case.

5. Conclusion

In summary, the trial court committed reversible error by failing to give Plaintiff's requested jury instruction on joint and several liability. Plaintiff's requested instruction was correct as a matter of law and was supported by the evidence, and the trial court's given instruction "failed to encompass the substance of the law requested." *Outlaw*, 190 N.C. App. at 243 (citation omitted). Furthermore, this error likely misled the jury in its damages award.

Joint and several liability is not a theory of liability; rather, it determines from whom a plaintiff can recover once he proves that the wrongful acts or omissions of two or more defendants concurred to produce a single, indivisible injury. *See Connette v. Charlotte-Mecklenburg Hosp. Auth.*, 382 N.C. 57, 79 (2022). Here, Whitehead's liability was established as a matter of law, and the jury found Palmetto liable for negligence and negligent hiring. Whitehead's and Palmetto's liability need not be relitigated. Further, the trial court correctly determined that Plaintiff's

injuries were indivisible. The trial court's judgment is thus reversed and remanded for a new trial on damages only.

B. Plaintiff's Rule 59 Motion

[2] Plaintiff next argues that the trial court erred by failing to amend its judgment on the basis of the grounds set forth in N.C. Gen. Stat. § 1A-1, Rule 59. Specifically, Plaintiff contends that the jury's verdict is contrary to law because it failed to hold Palmetto jointly and severally liable for all damages awarded to Plaintiff. Plaintiff asks this Court to remand the case to the trial court with instructions to enter an amended judgment holding both defendants jointly and severally liable for all damages awarded by the jury to Plaintiff, including those resulting from Whitehead's intentional torts.

"Rule 59(e) governs motions to alter or amend a judgment, and such motions are limited to the grounds listed in Rule 59(a)." *N.C. Alliance for Transp. Reform, Inc. v. N.C. DOT*, 183 N.C. App. 466, 469 (2007); N.C. Gen. Stat. § 1A-1, Rule 59 (2023). Rule 59(a) provides a number of grounds upon which a motion to alter or amend judgment may be granted, including: "the verdict is contrary to law," Rule 59(a)(7); there was "[e]rror in law occurring at the trial and objected to by the party making the motion," Rule 59(a)(8); and "[a]ny other reason heretofore recognized as grounds for new trial," Rule 59(a)(9).

Whether to grant or deny a Rule 59(e) motion is within the sound discretion of the trial court. *Young v. Lica*, 156 N.C. App. 301, 304 (2003). "However, where the motion involves a question of law or legal inference, our standard of review is *de novo*." *Kinsey v. Spann*, 139 N.C. App. 370, 372 (2000) (citation omitted). Accordingly, whether a verdict is contrary to law under Rule 59(a)(7) or an error in law occurred at trial under Rule 59(a)(8) will be reviewed de novo on appeal. *Young*, 156 N.C. App. at 304; *Greene v. Royster*, 187 N.C. App. 71, 78 (2007). The standard of review under Rule 59(a)(9) is abuse of discretion. *Boykin v. Wilson Med. Ctr.*, 201 N.C. App. 559, 561 (2009).

As determined above, the trial court erred by failing to instruct the jury on joint and several liability, and as a result, Plaintiff is entitled to a new trial on damages. However, we cannot say that, had the jury been correctly instructed and the verdict sheet reflected these instructions, the jury would have returned the same award.

"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 (2000) (citation omitted). "[W]here there

are joint tort-feasors there can be but one recovery for the same injury or damage . . . ." *Holland v. S. Pub. Utils. Co.*, 208 N.C. 289, 291 (1935) (citation omitted).

Here, the jury was asked to determine damages based on causes of action rather than Plaintiff's injuries; the jury awarded Plaintiff damages for each cause of action. We cannot tell from the face of the verdict sheet whether the jury awarded duplicative damages for the same injuries or instead apportioned the damages between the defendants.

Accordingly, the trial court did not abuse its discretion by denying Plaintiff's motion.

III. Conclusion

For the foregoing reasons, the trial court's judgment is reversed in part and the matter remanded for a new trial on damages. The trial court's order denying Plaintiff's Rule 59 motion is affirmed.

REVERSED IN PART AND REMANDED; AFFIRMED IN PART.

Judges WOOD and GRIFFIN concur.

BESSIE PEACOCK CLOER, Widow and Administrator of the Estate of JAMES RICHARD CLOER, Employee, Plaintiff

v.

KING ARTHUR INC., Employer; THONET INDUSTRIES INC., Employer; SCH LIQUIDATING CORP., Employer; SHELBY WILLIAMS INDUSTRIES, INC., Self-Insured Employer, and NORTH CAROLINA SELF-INSURANCE SECURITY ASSOCIATION, Defendants

No. COA24-587

Filed 4 June 2025

Workers' Compensation—North Carolina Self-Insurance Security Association—covered claim—requirements not met

In a workers' compensation matter where plaintiff, the administrator of the estate of her deceased husband—a longtime employee at a furniture factory who died from mesothelioma sixteen years after he last worked for the factory, allegedly as a result of asbestos exposure throughout his employment—entered into settlement agreements releasing the factory's owner (and the surviving entity resulting from various mergers involving the factory) from

any and all liabilities, which in turn were approved by the Industrial Commission, the Commission did not err in denying plaintiff's motion to add the North Carolina Self-Insurance Association as a defendant. The Association—a nonprofit unincorporated legal entity created by statute to provide mechanisms for the payment of a "covered claim" against a member self-insurer—was not a proper party because plaintiff's claim failed to satisfy two of the four requirements set forth in N.C.G.S. § 97-130(4) for a "covered claim": (1) the member self-insurer was not insolvent, even though the original owner of the factory had gone through bankruptcy, because the surviving entity of a post-reorganization merger was liable for the original owner's liabilities and was not itself insolvent; and (2) the claim was not unpaid, as plaintiff had settled with the surviving entity.

Judge HAMPSON dissenting.

Appeal by Plaintiff from opinion and award entered 13 March 2024 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 January 2025.

Wallace and Graham, P.A., by Edward L. Pauley, for Plaintiff-Appellant.

Stuart Law Firm, PLLC, by William A. Piner, II, and Catherine R. Stuart, for Defendant-Appellee North Carolina Self-Insurance Security Association.

COLLINS, Judge.

Plaintiff Bessie Peacock Cloer, as administrator of the estate of her deceased husband, James Richard Cloer, appeals from the North Carolina Industrial Commission's opinion and award denying Plaintiff's motion to add the North Carolina Self-Insurance Security Association as a party. As there is no "covered claim" for Plaintiff to pursue against the Association, the Commission did not err by denying Plaintiff's motion to add the Association as a party.

I. Background

James Richard Cloer ("Decedent") worked at a furniture factory for many years, including from 1987 to 1997. The factory was owned and operated by Shelby Williams from 1987 through 30 June 1999. From June 1987 to 30 June 1988, Shelby Williams had workers' compensation

coverage with Hartford Accident and Indemnity Company. Shelby Williams was approved to self-insure its workers' compensation claims liabilities by the North Carolina Department of Insurance and was a member of the Association from 1 July 1989 through 30 June 1999.

On 5 May 1999, Shelby Williams and Falcon Products, Inc. executed an "Agreement and Plan of Merger" whereby Shelby Williams was acquired by Falcon and became Falcon's affiliate. Falcon was never a licensed North Carolina self-insurer and maintained workers' compensation insurance coverage during the period it operated in North Carolina.

On 1 January 2005, Falcon and its affiliates, including Shelby Williams, filed a Chapter 11 voluntary petition for bankruptcy in the United States Bankruptcy Court of the Eastern District of Missouri. All pre-petition workers' compensation claims, including those incurred against Shelby Williams, were paid. The bankruptcy plan made no provision for workers' compensation claims that had been incurred but not yet reported. The bankruptcy court approved Falcon's plan for reorganization, and on 28 November 2005, Falcon officially changed its name to Commercial Furniture Group, Inc. ("CFG"). Shelby Williams then merged with CFG in December 2005. As a result, Shelby Williams ceased to exist, and CFG became the sole surviving entity.

Approximately sixteen years after his last date of employment with Shelby Williams, in February 2013, Decedent was diagnosed with mesothelioma. Decedent filed a Form 18B with the Commission, alleging that his diagnosis was the result of asbestos exposure throughout his employment. Decedent died from mesothelioma on 6 July 2013, and Plaintiff filed an Amended Form 18B with the Commission in October 2013 to add Shelby Williams as a defendant and a claim for death benefits.

Five years later, Plaintiff moved to add CFG as a defendant; the motion was granted by the Executive Secretary of the Commission in August 2018. Plaintiff then moved to add the Association as a defendant; the motion was granted by the Executive Secretary of the Commission in November 2020. The Association filed a Form 33, Request that the Claim be Assigned for Hearing, alleging that the Association is not a proper party.

Plaintiff, Shelby Williams, and Hartford executed a "Final Compromise Settlement Agreement" on 9 February 2022 to settle Plaintiff's claim against Shelby Williams and Hartford for $50,000 for "any and all periods of coverage, known or unknown, for which Hartford could be liable." Additionally, Plaintiff and CFG executed a "Final Compromise Settlement Agreement and Release" on 27 August

2022 to settle Plaintiff's claim against CFG for $3,000 for "the period of self-insurance by Shelby Williams for which [CFG] may be liable." This settlement agreement released CFG "from any and all future responsibility or liability for [Decedent's mesothelioma] during the period of Shelby Williams' self-insurance." Both settlement agreements were approved by the Commission.

A deputy commissioner filed an opinion and order on 20 April 2023 denying Plaintiff's motion to add the Association as a defendant. Plaintiff appealed to the Full Commission. After a hearing, the Full Commission filed an opinion and award on 13 March 2024 denying Plaintiff's motion to add the Association as a defendant. Plaintiff appeals.

II. Discussion

Plaintiff argues that the Commission erred by denying its motion to add the Association as a party to this matter.

A. Standard of Review

This Court's review of an opinion and award of the Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660 (2008) (citation omitted). Evidence is to be viewed "in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 602 (2005) (citation omitted). "Findings of fact are conclusive on appeal when supported by competent evidence, despite evidence that would support contrary findings, and conclusions of law are reviewed *de novo*." *Id.* Under a de novo review, this Court "considers the matter anew and freely substitutes its own judgment for the agency's." *Sellers v. FMC Corp.*, 216 N.C. App. 134, 138 (2011) (cleaned up).

B. The Workers' Compensation Act

Under the Workers' Compensation Act, in cases "where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable." N.C. Gen. Stat. § 97-57 (2023). The statutory phrase "last injuriously exposed" means "an exposure which proximately augmented the disease to any extent, however slight." *Penegar v. United Parcel Serv.*, 259 N.C. App. 308, 318 (2018) (citing *Rutledge v. Texas Corp.*, 308 N.C. 85, 89 (1983)).

The Act authorizes claims to be paid through settlement agreements executed between an employee and employer. N.C. Gen. Stat. § 97-17(a) (2023). A settlement agreement approved by the Commission "is as binding on the parties as an order, decision[,] or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal." *Pruitt v. Knight Pub. Co.*, 289 N.C. 254, 258 (1976) (citations omitted).

C. Insuring Workers' Compensation Liability

An employer is primarily liable to its employees for the payment of benefits under the Act, and this liability remains regardless of whether "the employer has the necessary insurance, is self-insured, or has no insurance at all." *Ryles v. Durham County Hosp. Corp.*, 107 N.C. App. 455, 461 (1992); N.C. Gen. Stat. § 97-95 (2023). Nevertheless, "[e]very employer is required to secure its obligations under the Act by either insuring its workers' compensation liability or self-insuring where it has the financial ability to pay for benefits." *Goodson*, 171 N.C. App. at 605; N.C. Gen. Stat. § 97-93 (2023).

To self-insure under the Act, the employer must apply for and receive a license from the Commissioner of Insurance. N.C. Gen. Stat. §§ 97-170, 97-165(4) (2023). "Only an applicant whose total fixed assets amount to five hundred thousand dollars ($500,000) or more may apply for a license." N.C. Gen. Stat. § 97-170(c). An employer applying for a license to self-insure must file its application both with the Commissioner of Insurance and the Association. N.C. Gen. Stat. § 97-170(b).

D. The Association

"All . . . self-insurers are required to be members of the [] Association as a condition of being licensed to self-insure by the Commissioner of Insurance." *Ketchie v. Fieldcrest Cannon, Inc.*, 243 N.C. App. 324, 327 (2015); N.C. Gen. Stat. § 97-131(b) (2023). The Association is not an insurance carrier. Rather, it is a "nonprofit unincorporated legal entity" created by statute to "provide mechanisms for the payment of covered claims against member self-insurers . . . to avoid financial loss to claimants because of the insolvency of a member self-insurer[.]" N.C. Gen. Stat. § 97-131(a) (2023). A self-insurer "shall be deemed to be a member of the Association for purposes of its own insolvency if it is a member when the compensable injury occurs." N.C. Gen. Stat. § 97-131(b)(2) (2023).

The Association incurs liability only for "covered claims" as defined by statute. *Id.* A "covered claim" is "an unpaid claim against an insolvent . . . self-insurer that relates to an injury that occurs while the . . . self-insurer is a member of the Association and that is compensable

under [the Act]." N.C. Gen. Stat. § 97-130(4) (2023). Accordingly, the Association can be liable for a claim against one of its member self-insurers only when the following four requirements are met: (1) the self-insurer is insolvent; (2) the claim is unpaid; (3) the claim relates to an injury that occurred while the self-insurer was a member of the Association; and (4) the claim is otherwise compensable under the Act. *Id.*

E. Analysis

Here, the Commission concluded that the Association is not a proper party because Plaintiff's claim does not meet all four requirements of a covered claim. We agree.

At the outset, we note that the third and fourth requirements of a "covered claim" have been met. The parties stipulated that "Shelby Williams was a member self-insurer of the Association from 1 July 1989 to 30 June 1999" and that Plaintiff's "last date of employment with Shelby Williams and last alleged injurious exposure to asbestos were both in 1997 during the Shelby Williams period of self-insurance." Therefore, Plaintiff's claim relates to an injury that occurred while Shelby Williams was a member of the Association. *See id.* Second, Decedent's injury—mesothelioma resulting from asbestos exposure—constitutes an occupational disease covered under the Act. *See* N.C. Gen. Stat. § 97-53(13) (2023); *Rutledge*, 308 N.C. at 93. The parties do not dispute that Plaintiff's claim is compensable under the Act. *See* N.C. Gen. Stat. § 97-130(4).

However, the remaining first two requirements—the member self-insurer is insolvent and the claim is unpaid—have not been met.

Shelby Williams was self-insured and a member of the Association on the date of Decedent's last injurious exposure to asbestos in 1997. Shelby Williams was acquired by Falcon in May 1999, and Falcon, including Shelby Williams, filed for bankruptcy in 2005. All Shelby Williams' pre-petition workers' compensation claims were paid, and the bankruptcy plan for reorganization made no provisions for the payment of claims against Shelby Williams that had been incurred but not yet reported. The bankruptcy court approved Falcon's plan for reorganization in October 2005, and Falcon officially changed its name to CFG in November 2005. Shelby Williams merged into CFG in December 2005, and CFG became the surviving entity. As the surviving entity, CFG is responsible for Shelby Williams' liabilities and obligations, including Plaintiff's claim relating to Decedent's asbestos exposure that was incurred when Shelby Williams was self-insured but was not reported until Decedent was diagnosed with mesothelioma in 2013. As Shelby

Williams, the self-insurer, is now CFG, and CFG is not insolvent, there is no "covered claim" for which the Association could be liable.

Furthermore, Plaintiff agreed to settle its claims against CFG for $3,000 for "the period of self-insurance by Shelby Williams for which [CFG] may be liable." The settlement agreement provides, in part:

> 11. There currently exists a dispute among [Plaintiff and CFG]:
>
> a. Plaintiff contends that [CFG], for the period of Shelby Williams' period of self-insurance, is liable, in whole or in part, for []Decedent's mesothelioma and resulting death, entitling her to benefits under N.C. Gen. Stat. § 97-38.
>
> b. [CFG], on the other hand, disputes and denies any liability whatsoever. . . .
>
> c. [Plaintiff and CFG] agree that unless they are able to dispose of the matters and things in dispute in the case by agreement among themselves, hearings before the North Carolina Industrial Commission and subsequent appeals to the Full Commission and perhaps to the Court of Appeals will likely result and the matters will have to be decided as disputed claims.

The settlement agreement released CFG from any further liability resulting from "the period of Shelby Williams' self-insurance" from July 1989 through the end of Decedent's employment in 1997. This settlement agreement was approved by the Commission. As CFG had assumed liability for claims arising from Shelby Williams' period of self-insurance, and Plaintiff agreed to settle its claims against CFG for $3,000, this claim is not unpaid. *See* N.C. Gen. Stat. § 97-17(a) (authorizing claims to be paid through settlement agreements); *see also Pruitt*, 289 N.C. at 258 (emphasizing that settlement agreements approved by the Commission are binding). Accordingly, as CFG is not insolvent, and Plaintiff's claim is not unpaid, there is no "covered claim" for which the Association could be liable.

Because there is no "covered claim" for which the Association could be liable, the Commission did not err by denying Plaintiff's motion to add the Association as a party.

F. Plaintiff's Remaining Arguments

Plaintiff argues that the Commission made other errors in its opinion and award. We address each in turn.

First, Plaintiff argues that the Commission erred by determining that "the date which establishes who is liable for this claim is when the claim arose in 2013 (the death of Decedent and the filing of the claim) as opposed to the last date of exposure." Plaintiff mischaracterizes the Commission's findings and conclusions.

The parties stipulated that Decedent's "last date of employment with Shelby Williams and last alleged injurious exposure to asbestos were both in 1997 during the Shelby Williams (sic) period of self-insurance." It is also undisputed that Decedent was not diagnosed with mesothelioma until 2013. The Commission's challenged findings and conclusions establish that Plaintiff's cause of action against Shelby Williams for Decedent's last injurious asbestos exposure in 1997 accrued in 2013, at which point, CFG was responsible for claims related to Shelby William's period of self-insurance. Thus, the Commission did not erroneously determine "the date which establishes who is liable for this claim."

Plaintiff also argues that the Commission erred by using Delaware mergers and acquisitions law "to define the rights of the parties and whether the workers' compensation liabilities of Shelby Williams had transferred to Falcon and then CFG." Specifically, Plaintiff argues that questions arising from a workers' compensation claim should be governed solely by the Act, not mergers and acquisitions law. We disagree. Although the Act controls the adjudication of workers' compensation claims, the issue presented on appeal to this Court involves the effect that a corporate merger had on the liabilities of the entities involved.

Here, Shelby Williams merged with CFG in December 2005, and CFG is the surviving entity. Both Shelby Williams and CFG were created and incorporated pursuant to Delaware law. Under both North Carolina and Delaware law, all liabilities of each merged entity are retained in the surviving corporation. *See* N.C. Gen. Stat. § 55-11-06(a)(3) (2023); *see also Lee v. Scarborough*, 164 N.C. App. 357, 360-61 (2004) ("When a merger takes effect, the merging corporation ceases to exist; all assets and liabilities of the merging corporation are vested in the surviving corporation. . . .") (citation omitted); *see also* Del. Code Ann. tit. 8, § 259 (West 2023). Therefore, the Commission correctly concluded that as a result of the merger, Shelby Williams ceased to exist, and its liabilities were retained in CFG.

Finally, Plaintiff argues that N.C. Gen. Stat. § 97-6 bars CFG from assuming Shelby Williams' workers' compensation liabilities. Specifically, Plaintiff contends that Shelby Williams' merger with CFG improperly constituted an agreement that intended to relieve Shelby

Williams from its workers' compensation liabilities. Plaintiff's reliance on this provision is misguided.

N.C. Gen. Stat. § 97-6 provides, "No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer in whole or in part, of any obligation created by this Article, except as herein otherwise expressly provided." N.C. Gen. Stat. § 97-6 (2023). However, compromise settlement agreements approved by the Commission do not implicate this statute. *See* N.C. Gen. Stat. § 97-17; *see also Tellado v. Ti-Caro Corp.*, 119 N.C. App. 529, 533 (1995).

Here, the 2005 merger between Shelby Williams and CFG did not "operate to relieve" Shelby Williams of any liability; CFG's liability for claims related to Shelby William's period of self-insurance remained after the merger. The settlement agreement executed between Plaintiff and CFG relieved CFG of further liability. Therefore, the Commission was correct in concluding that N.C. Gen. Stat. § 97-6 does not apply to this matter.

III. Conclusion

Accordingly, for the reasons stated above, we affirm the Commission's opinion and award denying Plaintiff's motion to add the Association as a party.

AFFIRMED.

Judge WOOD concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

The limited issue before this Court is not whether the Association should ultimately be held liable for the payment of benefits under Plaintiff's claim, but rather whether the Association is properly a party to this matter. In my view, the Full Commission erred in dismissing the Association as a party. The Opinion and Award should be reversed and this matter remanded for further proceedings. Therefore, I respectfully dissent.

The Record before us demonstrates Decedent's employer—Shelby Williams—was self-insured and a member of the Association during

Decedent's employment and at the time of his alleged last exposure to asbestos in 1997, leading to his 2013 mesothelioma diagnosis and that Shelby Williams later became insolvent.[1] Shelby Williams made no payment on the claim prior to its insolvency and there is no evidence Falcon—which was not a self-insured employer—provided workers' compensation insurance to retroactively cover claims against Shelby Williams, or otherwise assumed any statutory liability for workers compensation benefits, upon acquiring Shelby Williams and prior to entering bankruptcy. As such, this claim meets all four requirements of a "covered claim" under the Act: (1) the self-insurer is insolvent; (2) the claim is unpaid; (3) the claim relates to an injury that occurred while the self-insurer was a member of the Association; and (4) the claim is otherwise compensable under the Act. *See* N.C. Gen. Stat. § 97-130(4) (2023). Thus, the Association has the statutory obligation to: "Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation[.]" N.C. Gen. Stat. § 97-133(a)(7) (2023). This should be where the analysis ends and this matter should move forward with the Association as a party to determine the extent, if any, of the Association's liability for this claim.

However, the Full Commission also erred in concluding Plaintiff's settlement with CFG forecloses any claim against the Association. It is apparent from the face of the settlement agreement—approved by the Commission—that Plaintiff was not discharging any potential liability of the Association.[2] Indeed, it was CFG's position that the Falcon/Shelby Williams bankruptcy discharged liability for the claim. It is evident from the face of the settlement agreement this was a disputed claim, CFG did not accept compensability of the claim, and was simply resolving the claim only to the extent it had any exposure. The settlement agreement provided:

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1. By statute, a self-insured member of the Association becomes insolvent, *inter alia*, upon: "Institution of bankruptcy proceedings by or regarding the member self-insurer." N.C. Gen. Stat. § 97-135(2) (2023).

2. Likewise, Plaintiff's earlier settlement with The Hartford Insurance Company—also approved by the Commission provided:

> A dispute has arisen concerning the alleged self-insured period for Shelby Williams Industries, Inc. Commercial Furniture Group ("CF Group") and the North Carolina Self-Insurance Security Association ("NCSISA") have both been added as party-Defendants to this claim for the period during which Shelby Williams was allegedly self-insured. CF Group and NCSISA are not parties to this Agreement, and Plaintiff maintains her right to pursue this claim against only CF Group and NCSISA for their alleged responsibility for Shelby Williams' period of self-insurance.

> 12. The North Carolina Self-Insurance Security Association is not a party to this Agreement, and Plaintiff reserves her right to pursue these claims against the North Carolina Self-Insurance Security Association as a result. Additionally, the Agreement also does not resolve and is not a release of any claim Plaintiff may have against insurance policies, bonds, trusts, or other sum of earmarked funds, not in the control of, administered by, or otherwise held by Employer-Defendant or Shelby Williams during the period of its self-insurance, which may be available to pay this claim.
>
> . . . .
>
> 14. The Parties acknowledge and agree that this Agreement does not contain any findings or stipulations with respect to insurance coverage or self-insurance for any other Employer-Defendant and shall not be used as evidence of coverage in these claims or any future claim, proceeding, or dispute. The Parties further acknowledge and agree that this Agreement is intended to include only the period of self-insurance by Shelby Williams for which Employer-Defendant may be liable. This Agreement fully releases Employer-Defendant, and all of its subsidiaries or other legal entities, from any and all future responsibility or liability for the alleged occupational injury, disease, and/or condition that gave rise to the claims to which this Agreement pertains during the period of Shelby Williams' self-insurance.

The subsequent Consent Order dismissing CFG from the action also makes clear both CFG's position and the fact neither the parties to the agreement nor the Commission itself believed the settlement with CFG resolved the potential liability of the Association. The Consent Order entered by the Commission provides: "Further, there is a significant issue over whether Employer-Defendant could have any responsibility for Plaintiff's claims given Shelby Williams' bankruptcy and rebranding, with other entities, as Employer-Defendant." It goes on to state:

> The Parties to this Consent Order acknowledge that Plaintiff still maintains her right to pursue these claims against the North Carolina Self-Insurance Security Association for its alleged responsibility for Shelby Williams' period of self-insurance. The Parties' compromised agreement

> does not serve to resolve any of the issues between Employee-Decedent and the North Carolina Self-Insurance Security Association. Further, the Parties' Agreement does not resolve and is not a release of any claim Plaintiff may have against insurance policies, bonds, trusts, or other sum of earmarked funds, not in the control of, administered by, or otherwise held by Employer-Defendant or Shelby Williams during the period of its self-insurance, which may be available to pay the death claim.

"A 'clincher' or compromise agreement is a form of voluntary settlement recognized by the Commission and used to finally resolve contested or disputed workers' compensation cases." *Chaisson v. Simpson*, 195 N.C. App. 463, 474, 673 S.E.2d 149, 158 (2009) (citation and quotation marks omitted). "It is well established that '[c]ompromise agreements are governed by the legal principles applicable to contracts generally.' " *Malloy v. Davis Mech., Inc.*, 217 N.C. App. 549, 553, 720 S.E.2d 739, 742 (2011) (quoting *Dixie Lines v. Grannick*, 238 N.C. 552, 556, 78 S.E.2d 410, 414 (1953)). "The scope and extent of the release should be governed by the intention of the parties, which must be determined by reference to the language, subject matter and purpose of the release." *Chemimetals Processing, Inc. v. Schrimsher*, 140 N.C. App. 135, 138, 535 S.E.2d 594, 596 (2000). Settlement agreements in the Industrial Commission carry an additional requirement: "Pursuant to N.C. Gen. Stat. § 97–17(a) and Rule 502, all settlement agreements must be approved by the Commission. The Commission must undertake a 'full investigation' to determine that a settlement agreement 'is fair and just [.]' " *Malloy*, 217 N.C. App. at 553, 720 S.E.2d at 742 (citations omitted).

Here, the express language of the settlement agreement with CFG expressly limits the scope of its release. There is a clear dispute—left unresolved by the Industrial Commission—as to whether the Shelby Williams/Falcon bankruptcy discharged any liability by CFG for Plaintiff's claim.[3] Moreover, there is a dispute as to which of either CFG or the Association, or both, is liable for Plaintiff's claim following Shelby Williams insolvency upon filing for bankruptcy and its subsequent re-organization as part of CFG. The settlement agreement resolved the

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3. If the claim was discharged in bankruptcy, then CFG is not responsible for the claim. Any discharge of the claim in bankruptcy would not have any impact on the Association's statutory duty triggered by Shelby Williams filing for bankruptcy to "Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation[.]" N.C. Gen. Stat. § 97-133(a)(7).

potential claim against CFG—and specifically is a lump sum payment not tied to any death benefit—and the Commission expressly approved the agreement allowing Plaintiff to pursue claims against the Association.

Thus, the Association is properly a party to Plaintiff's claim for death benefits. Therefore, the Commission erred by dismissing Plaintiff's claim against the Association. Consequently, the Opinion and Award should be reversed and remanded to the Commission for further proceedings to establish the Association's liability, if any, for Plaintiff's claim.

H/S NEW BERN, LLC, PLAINTIFF
v.
FIRST BERKSHIRE PROPERTIES, LLC, DEFENDANT

No. COA24-173

Filed 4 June 2025

Trespass—recurring trespass—stormwater runoff into retention pond—adjacent retail properties—nominal damages affirmed—removal of all impervious surfaces reversed

In an appeal and a cross-appeal arising from trial court orders entered in an action brought by plaintiff (the owner of a retail property) against defendant (the owner of an adjacent retail property) for trespass based on stormwater runoff from defendant's tract flowing into a retention pond on plaintiff's tract, the appellate court: (1) affirmed the judgment awarding plaintiff only $1,000 in nominal damages for defendant's recurring trespass because plaintiff failed to present evidence supporting compensatory damages—such as diminished rental value due to defendant's use of the pond or the costs to restore or repair the pond—and did not seek punitive damages; but (2) reversed one section of a separate order—requiring defendant to remove all impervious surfaces from its property—because there was insufficient evidence showing that such action was appropriate to address the recurring trespass.

Appeal by plaintiff from judgment entered 29 May 2023 and cross-appeal by defendant from order entered 21 August 2023, both by Judge Joshua W. Willey, Jr., in Craven County Superior Court. Heard in the Court of Appeals 29 January 2025.

Hull Property Group, LLC, by John M. Markwalter, and Davis Hartman Wright PLLC, by I. Clark Wright, Jr., for plaintiff-appellant/cross-appellee.

White & Allen, P.A., by John P. Marshall, for defendant-appellee/cross-appellant.

DILLON, Chief Judge.

Defendant First Berkshire Properties, LLC, and Plaintiff H/S New Bern, LLC, own adjacent retail properties that have historically been part of the same shopping center. Each has appealed from separate orders entered following a bench trial.

Plaintiff brought this action alleging Defendant was essentially trespassing based on stormwater runoff from Defendant's tract into a retention pond located on Plaintiff's tract. Plaintiff appeals from a judgment entered at the conclusion of the trial awarding it only $1,000.00 in nominal damages for Defendant's trespass.

Defendant appeals from a separate order requiring Defendant to build a stormwater retention pond on its own land.

I. Background

Plaintiff and Defendant own adjacent tracts that were developed decades ago by their predecessors in interest as part of the same shopping complex. Plaintiff owns a 34.45-acre parcel containing the New Bern Mall. Defendant owns a 5.183-acre parcel, upon which a K-Mart store was developed immediately adjacent to the Mall. Defendant's parcel is surrounded by Plaintiff's parcel.

In the late 1970s, the parties' predecessors in interest entered into a Two-Party Construction, Operation and Reciprocal Easement Agreement (the "COREA") as the Mall and K-Mart were being developed.

Pursuant to the COREA, portions of both Plaintiff's Mall parcel and Defendant's K-Mart parcel were to be developed and used as roads for ingress and egress from the public road and as parking lots and walkways, to be available for use by *all* shoppers. (That is, K-Mart shoppers could use the portion of the parking lot located on the Mall parcel, and vice versa.) Also, a portion of Plaintiff's parcel was developed as a retention pond to capture stormwater runoff from *both* Plaintiff's Mall parcel and Defendant's K-Mart parcel.

Under the COREA, Plaintiff was obligated to maintain *all* such "common" areas on both parcels *in exchange for* Defendant and other property owners paying Plaintiff a monthly fee (the "Common Area Provision"). Under the terms of the COREA, the exterior common area included all retention ponds.

By its terms, the COREA expired in September 2019 and was not renewed.

Plaintiff commenced this action in 2019 seeking, in relevant part, damages for trespass based on the stormwater from Defendant's parcel that continued to flow onto Plaintiff's tract and into Plaintiff's retention pond after Defendant's contractual right to use the pond under the COREA had terminated.

During the litigation, Defendant admitted to the trespass, though Defendant disagreed as to the amount of damages Plaintiff was seeking for the trespass. Also, Defendant consented to an order being entered directing it to develop a retention pond on its own tract to handle the stormwater accumulating on Defendant's tract.

In May 2023, at the conclusion of the bench trial, the trial court entered its judgment awarding Plaintiff $1,000.00 in nominal damages for trespass for Defendant's unauthorized use of Plaintiff's stormwater retention pond. The trial court indicated that it would enter a separate order concerning Defendant's obligation to take action to handle the stormwater accumulating on Defendant's tract. Plaintiff noticed its appeal from the May 2023 judgment, based on the small verdict.

In August 2023, after Plaintiff noticed its appeal from the May 2023 judgment, the trial court entered its separate order, directing Defendant to take certain actions on its land to handle accumulating stormwater. Defendant separately noticed its appeal from that August 2023 order.

II. Analysis

In this opinion, we address both Plaintiff's appeal and Defendant's cross-appeal in turn below.

A. Plaintiff's Appeal

Plaintiff appeals from the May 2023 judgment in which the trial court awarded a mere $1,000.00 in nominal damages for Defendant's admitted trespass based on Defendant's continued reliance on the retention pond on Plaintiff's tract to handle the stormwater from Defendant's tract.

On appeal, Plaintiff argues the trial court erred in relying on *Bishop v. Reinhold*, 66 N.C. App. 379 (1984), because *Bishop* dealt with a

continuing trespass, whereas the trespass here is an intermittent/renewing/recurring trespass. *See Galloway v. Pace Oil Co.*, 62 N.C. App. 213, 217 (1983) ("[I]f water is not diverted to a person's land so that it is permanently there, it is not a continuing trespass."); *Duval v. Atl. Coast Line R.R. Co.*, 161 N.C. 448, 449 (1913) ("The injury caused by wrongfully ponding or diverting water on the land of another, causing damage, is regarded as a renewing rather than a continuing trespass.").

Because the present case deals with a *recurring* trespass, Plaintiff argues the trial court should have measured damages according to other cases that dealt with recurring trespasses, namely *Phillips v. Chesson*, 231 N.C. 566 (1950), and *Casado v. Melas Corp.*, 69 N.C. App. 630 (1984). However, those cases are not clear as to how to measure damages for recurring trespasses. In *Phillips*, our Supreme Court stated that damages for recurrent trespasses should *not* be measured based on diminution in market value, but the Court declined to instruct as to how damages for recurring trespasses *should* be measured. 231 N.C. at 571. Rather, the Court stated that "[v]arious other rules are applied, such as [1] diminished rental value, [2] reasonable costs of replacement or repair, or [3] restoring the property to its original condition with added damages for other incidental items of loss[.]" *Id.*

Here, Plaintiff failed to present evidence for any of these potential measurements. Plaintiff put on no evidence of diminished rental value due to Defendant's use of the pond. And Plaintiff similarly failed to present evidence of the costs to replace or repair the pond or restore the pond to its original condition. We note the following finding of fact by the trial court:[1]

> Photographic evidence established the existence of damage to pavement and curbing as well as minor erosion around the pond. However, Plaintiff failed to establish a causal relationship between the damage and Defendant's trespass. The damage was no worse than in other areas of [the road bordering the retention pond] and the pond which were prone to flooding. Moreover, even if a causal relationship could be established, Plaintiff failed to offer any evidence of the cost of the repairs shown in the photographs.

1. When a party appeals the trial court's findings of fact from a bench trial, the contested findings are conclusive on appeal if supported by any competent evidence. *See Cherry Cnty. Org. v. Sellars*, 381 N.C. 239, 251-52 (2022) (citation omitted). We conclude this finding of fact is supported by competent evidence and, thus, conclusive.

Under a theory that it would take a one-acre stormwater retention pond to retain the surface water generated by Defendant's Parcel, Plaintiff offered evidence showing the rental value of *one acre of Plaintiff's undeveloped real property within Plaintiff's Parcel*. But that evidence is not relevant to the damages issue here. Here, the question is the rental value of the property actually occupied—not the rental value of a hypothetical new property. It is Plaintiff's burden to show how it was damaged, which Plaintiff failed to do here. *See Olivetto Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 547 (1987). Accordingly, the trial court only awarded nominal damages.

Plaintiff did attempt to put on evidence, including expert testimony, to prove its damages and argues on appeal that the trial court erred in not allowing much of this into evidence. Specifically, Plaintiff attempted to offer evidence that Defendant would need a one-acre retention pond to handle its stormwater, that the value of one acre of land was about $116,700.00; that it would cost $750,000.00 to construct a one-acre retention pond to handle stormwater; and that it would cost about $2,700.00 per month to rent an acre of land. However, none of this evidence is relevant to establish Plaintiff's *compensatory* damages: The evidence does not show the "diminished rental value" of *Plaintiff's* tract caused by Defendant's use of Plaintiff's retention pond; the "reasonable costs of . . . repair" for damage to Plaintiff's retention pond caused by Defendant's stormwater runoff; or the cost to "restor[e] [Plaintiff's] property to its original condition[.]" *Phillips*, 231 N.C. at 571.

That is not to say that Plaintiff's evidence would not be relevant to establish Defendant's liability for *punitive* damages if Plaintiff otherwise showed it was entitled to an award of punitive damages. Indeed, one aspect of property ownership is the right to exclude others from its use. *See Hildebrand v. S. Bell Tel. & Tel. Co.*, 219 N.C. 402, 408 (1941) (recognizing the right to exclude as an integral aspect of property ownership). And evidence of what Defendant would have to pay to develop or rent its own retention pond is evidence of the minimal punitive damage award which would deter Defendant or similar parties in Defendant's position from trespassing. For instance, in a case studied by many first-year law students, the Wisconsin Supreme Court upheld a jury's punitive award of $100,000.00 against a defendant who trespassed across the plaintiff's property to deliver a mobile home to another property to avoid a more costly delivery route, reasoning:

> [The defendant's] intentional trespass reveals an indifference and a reckless disregard for the law, and for the rights of others. . . . We are further troubled by [the defendant's]

> utter disregard for the rights of [the plaintiff]. Despite numerous unambiguous refusals by [the plaintiff] to allow [the defendant] access to their land, [the defendant] delivered the mobile home across [the plaintiff's land].
>
> Furthermore, . . . [the defendant] acted deviously. [After repeated assuring the plaintiff that it would not trespass to deliver the mobile home, the defendant's manager told his employees] to use any means to deliver the mobile home. . . .
>
> We feel certain that the $100.000 [punitive damage award, notwithstanding the fact that the plaintiff suffered only nominal damages otherwise] will serve to encourage [the defendant to obey the law in the future] by removing the profit from the intentional trespass.

Jacque v. Steenberg Homes Inc., 563 N.W.2d 154, 164–65 (Wisc. 1997).

In North Carolina, our General Assembly has provided that punitive damages may be awarded "in an appropriate case . . . to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C.G.S. § 1D-1. And our Court, quoting our Supreme Court, has held that an award of punitive damages is appropriate based on a trespass claim " 'where the wrong is done willfully or under circumstances of rudeness, oppression or in a manner which evinces a reckless and wanton disregard of plaintiff's rights[.]' " *Huberth v. Holly*, 120 N.C. App. 348, 355 (1995) (quoting *Van Leuven v. Akers Motor Lines, Inc.*, 261 N.C. 539, 546 (1964)).

In this present case, Plaintiff did seek punitive damages. However, the trial court made no award for punitive damages. And Plaintiff has made no argument on appeal that it was entitled to any punitive damages award. Accordingly, we hold that the trial court did not reversibly err in not considering the evidence of damages it sought to offer. And we affirm the May 2023 judgment awarding Plaintiff $1,000.00 in nominal damages.

A. Defendant's Cross-Appeal

During the trial, Defendant represented to the trial court that it would begin the process of constructing a stormwater retention pond on its own tract and would take any other necessary actions as soon as reasonably possible. Defendant stated that it would be willing to join in a consent order; however, Plaintiff and Defendant failed to reach any definitive agreement. In August 2023, after Plaintiff had noticed an appeal from the May 2023 judgment and following a hearing regarding

injunctive relief, the trial court entered an order titled "Order Addressing Injunctive Relief." This was not a consent order. One provision in the order requires Defendant to remove *all existing impervious surfaces* on its property and plant suitable grass cover within forty-five days. Defendant appeals this provision.

One could argue that the trial court lacked jurisdiction to enter the August 2023 order, as Plaintiff had already noticed an appeal from the May 2023 judgment. And, normally, the notice of an appeal divests the trial court of jurisdiction to do anything. *See Bower v. Hodge Motor Co.*, 292 N.C. 633, 635 (1977). However, our Court has held that an appeal from a non-appealable order does not divest the trial court from acting in the matter. *RPR & Assocs., Inc. v. Univ. of N. Carolina-Chapel Hill*, 153 N.C. App. 342, 347 (2002).

Here, Plaintiff's appeal was from an interlocutory judgment, as the trial court had indicated that it was still to rule on whether to grant injunctive relief. Therefore, based on our Court's decision in *RPR & Assocs.*, we must conclude that the trial court had jurisdiction to enter the August 2023 order.

Turning to the merits of Defendant's appeal from the August 2023 order, Defendant only challenges the portion of the order (paragraph 2 of that order) requiring it to remove all existing impervious surfaces on its parcel and plant suitable grass cover on the entire parcel. Defendant has not appealed the other provisions in that order which essentially direct Defendant to take action to build features on its property preventing its stormwater from escaping onto Plaintiff's property. After careful review of the record, we agree with Defendant that the trial court erred in requiring Defendant to remove all its impervious surfaces, as there was insufficient evidence showing that such action was appropriate. Accordingly, we reverse paragraph 2 of the August 2023 order but affirm it in all other respects.

III. Conclusion

We affirm the trial court's May 2023 judgment. We affirm in part and reverse in part the trial court's August 2023 order.

AFFIRMED IN PART; REVERSED IN PART.

Judges STROUD and ZACHARY concur.

IN RE B.B.A.

[299 N.C. App. 179 (2025)]

IN THE MATTER OF B.B.A.

No. COA24-951

Filed 4 June 2025

Termination of Parental Rights—termination not in juvenile's best interest—father thwarted by adoption agency—no abuse of discretion

In a termination of parental rights proceeding involving a mother who relinquished her parental rights to place her infant for adoption and a father who wished to raise the child, the district court did not abuse its discretion in determining that termination of the father's parental rights was not in the child's best interest, even though grounds existed that would support termination (the father had not legitimized the child or established paternity prior to the filing of a petition by an adoption agency). The court's unchallenged dispositional findings of fact were that the father expressed his desire for custody before the child's birth, made continuous efforts to obtain custody and prevent the child's adoption, would be a great father, had a plan of care for the child, and had a strong support system to help him raise the child; moreover, it was appropriate for the court to consider that grounds existed that would support termination due to factors that were largely outside of the father's control—including efforts by petitioner adoption agency to thwart the father's attempts to gain custody.

Appeal by Petitioner from Order entered 15 July 2024 by Judge Ashleigh S. Parker in Wake County District Court. Heard in the Court of Appeals 22 April 2025.

Heyward Wall Law, P.A., by Heyward G. Wall, for Petitioner-Appellant.

Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for Respondent-Appellee Father.

No brief filed for Guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Amazing Grace Adoptions (Petitioner) appeals from an Order denying its Petition for Termination of Respondent-Father's parental rights to B.B.A.[1] The Record before us tends to reflect the following:

Respondent-Father and Respondent-Mother began a relationship together in 2022.[2] At that time, Respondent-Father and Respondent-Mother both lived in California. Respondent-Mother later joined the military; Respondent-Father remained in California. Respondent-Mother learned she was pregnant in January or February 2023, while she was at a military "schoolhouse" in Florida. Respondent-Mother informed Respondent-Father of her pregnancy and initially indicated she was considering an abortion. Later, Respondent-Mother told Respondent-Father she wanted to give the child up for adoption. Respondent-Father opposed putting the child up for adoption, instead desiring to raise the child himself.

Respondent-Father offered to support Respondent-Mother and expressed a desire to be at the hospital when the baby was born. Respondent-Father inquired about the baby's due date and gender, but Respondent-Mother would not give him the information—outside of an "estimate" the child would be born in July or August. In March 2023, Respondent-Mother gave Respondent-Father Petitioner's contact information—the adoption agency she was working with, located in Raleigh, North Carolina. Soon after, Respondent-Mother began ignoring Respondent-Father's attempts to contact her.

On or about 9 March 2023, Respondent-Father contacted Petitioner and spoke with Respondent-Mother's pregnancy counselor. Respondent-Mother had informed the counselor Respondent-Father was the child's biological father, but the counselor refused to give Respondent-Father any information because she was "bound by confidentiality." Respondent-Father was adamant he did not want the child to be adopted, and the pregnancy counselor told him he would "have to get an attorney[.]"

Respondent-Father traveled to Raleigh, where he remained for approximately the next seven months, to continue his efforts to obtain custody of the unborn baby. On 1 May 2023, Respondent-Father went to Petitioner's office, waited outside, and called about speaking in person

1. The parties did not agree on a pseudonym for the minor child.

2. Respondent-Mother is not a party to this appeal.

to someone about the baby. Petitioner's staff indicated they were "busy" and there was no one who could help Respondent-Father. The following day, Respondent-Father returned to Petitioner's office but was told the staff "were in meetings all day" and there was no one available to talk to him. While Respondent-Father was waiting outside, Petitioner's director called him and threatened to "call the cops" on him.

After Petitioner continued to refuse to provide Respondent-Father with information, Respondent-Father hired a lawyer. Respondent-Father's counsel was also unsuccessful in obtaining information from Petitioner. Respondent-Father's counsel was told it was not possible to file a paternity action or request custody of the child until after the child was born.

When the baby was born on 30 June 2023, Respondent-Mother did not tell Respondent-Father. Respondent-Mother executed a relinquishment of her rights to the minor child the following day, on 1 July 2023. The minor child was placed with an adoptive family on 2 July 2023. That same day, Respondent-Father went to Petitioner's office and spoke to Respondent-Mother's pregnancy counselor, who did not tell him the baby had been born. Respondent-Father spoke to Petitioner's director on 3 July 2023, who also did not tell Respondent-Father the baby had been born. "[A]lmost a month" later, when Respondent-Father learned about the minor child's birth and placement with an adoptive family, he requested and was denied visitation.

On 3 July 2023, Petitioner filed a Petition for termination of Respondent-Father's parental rights. In the Petition, Petitioner alleged Respondent-Father's parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(5), in that Respondent-Father had not legitimated the child or established paternity. The Petition further alleged it was in the minor child's best interest that Respondent-Father's parental rights be terminated because Respondent-Mother believed it was in the child's best interest, the child was less than one month old, the child had no bond with Respondent-Father, the child had bonded with his adoptive parents, and terminating Respondent-Father's parental rights would aid in the successful adoption of the child by his adoptive parents. On 25 October 2023, Respondent-Father filed an Answer and Counterclaim for Paternity, Legitimation, and Temporary and Permanent Child Custody. Results of the subsequent paternity testing confirmed Respondent-Father is the minor child's biological father.

The hearing on the Petition was held on 13 June 2024. At the time of the hearing, Respondent-Father still had not met the minor child. At the hearing, the Guardian ad litem testified he thought Respondent-Father

"could accommodate having a child living with him and take care of the child." Respondent-Mother testified she believed the adoptive family would be "better" caretakers, but there was nothing to make her think Respondent-Father would not be a good father. Respondent-Father testified he had a plan for the child's care and family to support him. Respondent-Father admitted he did not file for legitimation or paternity prior to the filing of the Petition.

On 15 July 2024, the trial court entered an Order concluding grounds existed to terminate Respondent-Father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(5). The trial court further concluded it was not in the best interest of the minor child to terminate Respondent-Father's parental rights, and "it is absolutely in the best interest for the minor child to be in the care, custody, and control of his father and to have the opportunity to bond with his paternal biological family." On 13 August 2024, Petitioner timely filed Notice of Appeal.

Issue

The issue on appeal is whether the trial court abused its discretion in determining it was not in the juvenile's best interest to terminate Respondent-Father's parental rights.

Analysis

"A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage." *In re D.R.B.*, 182 N.C. App. 733, 735, 643 S.E.2d 77, 79 (2007). "In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B-1111(a) exists." *Id.*

"If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. Gen. Stat. § 7B-1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child. The standard of review of the dispositional stage is whether the trial court abused its discretion in terminating parental rights." *In re C.C.*, 173 N.C. App. 375, 380-81, 618 S.E.2d 813, 817 (2005) (citation omitted). " 'Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *In re C.J.H.*, 240 N.C. App. 489, 492-93, 772 S.E.2d 82, 86 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

"The trial court's dispositional findings of fact are reviewed under a competent evidence standard." *In re K.N.K.*, 374 N.C. 50, 57, 839

S.E.2d 735, 740 (2020) (citations and quotation marks omitted); *see also Stephens v. Stephens*, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011) ("As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." (citation and quotation marks omitted)). Unchallenged findings of fact are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

The parties do not challenge the trial court's determination grounds existed to terminate Respondent-Father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(5). Rather, Petitioner contends the trial court abused its discretion by declining to terminate those rights.

When determining whether termination of parental rights is in the best interest of a juvenile, N.C. Gen. Stat. § 7B-1110(a) requires the trial court consider:

> (a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. . . . In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2023). "[T]he language of [N.C. Gen. Stat. § 7B-1110(a)] requires the trial court to consider all six of the listed factors, and . . . any failure to do so would constitute an abuse of discretion." *In re D.H.*, 232 N.C. App. 217, 220-21, 753 S.E.2d 732, 735 (2014) (quotation marks omitted). However, "the court must enter written

findings in its order concerning only those factors that are relevant." *Id.* (citations and quotation marks omitted).

It is well established that "[a]fter the trial court has determined grounds exist for termination of parental rights at adjudication, the court is required to issue an order of termination in the dispositional stage, *unless it finds the best interests of the child would be to preserve the parent's rights*." *In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001) (emphasis added) (citation omitted). Here, the trial court concluded it was in the minor child's best interest to uphold Respondent-Father's parental rights:

> 4. That after considering all relevant factors for best interest and weighing them accordingly, it is not in the best interest of the minor child that the parental rights of the Respondent Father . . . be terminated.
>
> 5. That the relevant consideration is that it is absolutely in the best interest for the minor child to be in the care, custody, and control of his father and to have the opportunity to bond with his paternal biological family.

The trial court further concluded "Respondent Father has a paramount constitutional right to the care, custody, and control of his child and has not acted contrary to that right."

In support of its Conclusions, the trial court made the following Findings:

> 20. The Mother sought out the adoption agency despite the request from the Father to allow him to keep the child.
>
> 21. Respondent Father learned of the mother's intent to place the child for adoption when he received a packet from the Adoption Agency and then called and spoke with the Agency. He told the agency as early as April/May 2023 that he did not want his minor child to be adopted.
>
> 22. Respondent Father then flew from Los Angeles, California, to North Carolina several times to try to figure out what was happening with the adoption agency and how he could prevent the adoption of the minor child from happening.
>
> 23. Respondent Father even moved to North Carolina for seven months and hired an attorney to try and stop his child from being adopted.

24. Despite several attempts by Respondent Father and his attorney, the Adoption Agency would not speak with Respondent Father nor his attorney regarding the minor child, per their "policy" and the Agency's duty of confidentiality to pregnant clients. The Adoption Agency also would not speak with Respondent Father because he was hanging around their parking lot, the child had not yet been born, and they did not have any real information to give the Respondent Father. The Adoption Agency even threatened to have him trespassed because he sought answers on how to stop his child from being adopted.

25. The Adoption Agency ignored Respondent Father's and his attorney's requests to establish a bond with the minor child as they refused to let the Respondent father meet and spend time with the minor child.

26. Respondent Father has tried everything he can to create a bond with the minor child, including asking for visitation, but has been thwarted by the Adoption Agency in his attempts to create a bond with the minor child.

27. The Adoption Agency's only reason for denial of his attempts is that it is not in their "policy" to speak to or allow Respondent Father communication or visitation with the minor child.

28. An adoption agency does not have a carte blanche right to terminate a parent's parental rights simply because the child has been placed with a prospective adoptive family.

29. Respondent father was not afforded the opportunity to send the minor child gifts or financial assistance because the Adoption Agency would not accept them.

30. Respondent father has not been afforded an opportunity to foster the bond [between] a biological parent and child, despite his multiple efforts.

31. Mother stated that there was nothing wrong with Respondent Father and that while he would be a good father to their son, the family that she "chose" for him would give him a better life.

32. Respondent Father has a plan for the minor child and a strong support system of family members who reside with him and would assist him with his child.

> 33. The Guardian ad Litem said the child would do well in either home and could not make a determination on who would be in the child['s] best interest to remain with.

Petitioner challenges Findings 21, 28, and 29 as unsupported by the evidence.[3] Even assuming, without deciding, each of the challenged Findings is unsupported, the remaining unchallenged Findings are sufficient to support the trial court's Conclusions. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58-59.

The trial court's unchallenged Findings show Respondent-Father desired custody of the minor child before the minor child was born, made continuous efforts to obtain custody of the minor child and prevent the child's adoption, "would be a good father[,]" has a plan of care for the minor child, and has a "strong support system" to help him raise the minor child. The trial court considered—as it was allowed to do—that the reason grounds existed under N.C. Gen. Stat. § 7B-1111(a)(5) for termination of Respondent-Father's parental rights was largely due to circumstances outside Respondent-Father's control. *See Stephens*, 213 N.C. App. at 503, 715 S.E.2d at 174 ("[A]ny evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court . . . [because] trial courts are vested with broad discretion in child custody matters." (quotation marks and citations omitted)). The trial court found Respondent-Father had not acted contrary to his constitutionally protected right to the care, custody, and control of the minor child.[4] Accordingly, the trial court appropriately concluded it would not be in the minor child's best interest to terminate Respondent-Father's parental rights. *See Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 266 (2003) ("[A]bsent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail." (citation omitted)).

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3. Petitioner also challenges adjudicatory Finding 8. This Finding concerns whether grounds to terminate Respondent-Father's parental rights exist; because the parties do not challenge the trial court's Conclusion as to grounds for termination, Finding 8 is irrelevant to our analysis. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58-59 ("[W]e review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." (citation omitted)).

4. Although the trial court labeled this determination a Conclusion of Law, it is more properly characterized as a Finding of Fact, and thus we review it as such. *See Walsh v. Jones*, 263 N.C. App. 582, 589, 824 S.E.2d 129, 134 (2019) ("The labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." (citation and alteration omitted)).

Petitioner contends Respondent-Father's right to parent his child is irrelevant to the minor child's best interest and the trial court's Conclusions improperly favor Respondent-Father's interests over those of the minor child. In support of this assertion, Petitioner cites *In re Blackburn* for the premise that "[i]n all cases where the interests of the child and those of the child's parents or guardians are in conflict, . . . action which is in the best interests of the child should be taken." 142 N.C. App. at 612, 543 S.E.2d at 910 (citation omitted); *see also* N.C. Gen. Stat. § 48-1-100(c) (2023) ("Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor."); *id.* § 7B-1100(3) (2023) ("Action which is in the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile's parents or other persons are in conflict.").

Here, however, there is no evidence Respondent-Father's and the minor child's interests conflict; nor is there evidence indicating allowing Respondent-Father to bond with the minor child is not in the minor child's best interest. Rather, the Record tends to show terminating Respondent-Father's parental rights would be an unnecessary severance of Respondent-Father's relationship with the minor child. *See* N.C. Gen. Stat. § 7B-1100(2) (2023) (recognizing "the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents.").

Moreover, we cannot say Respondent-Father's right to the care and custody of the minor child is irrelevant to the minor child's interests. As the Supreme Court of the United States in *Lehr v. Robertson* recognized:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and *make uniquely valuable contributions to the child's development*.

463 U.S. 248, 262, 103 S. Ct. 2985, 2993, 77 L. Ed. 2d 614 (1983) (emphasis added) (footnote omitted); *see also Owenby*, 357 N.C. at 145, 579 S.E.2d at 266 (recognizing the presumption a fit parent will act in the best interest of their child). While upholding parental rights is not always in a juvenile's *best* interest, having a relationship with his or her biological parents is certainly relevant to a juvenile's interests. And here, as the trial court recognized, there was no evidence having a relationship with Respondent-Father would not be in the minor child's best interest.

Petitioner further makes the unsupported assertion the trial court acted on a belief a parent's constitutional right to custody and control of their child is "unbreakable" and "absolute." Nowhere in its Order, nor in the transcript of the hearing, nor anywhere else in the Record does the trial court purport to hold such a belief. To the contrary, the trial court concluded it was not in the minor child's best interest to terminate Respondent-Father's parental rights in part because Respondent-Father had "not acted contrary to" those rights. Thus, the trial court clearly recognized those rights were not absolute.

Lastly, Petitioner argues the trial court's decision means "[e]ven the most disinterested biological fathers could prevent adoptions merely by stating their opposition." This argument is a gross manipulation of the facts at bar. The trial court's unchallenged Findings do not indicate Respondent-Father is a "disinterested" parent, nor that Respondent-Father merely "announced" he wanted to preserve his parental rights. Quite the opposite, the trial court's Findings show Respondent-Father expressed an active desire to be involved in the minor child's life—before the minor child was born and continuing through the present. Indeed, all evidence tends to show Respondent-Father persistently advocated for his right to parent his child, including moving across the country to try to obtain custody of the minor child.

In light of the ample, competent evidence showing Respondent-Father's unwavering desire to parent his child—and the complete lack of evidence showing a relationship with Respondent-Father would not be in the minor child's best interest—we cannot say the trial court's decision to uphold Respondent-Father's parental rights was unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. *See In re C.J.H.*, 240 N.C. App. at 492-93, 772 S.E.2d at 86. Thus, the trial court properly concluded termination of Respondent-Father's parental rights was not in the minor child's best interest. Therefore, the trial court did not err in denying the Petition.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order.

AFFIRMED.

Judges STROUD and TYSON concur.

IN RE M.L.H.

[299 N.C. App. 189 (2025)]

IN THE MATTER OF M.L.H.

No. COA24-520

Filed 4 June 2025

Child Abuse, Dependency, and Neglect—no-merit brief—permanency planning order—reunification efforts ceased—guardianship awarded to foster parents

In a child neglect matter, the trial court's permanency planning order ceasing reunification efforts with respondent-father and granting permanent guardianship of the minor child to the child's foster parents was affirmed where, after respondent-father's counsel filed a no-merit brief identifying only one potential issue and respondent-father did not file a pro se brief, the appellate court conducted an independent review of the record and concluded that the trial court made the statutorily required findings and properly considered respondent-father's decision to voluntarily return to incarceration rather than remain on parole and that the trial court did not abuse its discretion in ceasing reunification efforts or in granting guardianship to the foster parents based on the minor child's best interest.

Appeal by Respondent-Father from order entered 14 March 2024 by Judge Pauline Hankins in Brunswick County District Court. Heard in the Court of Appeals 14 January 2025.

Batch, Poore & Williams, PC, by Sydney J. Batch, for Respondent-Appellant-Father.

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

Wake Forest University School of Law, by John J. Korzen, for Other-Appellees.

Campbell University School of Law, by Robert C. Montgomery, for the Guardian ad Litem.

CARPENTER, Judge.

Respondent-Father appeals from the trial court's 14 March 2024 permanency-planning order (the "Order") granting permanent guardianship of his son, M.L.H. ("Michael") to Michael's foster family (collectively, the "Sullivans").[1] Respondent-Father's appointed appellate counsel filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. After careful review, we affirm.

I. Factual & Procedural Background

Michael was born in September 2020 and lived with his biological mother, who is not a party to this appeal. On 8 September 2020, the Brunswick County Department of Social Services ("DSS") received a family assessment report alleging Michael was neglected, tested positive for THC at birth, and was a substance affected infant. The report also alleged Michael's mother had untreated substance abuse issues.

On 9 September 2020, a social worker responded to the report and met with Michael's family at their home. Michael and his mother were living in a home with several individuals, including Michael's maternal aunt, maternal aunt's boyfriend, boyfriend's brother, and the brothers' mother. When the social worker arrived, she observed Michael lying on a pull-out couch surrounded by several pillows, blankets, bottles, and bibs. The social worker identified this as an inappropriate sleeping environment that posed a risk to Michael's safety. During the visit, Michael's mother told the social worker that she used marijuana while pregnant with Michael, was currently using marijuana twice daily, and was not currently taking her medication for her mental health conditions. Michael's mother agreed, pursuant to a safety plan, that she would not use substances while caring for Michael and that Michael would be provided a sober caregiver. Before leaving, the social worker provided Michael's mother with a pack-n-play and safe-sleeping recommendations for Michael.

On 29 September 2020, DSS received a second family assessment report regarding Michael, which alleged continued neglect, improper supervision, substance abuse, and an injurious environment. Specifically, the report alleged Michael's mother placed Michael in the same inappropriate sleeping environment observed during the initial visit, failed to respond to Michael's feeding cries at night, and placed Michael in a car seat during the night on more than one occasion. Following the report, the social worker responded to the home a second time. During this

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

visit, Michael's mother, Michael's maternal aunt, and their respective boyfriends, all admitted to the allegations in the report.

On 30 September 2020, DSS filed a petition alleging Michael was a neglected and dependent juvenile. Although paternity had not yet been established, the petition listed an individual ("putative father") as Michael's father based on Michael's mother's belief regarding paternity. That same day, the trial court placed Michael in the custody of DSS, who temporarily placed Michael with the Sullivans.

On 12 November 2020, the trial court conducted an adjudication hearing. At the hearing, Michael's mother and putative father admitted that Michael tested positive for marijuana at birth, lacked proper care and supervision, lived in unstable housing, and was often placed in unsafe conditions. After DSS voluntarily dismissed the dependency allegation, the trial court entered an order adjudicating Michael as a neglected juvenile. On 3 December 2020, the trial court conducted a disposition hearing where it ordered that Michael remain in DSS custody and continue living with the Sullivans. Additionally, the trial court ordered DSS to continue reunification efforts with Michael's mother and putative father.

On 20 January 2021, the trial court conducted a review hearing. Prior to the hearing, putative father participated in DNA testing which revealed he was not Michael's biological father. Consequently, the trial court removed putative father as a party and ordered that DSS continue reunification efforts with Michael's mother. After several permanency-planning hearings, Michael's mother relinquished her parental rights as to Michael on 12 October 2022.

On 10 January 2023, DSS filed a motion to establish paternity after Michael's mother named Respondent-Father as a potential father. The motion indicated that Respondent-Father was incarcerated in Illinois and unable to participate in DNA testing without a court order. On 2 February 2023, following a hearing on the matter, the trial court ordered that Respondent-Father participate in DNA testing. Respondent-Father complied, and the DNA testing indicated a 99.99% probability that Respondent-Father was Michael's biological father. Accordingly, on 6 July 2023, the trial court adjudicated Respondent-Father as Michael's biological father.

On 31 July 2023, a notice of hearing was mailed to Respondent-Father. On 16 August 2023, the trial court conducted the first permanency-planning hearing since Respondent-Father was found to be Michael's biological father. Respondent-Father did not participate in the hearing, but his

attorney was present and offered a proffer in that Respondent-Father was presently incarcerated. Respondent-Father's attorney informed the trial court that Respondent-Father was scheduled to be released to a halfway house on 22 August 2023 where he would remain for two months. Respondent-Father planned to live with his mother in Illinois upon his release from the halfway house.

The trial court entered a permanency-planning order on 11 October 2023, making several findings regarding Michael's foster placement with the Sullivans. Specifically, the trial court found that Michael had been living with the Sullivans since he was twenty-nine days old and was "thriving." The trial court also found that the Sullivans were "the only home and family [Michael] knows." The trial court adopted a primary plan of reunification with Respondent-Father and a secondary plan of guardianship with the Sullivans.

On 11 September 2023, Respondent-Father executed an out-of-home services agreement with DSS that addressed mental health, employment, and housing. Then, on 26 September 2023, the trial court conducted a second permanency-planning hearing. Respondent-Father attended the hearing via Webex and testified. He informed the trial court that he had been released from incarceration and was living in a halfway house in Illinois as a condition of his parole, with his release contingent on his good behavior. The trial court entered a permanency-planning order on 30 November 2023, finding, again, that Michael was "thriving" with the Sullivans. The trial court maintained the primary plan of reunification with Respondent-Father and secondary plan of guardianship with the Sullivans.

In December 2023, however, Respondent-Father voluntarily returned to incarceration rather than remain on parole. According to Respondent-Father, he chose to return to incarceration because his parole officer was "writing him up for the littlest things."

On 22 January 2024, the trial court conducted another permanency-planning hearing. Respondent-Father appeared via Webex and testified that he voluntarily returned to incarceration and would be released in July 2024. Respondent-Father further testified that upon his release from incarceration he would be living with his significant other and that he hoped to be reunified with Michael even though he had never met him.

On 14 March 2024, the trial court entered the Order finding Respondent-Father acted in a manner inconsistent with Michael's health and safety, failed to make any measurable progress toward his case plan or reunification, and voluntarily returned to incarceration at a time when

it was critical for him to work on his case plan goals. The trial court further found that Respondent-Father demonstrated a disregard for Michael's best interest by voluntarily returning to incarceration rather than remaining in the halfway house where he could have made progress toward his case plan goals. The trial court found that reunification with Respondent-Father within the next six months was not possible and would clearly be unsuccessful due to Respondent-Father's decision to return to incarceration until July 2024. Accordingly, the trial court ceased reunification efforts and awarded guardianship of Michael to the Sullivans. The trial court did, however, grant Respondent-Father telephone contact and supervised monthly visits with Michael upon Respondent-Father's release from incarceration. On 28 March 2024, Respondent-Father filed written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7B-1001(a)(4) (2023).

III. Analysis

Respondent-Father's appellate counsel filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure after concluding "the record contains no issues of merit on which to base an argument for relief." As required under Rule 3.1(e), counsel advised Respondent-Father of his right to file *pro se* written arguments on his own behalf with this Court and provided him with the documents necessary to do so. *See* N.C. R. App. P. 3.1(e). Respondent-Father has not submitted a written argument to this Court.

Under Rule 3.1(e), this Court conducts an independent review of the issues identified by counsel in a no-merit brief. *See In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019); N.C. R. App. P. 3.1(e). Respondent-Father's appellate counsel specified one issue for our independent review: whether the trial court abused its discretion by awarding guardianship of Michael to the Sullivans.

"This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "Findings of fact not challenged by [the] respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58

(2019). "We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007). "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." *In re A.H.F.S.*, 375 N.C. 503, 513, 850 S.E.2d 308, 317 (2020) (citing *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

The longstanding rule that "incarceration, standing alone, is neither a sword nor a shield[,]" is applicable in the context of this case. *See In re K.N.*, 373 N.C. 274, 282, 837 S.E.2d 861, 867 (2020) (cleaned up); *In re E.B.*, 298 N.C. App. 311, 912 S.E.2d 884 (2024) (unpublished). In the same way a parent's incarceration, on its own, "cannot serve as clear, cogent, and convincing evidence of neglect," incarceration, on its own, cannot support the trial court's decision to eliminate reunification with a parent as a primary or secondary plan. *See In re K.N.*, 372 N.C. at 283, 837 S.E.2d at 867. The degree to which a parent's incarceration supports the trial court's decision to cease reunification depends on the facts and circumstances of each case, including the length of the incarceration and, as is relevant here, whether it was undertaken voluntarily. *See id.* at 283, 837 S.E.2d at 867–68.

As a general rule, the trial court is permitted to cease reunification efforts following a permanency-planning hearing if it "makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B–906.2(b) (2023). To make such a determination, the trial court must make written findings concerning:

> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

Id. § 7B–906.2(d) (2023); *see also In re D.C.*, 275 N.C. App. 26, 29–30, 852 S.E.2d 694, 697 (2020). The trial court exercises discretion when making written findings under section 7B–906.2(b) but is required to make written findings for the factors that demonstrate the degree of a parent's

progress, or lack thereof, toward reunification. *In re L.L.*, 386 N.C. 706, 718–19, 909 S.E.2d 151, 161 (2024).

Here, the unchallenged findings support the trial court's decision to cease reunification efforts with Respondent-Father and grant guardianship of Michael to the Sullivans. In accordance with section 7B–906.2(b), the trial court found that continued reunification efforts with Respondent-Father would be "clearly futile and [] unsuccessful." *See* N.C. Gen. Stat. § 7B–906.2(b). To support this finding, the trial court made the required findings under section 7B–906.2(d) demonstrating Respondent-Father's lack of progress toward reunification. *See In re L.L.*, 386 N.C. at 718–19, 909 S.E.2d at 161.

Specifically, the trial court found that Respondent-Father made inadequate progress toward his case plan within a reasonable period of time and failed to actively participate in the plan or cooperate with the Guardian ad Litem. *See* N.C. Gen. Stat. § 7B-906.2(d)(1)–(2). The trial court also found that Respondent-Father was not consistently available to the Guardian ad Litem, despite his availability to the trial court. *See* N.C. Gen. Stat. § 7B-906.2(d)(3). Further, the trial court found that Respondent-Father acted in a manner inconsistent with Michael's health and safety, highlighting Respondent-Father's choice to return to incarceration at a time when it was critical for him to work on his case plan goals. *See* N.C. Gen. Stat. § 7B-906.2(d)(4); N.C. Gen. Stat. § 7B-906.2(b). Finally, because placement with Respondent-Father was not possible at the time of the hearing or within the following six months due to his incarceration, the trial court found that continued reunification efforts were inconsistent with Michael's need for a safe and permanent home. *See* N.C. Gen. Stat. § 7B-906.1(g); N.C. Gen. Stat. § 7B-906.2(b).

Moreover, the trial court's reliance on Respondent-Father's incarceration in the Order was warranted under these circumstances. *See In re K.N.*, 373 N.C. at 282, 837 S.E.2d at 867; *In re E.B.*, 298 N.C. App. 311, 912 S.E.2d 884 (2024) (unpublished). Respondent-Father's choice to return to incarceration demonstrated a lack of genuine commitment to reunification and was the ultimate manifestation of neglect. *See In re G.B.*, 377 N.C. 106, 115, 856 S.E.2d 510, 517 (2021) (explaining the father's choices while incarcerated hindered his ability to comply with his case plan resulting in the father "construct[ing] the very barriers to the achievement of his case plan goals about which now he complains"). Similarly, here, Respondent-Father created the very obstacles that possibly prevented him from achieving his case plan goals.

Thus, because the trial court made the required findings and properly considered Respondent-Father's voluntary incarceration, it did not

abuse its discretion by ceasing reunification efforts. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58.

Likewise, the trial court did not abuse its discretion by awarding guardianship of Michael to the Sullivans. *See In re D.S.A.*, 181 N.C. App. at 720, 641 S.E.2d at 22. The unchallenged findings establish Michael has been living with the Sullivans since he was twenty-nine days old and has never met Respondent-Father. Further, the findings establish that Michael is "thriving and meeting all developmental milestones" and that the Sullivans' home is the only home Michael has ever known. Finally, the Sullivans testified they understand the legal significance of guardianship, have adequate resources to continue providing proper care for Michael, and are committed to facilitating a relationship between Michael and his biological family. *See* N.C. Gen. Stat. § 7B-906.1(j) (2023) (providing that the trial court shall verify that the person being appointed guardian understands the legal significance of the appointment and will have adequate resources).

Thus, the trial court's decision to award guardianship of Michael to the Sullivans based on Michael's best interest was not "so arbitrary that it could not have been the result of a reasoned decision." *See In re A.H.F.S.*, 375 N.C. at 513, 850 S.E.2d at 317. Therefore, the trial court did not abuse its discretion by awarding guardianship of Michael to the Sullivans.

IV. Conclusion

After careful consideration of the issue presented in the no-merit brief and following our independent review of the record, we conclude the trial court made the required findings and did not abuse its discretion by ceasing reunification efforts with Respondent-Father and awarding guardianship to the Sullivans. Accordingly, we affirm the Order.

AFFIRMED.

Judges STROUD and GRIFFIN concur.

IN RE TRADE LAND CO., LLC

[299 N.C. App. 197 (2025)]

IN THE MATTER OF THE APPEAL OF

TRADE LAND COMPANY, LLC, APPELLANT

FROM THE DECISION OF THE PITT COUNTY BOARD OF EQUALIZATION AND REVIEW

No. COA24-884

Filed 4 June 2025

1. Taxation—real property—revocation of tax-deferred status—sufficiency of notice—the Machinery Act—timing provisions not implicated

In an appeal brought by a corporate landowner (appellant) before the Property Tax Commission after a county tax assessor removed eleven of appellant's parcels from the Present-Use Value tax-deferral program (upon discovering that the parcels never qualified for the program in the first place), the Commission properly affirmed the county Board of Equalization and Review's decision upholding the revocation of the parcels' tax-deferred status. Appellant contended that it did not receive proper notice of the tax assessor's decision under the Machinery Act, which required notice prior to the Board's first meeting of the year whenever a property received a new "appraisal" or "assessment." However, this timing requirement was inapplicable because appellant's parcels had not been reappraised or reassessed; rather, the tax assessor simply changed the status of appellant's already-assessed taxes from deferred to due. Thus, the notice provided to appellant was sufficient under the Act.

2. Taxation—real property—revocation of tax-deferred status—notice—statute allowing for "immaterial irregularities"—not unconstitutional

In an appeal brought by a corporate landowner (appellant) before the Property Tax Commission after a county tax assessor removed eleven of appellant's parcels from the Present-Use Value tax-deferral program, where appellant contended that it received untimely notice of the change, the Commission properly affirmed the county Board of Equalization and Review's decision (upholding the parcels' removal from the program) under N.C.G.S. § 105-394, which provides that a failure to give proper notice is an "immaterial regularit[y]" for purposes of property tax assessments. Contrary to appellant's contention, section 105-394 had not been held

unconstitutional by the Supreme Court in a case that (1) involved an as-applied rather than facial challenge to the statute, and (2) was factually distinguishable from appellant's case in that it involved a total failure to provide notice.

3. Taxation—real property—revocation of tax-deferred status —due process—actual notice and opportunity to be heard

In an appeal brought by a corporate landowner (appellant) before the Property Tax Commission after a county tax assessor removed eleven of appellant's parcels from the Present-Use Value tax-deferral program, where the county Board of Equalization and Review upheld the parcels' removal from the program, the Commission—in affirming the Board's decision—properly determined that appellant's constitutional due process rights had been adequately preserved where it received actual notice of the change in the parcels' tax status and subsequently participated at a hearing before the Board. Appellant's argument that it was provided insufficient time between the notice and the hearing to prepare its case before the Board was meritless where: appellant chose the hearing date; appellant's manager presented all the evidence appellant intended to produce at the hearing; nothing in the record indicated that appellant had sought more time to hire counsel or obtain additional evidence; appellant's argument that, had it been given more time, it could have developed a different theory of the case fell flat where the proposed theory was itself meritless; and appellant failed to show that it was harmed by the timing of the notice.

Judge FREEMAN concurring in result only.

Appeal by appellant from decision of North Carolina Property Tax Commission entered 22 March 2024. Heard in the Court of Appeals 9 April 2025.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel L. Colston, S. Leigh Rodenbough IV, and Ashley Hodges Morgan, for appellant.

Pitt County Legal Department, by R. Matthew Gibson, for appellee.

ARROWOOD, Judge.

Trade Land Company, LLC ("appellant") appeals from the decision of the North Carolina Property Tax Commission ("the Commission")

affirming the decision of the Pitt County Board of Equalization and Review ("the Board") to revoke the Present-Use Value ("PUV") status of appellant's property subject to the decision. For the following reasons, we affirm the decision of the Commission.

I. Factual Background

This case concerns the County assessor's alleged failure to provide proper notice to a corporate landowner before revoking its tax-deferred status as to certain properties it owns. The following facts are established by the Record and Transcript of the hearing before the Commission. The facts for the most part are not in dispute.

Brothers Joshua and Will Clark, along with their father Edwin, are members and managers of appellant, a limited liability company, which owns 47 tax parcels in Pitt County, North Carolina. For four years, between 2018 and 2021, appellant participated in the PUV tax-deferral program for 11 of these parcels. The PUV program allows for the appraisal of property that is used primarily for agriculture, horticulture, or forestry at that property's present use value, and for the deferral of excess taxes that would be otherwise due under the property's standard valuation. N.C.G.S. §§ 105-277.4, -277.3 (2020).

If a business entity is seeking a PUV deferment, its "principal business" must be one of the above qualifying uses. *Id.* § 105-277.2(4)(b)(1). Appellant's 11 parcels had qualifying uses; however, as its counsel conceded at the hearing before the Commission, the appellant's overall principal business did not. Therefore it is undisputed under the Record before us that these properties did not qualify for PUV treatment. Despite this fact, the Pitt County tax assessor at the time of appellant's first application to the PUV program advised one of appellant's managers that it did qualify for the program, and, following a 2021 audit, appellant was allowed continued participation on 25 January 2022.

That changed in December 2022. In August 2022, Russell Hill ("Hill") was appointed as tax assessor for Pitt County. Thereafter, when appellant sought to sell a portion of one its tax-deferred parcels, Hill began to investigate appellant's PUV qualification. As a part of his investigation, Hill discovered that appellant was primarily a real estate business. On 5 December 2022, Hill called Joshua Clark to inform him that he had determined that appellant's properties did not qualify for PUV treatment. That same day, Cynthia Moore, the Pitt County Special Property Analyst, informed appellant by letter that it did not qualify, that its 11 parcels that had previously been granted PUV status were being removed from the PUV program, and that the deferred taxes were now due. Hill emailed

Will Clark on 6 December, explaining that if he would like to appeal the revocation decision, he could either have it heard at the final meeting of the Board on 12 December, or when the Board began meeting again in the spring of 2023.

Will Clark elected to attend the 12 December hearing and offered evidence and presented arguments in support of the LLC's appeal. The Board affirmed Hill's decision to disqualify appellant from the PUV program. The LLC appealed to the North Carolina Property Tax Commission on 11 January 2023 and the appeal was heard on 10 January 2024.

At the hearing, appellant argued that it had not been provided proper notice under N.C.G.S. § 105-296(i), which requires notice prior to the Board's first meeting of the year when a property receives a new appraisal or assessment. The Commission affirmed the decision of the Board. It concluded that N.C.G.S. § 105-394 was dispositive in the matter, which defines a failure to give notice as an immaterial irregularity for purposes of tax assessment and therefore the lack of proper notice would not affect the decision of the Board. The Commission further concluded that appellant had actual notice and the opportunity to be heard before the Board. Appellant filed a notice of appeal to this Court on 18 April 2024.

II. Discussion

Appellant raises two issues on appeal: whether the Commission erred as a matter of law by relying on N.C.G.S. § 105-394(9), which appellant claims was ruled unconstitutional by the North Carolina Supreme Court; and whether the Commission erred as a matter of law in failing to apply the notice requirements of N.C.G.S. § 105-296(i). We address these arguments as follows: first, we determine whether the statutory notice requirements were met; second, even assuming these requirements were not, we answer whether the Commission reliance on N.C.G.S. § 105-394(9) was in error; and finally, we address whether the notice and opportunity to be heard that appellant received was in keeping with constitutional strictures.

A. Standard of Review

The scope of our review of a decision of the Property Tax Commission is as follows:

> So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the

> decision of the Commission, declare the decision null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions, or decisions are any of the following:
>
> (1) In violation of constitutional provisions.
>
> (2) In excess of statutory authority or jurisdiction of the Commission.
>
> (3) Made upon unlawful proceedings.
>
> (4) Affected by other errors of law.
>
> (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted.
>
> (6) Arbitrary or capricious.

N.C.G.S. § 105-345.2(b) (2023). We review questions of law *de novo*, where we freely substitute our own judgment, while issues of sufficiency of evidence are reviewed in light of the whole record. *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647 (2003). "Issues of statutory construction are questions of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511 (2010) (citation omitted).

B. Notice Under the Machinery Act

[1] This first inquiry seems simple on its face: whether appellant was provided with the proper notice required under Subchapter II of the N.C.G.S. Ch. 105, also known as the Machinery Act. However, the Machinery Act itself is a labyrinthine compilation of statutes that requires careful interpretation. Our primary purpose in this endeavor is to give effect to the legislature's intent. *First Bank v. S & R Grandview, L.L.C.*, 232 N.C. App. 544, 546 (2014). Further, "[s]tatutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each." *Williams v. Williams*, 299 N.C. 174, 180–181 (1980) (internal citations omitted).

Under the Machinery Act, when an assessor determines that property is no longer eligible for the PUV program, the assessor must provide written notice to the taxpayer as required by N.C.G.S. § 105-296(i). N.C.G.S. § 105-277.4(b1) (2020). This notice statute provides:

> Prior to the first meeting of the board of equalization and review, the assessor may, for good cause, change the appraisal of any property subject to assessment for the current year. Written notice of a change in assessment

> shall be given to the taxpayer at his last known address prior to the first meeting of the board of equalization and review.

N.C.G.S. § 105-296(i) (2024).

This notice requirement could be argued to be in conflict with the timing for losing PUV eligibility and the resultant tax bill:

> The deferred taxes for the preceding three fiscal years are due and payable in accordance with G.S. 105-277.1F when the property loses its eligibility for deferral as a result of a disqualifying event. A disqualifying event occurs when the land fails to meet any condition or requirement for classification or when an application is not approved.

N.C.G.S. § 105-277.4(b1). N.C.G.S. § 105-277.1F makes deferred taxes "due and payable *on the day* the property loses its eligibility for the deferral program as a result of a disqualifying event." (emphasis added). Therefore, as soon as land fails to meet a condition for PUV status, it is disqualified, and the deferred taxes are due the day the disqualification occurs. However, it would be impossible to follow the requirements of N.C.G.S. § 105-296(i) if the disqualifying event occurs after the first meeting of the board of equalization and review, therefore creating an apparent conflict between the statutory provisions.

However, a harmonization between these statutes is possible through reference to the definition section of the Machinery Act, and additional aspects of the PUV program. The Machinery Act defines "appraisal" as the "true value of property or the process by which true value is ascertained," while "assessment" is the "tax value of property or the process by which the assessment is determined." N.C.G.S. § 105-273(2), (3) (2016). Applying these definitions to appellant, when Hill, as a result of his investigation, disqualified the property because the LLC was not a qualifying business, he changed neither the appraisal nor the assessment of the LLC's properties. These determinations had already occurred; indeed, they were what allowed Pitt County to determine the amount of tax that appellant was permitted to defer. On 5 December 2022, when Hill generated a new tax bill that was immediately due, this was neither a new appraisal nor a new assessment; rather, it was simply changing the status of appellant's already-assessed taxes from deferred to due. Thus, we find the timing requirements of N.C.G.S. § 105-296(i) were not implicated when appellant lost its PUV status.

The placement of N.C.G.S. § 105-296(i) within the Machinery Act further confirms our view. This statute is not situated merely within

the instructions for the PUV program but is part of the general description of the powers and duties of the assessor. *See* N.C.G.S. § 105-296. Because subsection (i) is the only reference to the assessor's duties in situations where a property's tax burden changes, it was logical for the General Assembly to reference this section when creating this PUV system that involved the potential for an assessor to change a property's tax burden, albeit, critically, one that involved a different mechanism than re-appraisal or re-assessment.

When the requirements implicated upon a new appraisal or assessment are set aside, the notice required when property loses its PUV status is simply that: notice. Because Hill provided appellant with notice that it was disqualified from the program and provided it with the opportunity to appeal that disqualification, we conclude that the requirements of the Machinery Act were satisfied. As a result of Hill's provision of notice, appellant was able to be heard before the Board, and before the Commission. As discussed below, we find the notice appellant was provided sufficient.

We note that an earlier notice requirement in the case of a re-appraisal or re-assessment, as opposed to deferred taxes coming due, comports with common sense. When a property is reappraised or the value is reassessed, the early notice requirement allows the property owner to appeal the value of the property on which the taxes are based near the beginning of the tax year; however, when there is a change in the determination of whether a property qualifies for PUV status, the question is not the value of property or the amount of taxes to be assessed, but rather whether the property owners will lose the benefit of a lower tax rate. The issue then is not the value of the property but whether the property qualifies under the PUV statute for a deferral of some of the taxes already assessed. Given that a loss of PUV status can occur at any time within a tax year, there is no logical reason to require a hearing at the first meeting of the Board, as opposed to another meeting after the loss of PUV status has been noted.

C. Constitutionality of N.C.G.S. § 105-394(9)

[2] Assuming, *arguendo*, that a change in PUV status could be considered a change in appraisal or assessment, we consider the Commission's holding that N.C.G.S. § 105-394(9) was sufficient to affirm the ruling of the Board. Appellant challenges the Commission's reliance on § 105-394(9), which they argue has been held unconstitutional by the North Carolina Supreme Court in *Henderson Cnty. v. Osteen*, 292 N.C. 692 (1977). At issue in *Osteen* was the application of § 105-394(9) to Henderson County's failure to provide any notice to a deceased taxpayer

that the county was selling land owned by him on which the county had a tax lien. *Id.* at 710.

The statute at issue provides: "[i]mmaterial irregularities in the listing, appraisal, or assessment of property for taxation" do not invalidate taxes imposed as a result. N.C.G.S. § 105-394. The section provides eleven example of immaterial irregularities, including "failure to make or serve any notice mentioned in this Subchapter." *Id.* § 105-394(9). The *Osteen* Court held that the county was not permitted to dispense with notice by relying on this statute, since the failure to give notice was in conflict with Article 1 § 19 of the North Carolina Constitution. *Osteen*, 292 N.C. at 708, 710.

The challenge to § 105-394(9) in *Osteen* was an as-applied challenge, rather than a facial challenge. The difference between these challenges is "that an as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context." *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 460 (2016) (quotations and citation omitted). Rather than abrogate the statute, the *Osteen* Court held that the statute's *application* to the action taken by the county in that particular case was unconstitutional. *Osteen*, 292 N.C. at 710.

What distinguishes the as-applied challenge in *Osteen* from the facts of the case *sub judice* is the total failure to provide notice in the former, and the alleged failure to provide the notice at the appropriate time, as required under the Machinery Act, in the latter. As the issue of sufficient notice was not before the *Osteen* Court, its opinion is silent as to what would constitute proper notice. Because the facts in the case *sub judice* and the facts in *Osteen* are substantially different, we conclude that *Osteen* is not controlling authority and the Commission did not err in relying on § 105-394(9).

D. Actual Notice and Opportunity to Be Heard

[3] Finally, we address the fact that the Commission, while holding that § 105-394(9) was dispositive, also noted that appellant received actual notice and a hearing before the Board, and participated in that hearing. We hold, even assuming, *arguendo*, that the Board or the Commission erred in their statutory reliance, that appellant's constitutional rights were preserved by the notice and hearing they were provided by the Board.

"The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Emp. Sec. Comm'n of*

N.C., 349 N.C. 315, 322 (1998) (citation omitted). This notice and opportunity must be meaningful, although the exact mechanism according to which these are provided depends on the circumstances of each case. *Id*. We have previously held that where a plaintiff knew of the existence and scope of a hearing, and while present at the hearing asked questions and presented testimony, his procedural due process rights had not been violated. *Lipinski v. Town of Summerfield*, 230 N.C. App. 305, 309 (2013). While we recognize that the particular facts of a meaningful notice case are not dispositive for future cases, we note that the appellant, in the case *sub judice*, received the same opportunity to be heard as the appellant in *Lipinski*.

Appellant's current challenge as to whether the notice provided was sufficient is the alleged insufficient time between the notice and the hearing. Appellant received notice of the property's loss of PUV status 5 December, and on 6 December was informed that it could appeal Hill's decision at the 12 December meeting of the Board, or the first meeting of the Board in 2023. Having been provided with two dates from which to choose, appellant's manager chose the hearing date which it now complains was insufficient to comport with due process. Appellant's manager attended and presented all the evidence appellant sought to produce. Nowhere in the record is there any indication that appellant sought more time to obtain counsel or marshal additional evidence. Nor is there any indication that it sought to continue the date of the hearing that it had selected.

Appellant now argues that the notice was not sufficient to comport with due process because there was not enough time to hire counsel and marshal the evidence needed to properly represent its case before the Board. The appellant has not documented any attempts it made to hire counsel, instead simply averring that there was not enough time. Appellant further contends that, in essence, had it had more time, it would have had the opportunity to develop a theory of the case based on Trade Land's total income that would have allowed it to challenge Hill's decision more thoroughly. However, appellant had the opportunity to argue this before the Board but did not do so. Further, counsel never raised the issue of lack of procedural due process before the Commission. In fact, appellant has not presented this argument in its briefs to this Court. The argument related to the inability to marshal the necessary evidence was presented for the first time in its oral arguments before us.

Appellant consistently stipulated that Trade Land LLC was not primarily engaged in a qualifying business in its 2021 audit and before

the Board and the Commission. Its arguments before the Commission appeared to rely on an estoppel theory that the county, having initially found the properties to be eligible for PUV status, could not in the same tax year after receiving additional information and a change in the tax assessor change its determination, because it was too late to have that determination challenged before the April meeting of the Board as required by the Machinery Act. Having determined that this argument now fails we find the Commission properly rejected the contention.

Appellant has now changed horses midstream to argue that the notice it received does not comport with due process because had it been given more time, it *might have been able* to develop evidence that the tax assessor was incorrect in the determination that appellant was not a qualifying business. Further, appellant has not alleged that this line of inquiry would have been successful. In fact, this argument fails given the multiple times appellant conceded that Trade Land LLC was not a qualifying business, both before the Board and later to the Commission.

Next, appellant claims it was harmed because the timing of the notice gave insufficient time to proactively address the loss of PUV status by placing the properties that could qualify for PUV status into a separate entity that only owned those properties. However, at oral argument, appellant admitted it did create this new entity, Trade Family Farms, LLC, was created and that, although its application was initially denied, this decision was overturned by the Board and those properties now enjoy deferred-tax status for the new tax year. Additionally, such change, if it were effected earlier in the prior tax year, would not have been sufficient to save the tax status for the previous disqualification.

In sum, when examining all the evidence in this case, we conclude that appellant's constitutional rights to due process were not violated by Pitt County.

III. Conclusion

For the foregoing reasons, we affirm the decision of the North Carolina Property Tax Commission.

AFFIRMED.

Judge ZACHARY concurs.

Judge FREEMAN concurs in result only.

RUSSELL v. TAYLOR

[299 N.C. App. 207 (2025)]

TONY RUSSELL, PLAINTIFF
v.
GEORGE WILLIAM BAGBY TAYLOR JR. D/B/A NATIONAL SPEED OF WILMINGTON, INC. A/K/A NATIONAL SPEED, INC., DEFENDANT

No. COA24-745

Filed 4 June 2025

Process and Service—change of parties on default judgment—void for lack of personal jurisdiction—no summons issued to individual—Rule 60 motion inappropriate

In a negligence case in which the trial court entered an order for entry of default judgment against a corporation, but plaintiff, after discovering that the corporation had been administratively dissolved years earlier, filed a Rule 60 motion to change the name of the judgment defendant from the corporate name to an individual ("Taylor"), the trial court abused its discretion by allowing the motion. First, the trial court had no personal jurisdiction over Taylor because, although plaintiff had served the summons and complaint on Taylor in his capacity as the corporation's registered agent, no summons had been issued or directed to Taylor in his individual capacity and, therefore, valid service of process did not occur. Moreover, plaintiff's attempt to use a Rule 60 motion to name a different judgment defendant could not cure the defective process because, rather than merely correcting a clerical error, the name change amounted to an improper substitution or entire change of parties. Accordingly, the trial court's amended order was vacated as void.

Appeal by Defendant from order entered 27 March 2024 by Judge Keith O. Gregory in Johnston County Superior Court. Heard in the Court of Appeals 9 April 2025.

Fox Rothschild LLP, by Matthew Nis Leerberg and Brian C. Bernhardt, for Defendant-Appellant.

Wicker Law Firm, P.L.L.C., by Harrison L. Wicker and Jackson D. Wicker, for Plaintiff-Appellee.

COLLINS, Judge.

George William Bagby Taylor appeals from the trial court's order entering default judgment against him. Taylor argues that the trial court erred by changing the name of the judgment debtor on an Order for Entry of Default Judgment from "National Speed of Wilmington, Inc." to Taylor in his individual capacity, as requested by Plaintiff in his amended Rule 60 motion, and by entering an Order for Entry of Default Judgment against Taylor in his individual capacity. We agree and vacate the Order for Entry of Default Judgment entered against Taylor.

I. Background

Plaintiff Tony Russell filed a complaint against National Speed of Wilmington, Inc. ("NSW, Inc.") on 11 January 2022. Plaintiff alleged that NSW, Inc. negligently tuned his vehicle, causing substantial damage to the vehicle, and Plaintiff sought redress. Summons was issued on that date. Plaintiff served the summons and complaint on NSW, Inc. by serving Taylor in his capacity as NSW, Inc.'s registered agent. NSW, Inc. filed an answer to the complaint on 25 March 2022.

Plaintiff filed a motion for leave to file a first amended complaint and served the motion on Lamar Armstrong, Jr., as counsel for NSW, Inc. Armstrong subsequently moved to withdraw as counsel. The trial court granted Armstrong's motion to withdraw and ordered that Plaintiff serve NSW, Inc. by first class mail addressed to: "National Speed of Wilmington, Inc., 6779 Gordon Road, Wilmington, NC 28411."

Plaintiff served the first amended complaint via mail on NSW, Inc. at the address ordered. After receiving no response, Plaintiff moved for entry of default against NSW, Inc. The trial court entered an order of default against NSW, Inc. on May 2023. Plaintiff moved for default judgment against NSW, Inc. and served the motion via mail to NSW, Inc. at the address ordered.

The trial court entered an Order for Entry of Default Judgment against NSW, Inc. for $81,833.68. Plaintiff served the Order for Entry of Default Judgment on NSW, Inc. at the address ordered.

Plaintiff began collection efforts, including docketing the judgment in New Hanover County. At some point during these efforts, Plaintiff learned that NSW, Inc. had been administratively dissolved in 2012 for failure to file its annual report.

Plaintiff filed a Rule 60 motion to amend the Order for Entry of Default Judgment, asking the trial court to change the name of the judgment defendant from "National Speed of Wilmington Inc." to "George William Bagby Taylor, Jr. d/b/a National Speed of Wilmington." Plaintiff

later filed a second Rule 60 motion to amend the Order for Entry of Default Judgment, asking the trial court to change the name of the judgment defendant from "National Speed of Wilmington, Inc." to "George William Bagby Taylor, Jr. d/b/a National Speed of Wilmington f/k/a National Speed, Inc."

After a hearing on Plaintiff's amended motion, the trial court announced orally that it would allow the motion under Rule 60(a), which permits a trial court to correct clerical errors. Although there was talk of a written order, none appears in the record. What does appear in the record is a red-lined version of the Order for Entry of Default Judgment, which changes the name of the judgment defendant from "National Speed of Wilmington, Inc." to "George William Bagby Taylor, Jr. d/b/a National Speed of Wilmington f/k/a National Speed, Inc" and indicates the entered date as "nunc pro tunc July 11th 2023," the date the Order for Entry of Default Judgment against NSW, Inc. was signed by the trial court. The amended order was filed 27 March 2024.

Taylor timely filed a Notice of Appeal.

II. Discussion

Taylor contends that the trial court erred for numerous reasons by changing the name of the judgment debtor on the Order for Entry of Default Judgment from "National Speed of Wilmington, Inc." to Taylor in his individual capacity, as requested by Plaintiff in his amended Rule 60 motion, and entering an Order for Entry of Default Judgment against Taylor in his individual capacity. We agree.

This Court reviews a trial court's grant of a Rule 60 motion for abuse of discretion. *Lumsden v. Lawing*, 117 N.C. App. 514, 518 (1995). "[A]n error of law is an abuse of discretion" and is reviewed de novo. *Miller v. Carolina Coast Emergency Physicians, LLC*, 382 N.C. 91, 104 (2022) (internal quotation marks omitted).

Taylor first argues that the trial court erred by entering an Order for Entry of Default Judgment against him in his individual capacity because the trial court lacked personal jurisdiction. We agree.

For a court to obtain personal jurisdiction over a defendant, a summons must be issued in the name of that individual and service of process secured on that individual by one of the statutorily specified methods. *Grimsley v. Nelson*, 342 N.C. 542, 545 (1996); N.C. Gen. Stat. § 1A-1, Rule 4(j) (2023). If a party fails to obtain valid service of process, "a court does not acquire personal jurisdiction over the defendant and

the action must be dismissed." *Bentley v. Watauga Bldg. Supply, Inc.*, 145 N.C. App. 460, 462 (2001).

Under Rule 4 of the North Carolina Rules of Civil Procedure, "[u]pon the filing of the complaint, summons shall be issued forthwith, and in any event within five days." N.C. Gen. Stat. § 1A-1, Rule 4(a) (2023). The summons "shall be directed to the defendant or defendants," *id.* § 1A-1, Rule 4(b) (2023), and service of the summons must be made in a time and manner consistent with Rule 4.

Here, the complaint named NSW, Inc. as the defendant and summons was issued in that name. Plaintiff served the complaint and summons on NSW, Inc. by certified mail to Taylor in his capacity as registered agent for NSW, Inc., not in his individual capacity. Plaintiff amended the complaint and served it on NSW, Inc. as the defendant.

At no point was a summons issued or directed to Taylor in his individual capacity. Thus, valid service of process did not occur, and the trial court did not have personal jurisdiction over Taylor. Accordingly, the Order for Entry of Default Judgment naming Taylor in his individual capacity as defendant is void and is vacated. *See Jones v. Wallis*, 211 N.C. App. 353, 356 (2011) (a default judgment is void if there was a defect in the service of process).

Taylor also argues that Plaintiff's attempt to establish proper service of process on him by substituting him in his individual capacity for NSW, Inc., under the guise of correcting a misnomer, is invalid. We agree.

Rule 4(i) of the Rules of Civil Procedure permits trial courts to allow, in their discretion, the amendment of any process or proof of service thereof "unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued." N.C. Gen. Stat. § 1A-1, Rule 4(i) (2023). "[T]he discretionary powers of amendment permit the courts to allow amendment to correct a misnomer or mistake in the name of a party." *Harris v. Maready*, 311 N.C. 536, 546 (1984) (citation omitted). "If the amendment amounts to a substitution or entire change of parties, however, the amendment will not be allowed." *Id.* (citation omitted).

Here, NSW, Inc. was a North Carolina Corporation that was administratively dissolved in November 2012; Taylor is a natural person. By his Rule 60 amended motion, Plaintiff did not seek to merely correct a misnomer or mistake in NSW, Inc.'s name. Instead, Plaintiff's attempt to amend the Order for Entry of Default Judgment against NSW, Inc. to name Taylor in his individual capacity as the judgment defendant

"amounts to a substitution or entire change of parties" and "will not be allowed." *Id.* Accordingly, the trial court abused its discretion by granting Plaintiff's amended Rule 60 motion.

III. Conclusion

The trial court did not have personal jurisdiction over Defendant. Therefore, the Order for Entry of Default Judgment against Taylor in his individual capacity is vacated.

VACATED.

Judges HAMPSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
RAYMOND DERRICK ARRINGTON

No. COA24-688

Filed 4 June 2025

Criminal Law—prosecutor's closing argument—murder trial—credibility of witness

In defendant's trial for first-degree murder arising from a fatal shooting, the trial court did not commit reversible error by failing to intervene ex mero motu during the State's closing argument when the prosecutor stated that one of the witnesses "was the most credible witness that testified" in the trial, that the witness "never lied," and that the witness told the jury the truth. The statements were not improper because they were made in the context of showing that the witness gave specifics in his testimony that matched the physical evidence and, as such, did not constitute improper statements of the prosecutor's personal beliefs but were made in order to give the jury reasons to believe the witness by arguing his truthfulness.

Appeal by Defendant from judgments entered 6 November 2023 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 26 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Lindsay Vance Smith, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for Defendant-Appellant.

COLLINS, Judge.

Defendant Raymond Derrick Arrington appeals from judgments entered upon guilty verdicts of first-degree murder and possession of a firearm by a felon, and upon his guilty plea to having attained habitual felon status. Defendant argues that the trial court erred by failing to intervene ex mero motu during the State's closing argument. We find no error.

I. Background

Defendant was indicted on 13 September 2021 on the charges of murder and possession of a firearm by a felon. On 25 October 2022, Defendant was indicted for having attained habitual felon status. Defendant's case came on for jury trial on 30 October 2023 and concluded on 6 November 2023. The evidence at trial tended to show the following:

At approximately 10:26 p.m. on 9 August 2021, law enforcement officers with the Raleigh Police Department responded to 911 calls reporting a shooting near 1204 Boyer Street in Raleigh, North Carolina. Upon arriving at the scene, officers found Robert Taylor on the ground and receiving CPR by paramedics; Taylor was unresponsive after having been shot five times. Taylor was transported by ambulance to the hospital, where he ultimately died as a result of the gunshot wounds. Following an investigation into Taylor's death, officers concluded that they had probable cause to arrest Defendant for Taylor's murder.

Officers discovered that, approximately eight months prior to the shooting, Taylor had robbed Defendant; during the robbery, Defendant sustained a "bleeding" "gash" wound to the head and was "angry" about the incident. The night before the shooting, Defendant went to Boyer Street in search of Taylor. Defendant could not find Taylor, but he encountered Zachary Sanders. Defendant asked Sanders where Taylor was, and Sanders replied that Taylor had just left. Defendant "walked to his car, came back with a rifle[,]" and stated, "Man, I'm going to ask you one more time. I know you all are hiding him out here. Now, where is he at?" Sanders again told Defendant that Taylor was not there and had just left; Defendant brandished the rifle that he was carrying and replied, "Well, when you see him again, tell him he's a dead man."

Sanders saw and spoke with Taylor the following morning. Sanders told Taylor about the encounter with Defendant, stating, "You need to

stop coming on Boyer. You need to get low for a while, get out of sight . . . I'm telling you now, you need . . . to stay off Boyer." Taylor said that Defendant was "scared of [him]" and Sanders replied, "[Defendant] ain't scared of you. I'm telling you something for your own good, stay off Boyer."

Later that evening, Sanders witnessed someone shoot Taylor shortly after he parked his car on Boyer Street. Taylor and his girlfriend parked his car in front of 1204 Boyer Street, and his girlfriend decided to nap in the backseat while Taylor stepped out of the car to talk with a friend. Sanders was standing across the street from Taylor when he heard gunshots and heard Taylor "grunt twice." Sanders heard more gunshots and Taylor "grunted twice more[,]" and he "figured [Taylor] got hit two more times." Sanders watched Taylor run across the street towards him, up a driveway, and behind the house next door to Sanders. Sanders then saw a shooter in the street, wearing a mask, who then disappeared.

Sanders testified that, when the first shots rang out, Taylor was standing in front of his car; because of Taylor's positioning, the shooter "had to be laying" in the woods on the other side of Taylor's car when the shots were fired. Sanders testified that the gun used by the shooter was the "same size" and the "same rifle" as the one that Defendant brandished in front of him the day before.

The State's forensic investigators concluded that eleven shell casings retrieved from the scene of the shooting all came from the "same firearm" – a .22 caliber "long rifle." Investigators also concluded that the shots had all been fired from the direction of a set of trash cans near 1204 Boyer Street, the house in front of which Defendant had parked his car. The State presented detailed call records from Defendant's cell phone which showed that he was on Boyer Street at the time of the shooting. Specifically, the call records showed that, at 10:04 p.m., Defendant traveled from his home towards the area of Boyer Street; at 10:21 p.m., just before the shooting occurred, Defendant's phone registered in the immediate vicinity of Boyer Street. At 10:25 p.m., Defendant's phone began traveling away from Boyer Street and back towards Defendant's home, arriving back at his home at 10:55 p.m.

Defendant's girlfriend, Britney Johnson, took the stand and testified that, upon his arrival home at approximately 10:55 p.m., Defendant told her that she should turn on the news because "somebody [was] shot, found dead on Boyer Street[.]" When asked whether Defendant told her that he murdered Taylor, Johnson testified, "Yeah, I just said I didn't remember verbatim what he said, but basically he did say he did it." When asked if she knew that Defendant had committed the murder

of Taylor, Johnson testified, "I did." Johnson stated that Defendant "killed" Taylor "[be]cause of their past issue" with "the gash on his head" that took place approximately eight months prior. Johnson further testified that she knew Defendant had committed the murder when she was interviewed by detectives, but that she was not honest with them at that time because she "was in love and stupid and just making bad decisions." Johnson also admitted to providing a false cell phone number to detectives because she was "trying to protect [Defendant]."

Following the presentation of the State's evidence, the jury heard closing arguments from the prosecutor; at no point during the State's closing arguments did Defendant object to any portion of the prosecutor's arguments. The jury found Defendant guilty of first-degree murder and possession of a firearm by a felon, and Defendant pled guilty to having attained habitual felon status. The trial court sentenced Defendant to life in prison without parole for the first-degree murder conviction, and it sentenced him as a habitual felon to a concurrent term of 88 to 118 months in prison for the possession of a firearm by a felon conviction. Defendant gave proper oral notice of appeal.

II. Discussion

Defendant argues that the trial court committed reversible error by failing to intervene ex mero motu when the prosecutor stated in closing arguments that Sanders told the jury the truth, that Sanders did not lie, and that Sanders was the most credible witness who testified at trial.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133 (2002) (citation omitted). To establish such error, "defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Anthony*, 354 N.C. 372, 423 (2001) (citation omitted). This Court will grant relief "[o]nly when it finds both an improper argument and prejudice[.]" *State v. Huey*, 370 N.C. 174, 179 (2017) (citation omitted).

N.C. Gen. Stat. § 15A-1230 provides that, 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. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230 (2023). Our Court has further explained that an attorney may not make statements that "place before the jury the personal beliefs or knowledge of counsel which are not supported by evidence presented at trial." *State v. Craig*, 308 N.C. 446, 462 (1983) (citations omitted). However, this Court has long held that "prosecutors are allowed to argue that the State's witnesses are credible" in order to "giv[e] the jury reasons to believe the State's evidence[.]" *State v. Augustine*, 359 N.C. 709, 725 (2005) (citation omitted); *see State v. Wiley*, 355 N.C. 592, 621-22 (2002) (a prosecutor's statements to the jury that a witness "pretty much told the truth" and that "he's told the truth" were not improper). A prosecutor's statement regarding a witness's truthfulness that relates to the evidence presented is thus not improper because it "merely giv[es] the jury reasons to believe the state's witnesses . . . ." *Id.* at 622 (citations omitted). Additionally, a prosecutor's statement made during closing argument "should not be viewed in isolation but must be considered in the context in which the remarks were made and the overall factual circumstances to which they referred." *Augustine*, 359 N.C. at 725-26 (cleaned up).

Applying these principals here, we determine that the two challenged statements made by the prosecutor did not stray outside the bounds of proper argument. The prosecutor first told the jury that

> [Sanders] . . . was the most credible witness that testified in this trial. He said -- He told you how it is. [Sanders] gave you specific details. I want you to remember that when I was questioning [Sanders], I never approached him with shell casings. I never asked him about the physical evidence. But did you notice how everything that he said matched up with all of the physical evidence?

The prosecutor then said:

> [Sanders] told you the truth. And [he] never lied. Let's make that clear. He told you, "I didn't want to be involved." He never gave a statement. He didn't want to talk to Detective Morgan. While we wish he would have, he didn't. He never lied. He told you all the truth.

These statements were made in the context of the prosecutor's arguments to the jury that Sanders' testimony was credible because specific

portions of his testimony matched the physical evidence presented in the case. As in *Wiley*, the prosecutor here was not impermissibly "vouching" for Sanders, but instead "was merely giving the jury reasons to believe the state's witness[]" by arguing Sanders' truthfulness. *Id.* at 622 (citations omitted).

Defendant relies on *State v. Phillips*, 365 N.C. 103 (2011), and *State v. Locklear*, 294 N.C. 210 (1978), to argue that the prosecutor's statements here were improper and prejudicial. However, these cases are distinguishable from the present facts. In *Phillips*, our Supreme Court determined that the prosecutor's statement that an expert witness was "wholly unbelievable" was an improper "flat statement" of the prosecutor's personal belief. *Id.* at 139. In *Locklear*, our Supreme Court determined that the prosecutor's statement, "[Y]ou are lying through your teeth and you know you are playing with a perjury count[,]" was improper because the prosecutor was "assert[ing] his opinion that a witness [was] lying." *Id.* at 217. However, the Court explained that the prosecutor could have "argue[d] to the jury that they should not believe a witness, but he should not call him a liar." *Id.* (citation omitted).

In both *Phillips* and *Locklear*, the prosecutors' improper remarks were flat statements of their personal beliefs and, unlike here, the statements were not made in the context of providing the jury reasons to believe a witness's testimony because specific portions of the testimony matched the physical evidence presented by the State. Moreover, even if we were to assume that the prosecutor's statements about Sanders' truthfulness were improper, Defendant has failed to demonstrate prejudice by showing how these statements "infected the trial with unfairness and thus rendered the conviction fundamentally unfair." *State v. Carroll*, 356 N.C. 526, 537 (2002) (citation omitted).

III. Conclusion

Because the prosecutor's statements were not improper, the trial court did not commit reversible error by failing to intervene ex mero motu during the State's closing arguments.

NO ERROR.

Judges ZACHARY and GORE concur.

STATE OF NORTH CAROLINA
v.
JULIA LOUISE COPENHAVER

No. COA24-221

Filed 4 June 2025

1. Constitutional Law—defenses—first-degree murder—diminished capacity—potential consequences—colloquy with defendant—correct statement of law

In a prosecution for first-degree murder, arising from defendant having stabbed and bludgeoned her mother to death, the trial court's statements during a colloquy with defendant and her counsel about the affirmative defense of diminished capacity, taken as a whole, correctly informed defendant that, in order to assert the defense, defendant must admit her guilt to the murder, and, further, that such an admission and defense could potentially result in an instruction to the jury on second-degree murder.

2. Criminal Law—defenses—insanity—jury instruction given against defendant's wishes—plain error not shown

In a prosecution for first-degree murder, arising from defendant having stabbed and bludgeoned her mother to death, defendant did not establish prejudice in the trial court's instruction to the jury on the defense of insanity—assuming, without deciding, that the instruction constituted error—even though defendant repeatedly refused to argue insanity at trial and contended on appeal the evidence did not support such an instruction. The jury, in returning a verdict of guilty of first-degree murder, rejected both of the affirmative defenses it was instructed on—insanity and diminished capacity—after the State, in its closing argument, accurately distinguished between the defenses and emphasized that neither defendant nor the State was seeking a verdict of not guilty by reason of insanity.

3. Constitutional Law—effective assistance of counsel—Harbison error—jury instruction—prejudice not shown

In defendant's appeal from her conviction of first-degree murder, arising from defendant having stabbed and bludgeoned her mother to death, the record was sufficient for the Court of Appeals to resolve her ineffective assistance of counsel claims. First, to the extent defendant's trial counsel's admission of defendant's guilt triggered a *Harbison* inquiry, counsel's discussion—and the trial court's

colloquy at the outset of trial—with defendant demonstrated defendant's knowing and voluntary consent to her counsel's admission. Second, the failure of defendant's trial counsel to object to the trial court's jury instruction on the defense of insanity, despite defendant's clear desire that such a defense not be asserted, even if error, was not prejudicial in light of the jury's verdict—declining to find defendant not guilty by reason of insanity.

Judge HAMPSON concurring in part and dissenting in part.

Appeal by Defendant from Judgment entered 30 May 2023 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 30 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Michael T. Henry, for the State.

Parry Law, PLLC, by Edward Eldred, for Defendant-Appellant.

STADING, Judge, delivers the opinion of the Court in part II and announces the judgment of the Court, in which Judge FLOOD concurs and Judge HAMPSON concurs in part and dissents in part by separate opinion. HAMPSON, Judge, delivers the opinion of the Court in part I in which Judges FLOOD and STADING concur.

I.

HAMPSON, Judge.

Factual and Procedural Background

Julia Louise Copenhaver (Defendant) appeals from a Judgment entered upon a jury verdict finding her guilty of First-Degree Murder. The Record before us tends to reflect the following:

Following Hurricane Florence, Defendant's mother, Susan Copenhaver, went to the family's vacation home in Oak Island, North Carolina, alone to inspect it for damage on 24 October 2018. She spoke with Defendant's aunt by phone around 9:30 p.m., and they discussed that Defendant had recently left her Virginia home—where she had been staying—without explanation and was not responding to calls or text messages.

On 25 October 2018, Officers William Bopst and Lloyd Hames with the Oak Island Police Department went to the family's vacation home to

conduct a welfare check because Defendant's family believed something was wrong. According to Officer Bopst, Defendant's family had called 911 and reported Defendant had told them her mother had attacked her and was deceased and in the closet. When Officers Bopst and Hames arrived, Defendant answered the door and told Officer Bopst her mother had attacked her. Officer Bopst asked where Defendant's mother was and Defendant pointed toward a bedroom. The officers found Defendant's mother's body in the closet; she had been stabbed approximately 95 times and also suffered "blunt force injuries."

At the scene, Defendant was "calm" and "[q]uiet." However, after Defendant was taken into custody and brought to a detention center, she became "extremely agitated" and had to be secured in a restraint chair.

Upon motion of defense counsel, the trial court committed Defendant to Central Regional Hospital for preparation of a mental health report. On 20 August 2019, Dr. Teresa Wise, a clinical psychologist, submitted a report concluding Defendant was incapable of proceeding to trial. Based on this report, the trial court found there were reasonable grounds to believe Defendant was incapable of proceeding to trial and committed her to Cherry Hospital for treatment and capacity restoration. On 4 May 2020, the trial court was notified Defendant's capacity had been restored. After this, however, her mental state "declined significantly." A report prepared by Dr. Wise on 8 July 2021 found Defendant had "persistent deficiencies in understanding the facts and evidence relating to her charges." The trial court concluded Defended was incapable of proceeding and committed her again to Cherry Hospital for capacity restoration. On 20 December 2022, Dr. Holly Manley, Senior Psychologist with Cherry Hospital, submitted a report concluding Defendant was capable of proceeding. On 6 January 2023, the trial court found Defendant was capable of proceeding.

In March 2023, Defendant gave notice of her intent to present a defense of diminished capacity. Defense counsel had previously advised Defendant to plead not guilty by reason of insanity (NGRI), but Defendant rejected that defense. On 23 May 2023, the morning of trial, defense counsel informed the trial court that Defendant still intended to present a diminished capacity defense. Defense counsel stated she had discussed the differences between NGRI and diminished capacity with Defendant at length. This included explaining to Defendant that asserting diminished capacity required admitting to killing the victim but disputing the ability to form the specific intent required for first-degree murder.

The trial court conducted a colloquy to ensure Defendant understood asserting a defense of diminished capacity involved admitting she

was "responsible for the death of the victim." Responding to Defendant's questions around receiving instructions for lesser offenses than second-degree murder, the trial court explained that whether Defendant would receive an instruction on voluntary manslaughter was "fact-specific" but, at a minimum, evidence of diminished capacity would "guarantee an instruction for second-degree murder." Defendant replied that she still had "issues" with her attorney admitting her guilt. The trial court explained, "[b]ut you understand that if you do not make that admission, she cannot utilize the diminished capacity defense, which would mean the jury will not get an instruction for second-degree murder[.]" Defendant then agreed her counsel could admit to her guilt in order to utilize a diminished capacity defense.

At trial, Defendant presented evidence tending to show she "had long exhibited evidence of mixed personality disorders exhibiting [a] clinically relevant degree of narcissism[.]" Defendant was diagnosed with Attentive Deficit Hyperactivity Disorder as a child, for which she was prescribed a stimulant, and had also received numerous sports-related concussions, resulting in "chronic post-concussive syndrome." Both the use of stimulant medications and head injuries are risk factors for psychosis. Further, in late September 2018, Defendant experienced a "sudden precipitous onset of very significant paranoia" and was ultimately diagnosed with "unspecified psychosis." Defendant also presented evidence regarding her behavior during the time between her initial diagnosis of psychosis and the time of the killing.

Following the charge conference, in which the parties largely agreed on the jury instructions to be given, the trial court emailed counsel to inform them the jury would also receive an instruction on NGRI. Both over email and in person prior to closing arguments, defense counsel agreed to the instruction. There were no objections to the trial court's final instructions or verdict form.

During closing arguments, the State emphasized the premeditated nature of Defendant's actions. The State addressed both diminished capacity and NGRI. With respect to diminished capacity, the State told the jury: "You may find evidence that the defendant lacked mental – mental capacity at the time of the murder, whether the condition affected the defendant's ability to formulate the specific intent which is required for first-degree murder. It means you can consider second-degree murder, because it doesn't require specific intent. We covered that. She had the intent." The State contrasted this with NGRI and expressly noted Defendant had not asked for NGRI: "The defense did not ask you to find her not guilty by reason of insanity. Just to make sure you picked up on

that. That's not what they're asking you for. . . . She's not raising insanity. She did not raise that defense." The trial court then instructed the jury, including providing instructions on first-degree murder, second-degree murder, diminished capacity, and NGRI.

On 30 May 2023, the jury returned a verdict finding Defendant guilty of First-Degree Murder. The trial court sentenced her to life imprisonment without parole. Defendant gave oral Notice of Appeal in open court the same day.

Issues

The issues on appeal reviewed in Part I are whether: (A) Defendant gave her knowing and voluntary consent to allow her attorney to tell the jury Defendant killed the victim; and (B) the trial court erred by providing a jury instruction on the defense of insanity. In Part II we determine whether the Record is sufficient to review Defendant's ineffective assistance of counsel (IAC) claims on direct review.

Analysis

A. Consent to Admission

[1] Defendant contends the trial court misstated the law regarding the requirement she admit guilt to the murder in order to assert a defense of diminished capacity. Thus, in her view, her consent to her counsel making that admission of guilt was uninformed and, therefore, prejudicial error per se under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985).

Although Defendant alleges a *Harbison* error occurred in her trial, the action she complains about is the trial court's colloquy with Defendant. We conclude the trial court's statements of law were not erroneous. However, to the extent Defendant's alleged error on this issue relates to the conduct of her attorney in admitting her guilt, we view Defendant's argument on appeal as an ineffective assistance of counsel claim. Coupled with her other allegations of IAC, we address that issue separately.

"An instruction on diminished capacity is warranted where the evidence of defendant's mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier-of-fact as to whether defendant had the ability to form the necessary specific intent to commit the crimes for which he is charged." *State v. Lancaster*, 137 N.C. App. 37, 44, 527 S.E.2d 61, 66-67 (2000) (citing *State v. Clark*, 324 N.C. 146, 163, 377 S.E.2d 54, 64 (1989)). "Diminished capacity is a means of negating the 'ability to form the specific intent to kill required for a first-degree murder conviction on the basis of premeditation and deliberation.' " *State v. Roache*, 358

N.C. 243, 282, 595 S.E.2d 381, 407 (2004) (quoting *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997), *cert. denied*, *Page v. North Carolina*, 522 U.S. 1056, 118 S. Ct. 710, 139 L. Ed. 2d 651 (1998)); *see also State v. Staten*, 172 N.C. App. 673, 685, 616 S.E.2d 650, 659 (2005) ("The defense of diminished capacity neither justifies nor excuses the commission of an offense, but rather negates only the element of specific intent[.]" (citing *State v. Holder*, 331 N.C. 462, 473-74, 418 S.E.2d 197, 203-04 (1992)). As such, it is "clearly inconsistent with a claim of innocence." *State v. Poindexter*, 359 N.C. 287, 291, 608 S.E.2d 761, 764 (2005). Indeed, an affirmative defense is "of the nature of a plea of confession and avoidance[.]" *State v. Caddell*, 287 N.C. 266, 282, 215 S.E.2d 348, 358 (1975) (quoting *State v. Creech*, 229 N.C. 662, 673, 51 S.E.2d 348, 356 (1949)). "An affirmative defense is one in which the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged because * * *.' " *Id.* at 289, 215 S.E.2d at 363.

Defendant contends the trial court erroneously informed her that evidence of diminished capacity would "guarantee" the jury would be instructed on second-degree murder and that receipt of a second-degree murder instruction "depend[ed] on" there being evidence of diminished capacity. Defendant argues no instruction can be guaranteed before evidence is presented and diminished capacity is not the only reason to instruct on second-degree murder.

In a colloquy with Defendant and her counsel, the trial court repeatedly referred to second-degree murder as a possible or potential instruction:

> [Trial Court]: However, that [diminished capacity defense] would require your attorney to make admission – to make an admission that you did in fact commit the murder; however, that it wasn't first-degree murder due to your diminished mental capacity. . . . Do you understand what I'm telling you?
>
> [Defendant]: Yeah. But then would – what would be considered then?
>
> [Trial Court]: *Potentially* second-degree murder.
>
> . . . .
>
> [Trial Court]: And did you inform [Defendant] at that time that [diminished capacity] would result in *potentially* a second-degree murder charge to the jury?

> [Defense Counsel]: Potentially. And it could also result in a life-without-parole sentence.
>
> . . . .
>
> [Trial Court]: I haven't heard – the problem is I haven't heard the evidence to know whether or not this case would involve an instruction for voluntary manslaughter. I'm not trying to dance around your question; I don't know. . . . Maybe that's something [defense counsel] can enlighten you on. I'm certain she can enlighten you on that better than I can. She knows your case. She's been representing you on it. She knows what the facts are. I don't.
>
> [Defendant]: All right.
>
> [Trial Court]: But it would guarantee – a diminished capacity defense would guarantee an instruction for second-degree murder.
>
> [Defendant]: But nothing less? That's what I don't understand.
>
> [Trial Court]: I don't know if there would be anything less that would follow that. . . . Well it sounds like [defense counsel] told you that by utilizing diminished capacity a jury instruction for second-degree murder *is what would likely result*[.]

(emphasis added). The transcript reflects the trial court repeatedly communicated that an instruction on second-degree murder was possible if Defendant produced evidence of her diminished capacity. This is an accurate statement of the law. *See State v. Davis*, 349 N.C. 1, 35, 506 S.E.2d 455, 473-74 (1998) ("[T]he trial court properly instructed that if the jury found defendant could not form the specific intent required for first-degree murder, then it '*would* consider second degree murder.' Thus, the trial court properly conveyed the mandatory nature of this instruction." (emphasis in original)).

Defendant also contends the trial court incorrectly suggested only evidence of diminished capacity could result in a second-degree murder instruction. Again, the transcript reflects the trial court's efforts to accurately explain the law to Defendant.

> [Trial Court]: Do you have any issue with [defense counsel] admitting that you are responsible for the homicide of the victim? So that – I'm sorry?

> [Defendant]: Yeah. I have issues with that.
>
> [Trial Court]: All right. Explain why you have issues with that.
>
> [Defendant]: Because it's her admitting.
>
> [Trial Court]: Okay. But you understand that if you do not make that admission, she cannot utilize the diminished capacity defense, which would mean the jury will not get an instruction for second-degree murder?
>
> [Defendant]: All right. She can use it.
>
> . . . .
>
> [Trial Court]: You do want [defense counsel] to utilize the diminished capacity defense?
>
> [Defendant]: Yes.
>
> [Trial Court]: So that the jury can receive an instruction for second-degree murder? Yes?
>
> [Defendant]: Yeah.

The trial court's statements, taken as a whole, accurately state the law with respect to diminished capacity and Defendant's entitlement to an instruction on second-degree murder.

Thus, the trial court's statements to Defendant were correct statements of law. Therefore, the trial court did not err in instructing Defendant.

B. Jury Instruction

[2] Defendant contends the trial court committed plain error by instructing the jury on the defense of insanity without Defendant's consent and "in the absence of any evidence supporting the instruction." Importantly, Defendant's trial counsel agreed to the NGRI instruction, although Defendant had previously declined to plead NGRI.

Defendant contends we should apply a structural error analysis to these issues to consider how our courts should "protect a defendant's constitutional right to direct her own defense when the defendant's counsel throws away that right 'at trial.' " "Structural error is a rare form of constitutional error resulting from 'structural defects in the constitution of the trial mechanism' which are so serious that 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.' " *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744

(2004) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 1264-65, 113 L. Ed. 2d 302 (1991) (citation and quotation marks omitted)). But again, to the extent Defendant's complaint relies upon her counsel's acquiescence to the instruction, it is really about her trial counsel's conduct. Thus, we consider it another claim for ineffective assistance of counsel. We, therefore, limit our review of this issue here to the instruction the trial court gave the jury on NGRI.

As Defendant acknowledges, she did not object to the instruction at trial, thus our review is limited to plain error. N.C. R. App. P. 10(a)(4) (2024) ("In criminal cases, an issue that was not preserved by objection noted at trial . . . 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).

Defendant's argument is two-fold: the trial court erred by instructing the jury, first because Defendant had repeatedly refused to argue insanity, and second because the evidence did not support the instruction. Even assuming arguendo the trial court's instruction was erroneous, Defendant has not established the prejudice necessary to meet the bar for plain error.

The trial court instructed the jury on the issues of diminished capacity and NGRI as follows:

> You may find there is evidence which tends to show that the defendant lacked mental capacity at the time of the acts alleged in this case. If you find that the defendant lacked mental capacity, you should consider whether this condition affected the defendant's ability to formulate

> the specific intent which is required for conviction of first-degree murder. In order for you to find the defendant guilty of first-degree murder, you must find beyond a reasonable doubt that the defendant killed the deceased with malice and in the execution of an actual, specific intent to kill formed after premeditation and deliberation. If, as a result of lack of mental capacity, the defendant did not have the specific intent to kill the deceased, formed after premeditation and deliberation, the defendant is not guilty of first-degree murder. Therefore, I charge that if, upon considering the evidence with respect to the defendant's lack of mental capacity, you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first-degree murder, you will not return a verdict of guilty of first-degree murder.
>
> . . . .
>
> When there is evidence which tends to show that the defendant was legally insane at the time of the alleged offense, you will consider this evidence *only if you find that the State has proved beyond a reasonable doubt each of the things about which I have already instructed you* [the elements of first-degree murder]. Even if the State does prove each of these things beyond a reasonable doubt, the defendant would nevertheless be not guilty if she was legally insane at the time of the alleged offense. I instruct you that sanity or soundness of mind is the natural and normal condition of people. Therefore, everyone is presumed sane until the contrary is made to appear. The test of insanity as a defense is whether the defendant, at the time of the alleged offense, was laboring under such a defect of reason, from disease or deficiency of the mind, as to be incapable of knowing the nature and quality of the act or, if the defendant did know this, whether the defendant was, by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to that act.

(emphasis added).

First and foremost, the jury in this case clearly rejected all affirmative defenses instructed upon because they found Defendant guilty of first-degree murder. Importantly, the instruction Defendant challenges

correctly stated the law. *See State v. Evangelista*, 319 N.C. 152, 161, 353 S.E.2d 375, 382 (1987) (explaining elements of defense of insanity). And, indeed, the trial court instructed the jury it could only consider evidence of insanity if it first found the State had proven first-degree murder beyond a reasonable doubt. This includes—as the trial court expressly instructed—specific intent. Finding Defendant had a specific intent to kill means the jury rejected the defense of diminished capacity. *See Page*, 346 N.C. at 698, 488 S.E.2d at 231 ("A defendant is entitled to present evidence that a diminished mental capacity not amounting to legal insanity negated his ability to form the specific intent to kill required for a first-degree murder conviction on the basis of premeditation and deliberation." (citing *State v. Shank*, 322 N.C. 243, 249, 367 S.E.2d 639, 643 (1988))). Thus, to find Defendant guilty of first-degree murder, the jury must have first rejected the defense of diminished capacity and then rejected the defense of insanity.

Defendant contends the jury instruction on insanity, coupled with the State's closing argument, may have confused the jury as to the defense of diminished capacity. However, in its closing argument, the State expressly differentiated between NGRI and diminished capacity:

> Let's talk about diminished capacity. This is essentially what [defense counsel] argued to you. Diminished capacity. You may find evidence that the defendant lacked mental – mental capacity at the time of the murder, whether the condition affected the defendant's ability to formulate the specific intent which is required for first-degree murder. It means you can consider second-degree murder, because it doesn't require the specific intent. We covered that. She had the intent.
>
> . . . .
>
> We've talked about not guilty by reason of insanity. Which [Defendant]'s not asking for. The defense did not ask you to find her not guilty by reason of insanity. Just to make sure you picked up on that. That's not what they're asking you for. . . . She's not raising insanity. She did not raise that defense.

These statements demonstrate that, taken as a whole, the State's closing argument differentiated NGRI and diminished capacity as separate defenses, correctly articulated which Defendant had asserted, and correctly stated the elements of the defenses.

Thus, based on the Record before us, Defendant has not shown the allegedly erroneous instruction "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (citation omitted)). Therefore, any error in the trial court's jury instruction does not constitute plain error.

II. Ineffective Assistance of Counsel

STADING, Judge.

[3] For Defendant to successfully assert a claim for ineffective assistance of counsel, she must satisfy a two-part test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Defendant must first show that her attorney's performance "fell below an objective standard of reasonableness." *State v. Blakeney*, 352 N.C. 287, 307, 531 S.E.2d 799, 814–15 (2000) (citation omitted). She must next show the error committed was so serious that "a reasonable probability exists that the trial result would have been different absent the error." *Id.* at 307–08, 531 S.E.2d at 815 (citation omitted). That said, in *State v. Harbison*, our Supreme Court held, "that a criminal defendant suffers a per se violation of his constitutional right to effective assistance of counsel when his counsel concedes the defendant's guilt to the jury without his prior consent." *State v. McAllister*, 375 N.C. 455, 456, 847 S.E.2d 711, 712 (2020).

A. Admission of Guilt

Defendant challenges the assertion that her attorney, Ms. Gibson, had permission to admit her guilt. *See State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985). However, the trial court conducted an inquiry sufficiently showing Defendant knowingly and voluntarily consented to her attorney's admission of her guilt—in furtherance of her defense. *See State v. McAllister*, 375 N.C. at 477, 847 S.E.2d at 724 (citation omitted) ("This 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 . . . .' "). Although Defendant initially expressed confusion and disagreement with admitting guilt, the trial court's complete colloquy with Defendant at the outset of trial provides a clear display of her understanding and consent to her attorney's admission:

> THE COURT: You've spoken to Ms. Gibson about the diminished capacity defense; is that correct?
>
> DEFENDANT: Yeah.

THE COURT: All right. Are you satisfied you, at least in your mind, understand the diminished capacity defense that Ms. Gibson has spoken to you about?

DEFENDANT: For the most part.

THE COURT: All right. Is there something you don't understand about that diminished capacity defense?

DEFENDANT: No. No.

THE COURT: There's not?

DEFENDANT: No.

THE COURT: Okay. Do you understand that in order -- at least Ms. Gibson's position is in order to utilize that diminished capacity defense, that will require an admission on your part?

DEFENDANT: No. I don't really understand that part.

THE COURT: All right. It will require an admission that you in fact did -- you were responsible for the death of the victim.

DEFENDANT: Well, she really didn't explain all that to me so --

THE COURT: Do you understand that?

DEFENDANT: Not exactly. I don't understand why it's part of the defense.

THE COURT: Well, Ms. Gibson has provided notice that you lacked the proper mental capacity to commit first-degree murder in that you were not able to form the state of mind necessary for that type of murder. That your mental capacity was diminished to the point that you could not do that. Do you understand that part?

DEFENDANT: Yeah.

THE COURT: However, that would require your attorney to make admission -- to make an admission that you did in fact commit the murder; however, that it wasn't first-degree murder due to your diminished mental capacity.

DEFENDANT: Okay.

THE COURT: Do you understand that? Do you understand what I'm telling you?

DEFENDANT: Yeah. But then would – what would be considered then?

THE COURT: Potentially second-degree murder.

DEFENDANT: No. I don't understand that part.

THE COURT: You don't understand that part?

DEFENDANT: No.

THE COURT: All right. Second-degree murder does not require premeditation or deliberation. First-degree murder requires premeditation and deliberation. So Ms. Gibson's defense -- by utilizing diminished capacity, her position on your behalf would be that you did not have the mental capacity to form premeditation and deliberation.

DEFENDANT: But it can't be anything lesser than that?

THE COURT: Anything lesser than that?

DEFENDANT: Than second? So it's not the paper that she showed me?

THE COURT: What's the paper that Ms. Gibson showed you?

DEFENDANT: Diminished capacity.

THE COURT: Ms. Gibson, do you want to enlighten me? I'm not sure --

MS. GIBSON: What I have verbally explained to Miss Copenhaver -- I gave her an article that was written -- I'm not sure if it was Jeff Wel[t]y or another person that --

THE COURT: John Rubin?

MS. GIBSON: Yes.

THE COURT: Okay.

MS. GIBSON: Gave her that. And then about three weeks ago, I sent her a three-page letter explaining the different options, and one of the sections was diminished capacity, explaining that by asserting that defense she would be

admitting that she committed the murder, but lacked the intent to form premeditation.

THE COURT: Okay. And did you inform Miss Copenhaver at that time that that would result in potentially a second-degree murder charge to the jury?

MS. GIBSON: Potentially. And it could also result in a life-without-parole sentence.

THE COURT: Okay.

DEFENDANT: And also something could be lesser than that too. That's what the article says.

MS. GIBSON: I think she's probably thinking of manslaughter.

THE COURT: Yes.

MS. GIBSON: Because I think, as you said --

THE COURT: That's fact-specific, Miss Copenhaver. That doesn't mean that necessarily in your case that it would result in a jury instruction for voluntary manslaughter.

DEFENDANT: Yeah. I'm just trying to understand like if that's possible in this defense with regards to those two options.

THE COURT: I haven't heard -- the problem is I haven't heard the evidence to know whether or not this case would involve an instruction for voluntary manslaughter. I'm not trying to dance around your question; I don't know.

DEFENDANT: Okay.

THE COURT: Maybe that's something Ms. Gibson can enlighten you on. I'm certain she can enlighten you on that better than I can. She knows your case. She's been representing you on it. She knows what the facts are. I don't.

DEFENDANT: All right.

THE COURT: But it would guarantee -- a diminished capacity defense would guarantee an instruction for second-degree murder.

DEFENDANT: But nothing less? That's what I don't understand.

THE COURT: I don't know if there would be anything less that would follow that. So -- yes, ma'am?

MS. GIBSON: I think I should put on the record now that I do not believe that the evidence is going to support a jury instruction of manslaughter.

. . . .

DEFENDANT: That's not what she told me about when I agreed to this defense.

THE COURT: Well, it sounds like Ms. Gibson told you that by utilizing diminished capacity a jury instruction for second-degree murder is what would likely result, which is significantly different than a jury instruction for first-degree murder. First-degree murder jury instruction -- well, first-degree punishment is life in prison without parole. Do you understand that?

DEFENDANT: Yeah.

THE COURT: For second-degree -- and that's no matter what your prior record level is.

For second-degree murder, of course, it's still potentially life in prison without parole. However, depending on your prior record, it does not require life without parole. First-degree murder conviction requires life without parole; second-degree murder does not require life without parole. Do you understand that?

DEFENDANT: Yeah.

THE COURT: So knowing that, are you authorizing Ms. Gibson to make that admission and utilize the defense of diminished capacity on your behalf as a trial strategy?

DEFENDANT: I don't know. She didn't really explain that much to me, so I guess I have to think about it.

THE COURT: Well, you don't really have time to think about it, Miss Copenhaver. This is your day of trial. It starts today.

DEFENDANT: Then yes.

THE COURT: I'm sorry?

DEFENDANT: Yes.

THE COURT: Ms. Gibson, for the record, when did you have this conversation with Miss Copenhaver?

MS. GIBSON: We've been having the conversation for months. Her consent, I believe, came probably six weeks ago. My letter explaining it to her was three weeks ago. I met with her last Thursday at the jail to again talk about NGRI versus diminished capacity. I was not received well. So I will put on the record that counsel has made every effort possible to explain this to her. And she has not been cooperative or talkative with me. So I've made every effort. But I will say this on the record also: If she has any doubt about the defense of diminished capacity and making the admissions that she committed the murder, I do not and will not go forward with that defense.

THE COURT: Miss Copenhaver, I'm not trying to be difficult. Take your mask off for me. Okay? Do you have any issue with Ms. Gibson admitting that you are responsible for the homicide of the victim? So that – I'm sorry?

DEFENDANT: Yeah. I have issues with that.

THE COURT: All right. Explain why you have issues with that.

DEFENDANT: Because it's her admitting.

THE COURT: Okay. But you understand that if you do not make that admission, she cannot utilize the diminished capacity defense, which would mean the jury will not get an instruction for second-degree murder?

DEFENDANT: All right. She can use it.

THE COURT: I'm sorry?

DEFENDANT: She can use it then.

THE COURT: So what I'm hearing you say is you want the jury to receive an instruction for second-degree murder, and in order for –

DEFENDANT: Diminished capacity defense.

THE COURT: You do want her to utilize the diminished capacity defense?

> DEFENDANT: Yes.
>
> THE COURT: So that the jury can receive an instruction for second-degree murder? Yes?
>
> DEFENDANT: Yeah.
>
> THE COURT: Are you sure?
>
> DEFENDANT: Yeah.

Considering the above exchange, it is clear Defendant's counsel informed her of the requirements for the defense of diminished capacity. Defendant was informed of these requirements weeks before her decision, and the trial court obtained her consent upon a clear and careful explanation. The trial court conducted an additional colloquy with Defendant after the charge conference and before closing arguments:

> THE COURT: All right. And prior to trial -- Miss Copenhaver, if you'll stand up for me, please, ma'am. Prior to trial, Miss Copenhaver, you and I had a discussion about potential admissions by Ms. Gibson as it relates to diminished capacity. Do you remember that discussion?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you approved that admission; is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Regarding potentially admitting the murder but with diminished capacity. Is that an accurate statement on my part?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you still approve of the same?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: All right. You can be seated.

Here, since the record contains sufficient information to resolve Defendant's allegation, it is properly reviewed by this Court. *See id*. In view of the record, we hold Defendant's attorney's performance did not amount to a *Harbison* error. *See State v. Bryant*, 281 N.C. App. 116, 126–27, 867 S.E.2d 580, 587 (2021) ("[W]e conclude to the extent defense trial counsel's admissions in opening statements triggered *Harbison*, the trial court's colloquy with Defendant in this case was adequate

to ascertain Defendant's consent to those admissions. Consequently, Defendant was not per se denied effective assistance of counsel."); *see also State v. Foreman*, 270 N.C. App. 784, 792, 842 S.E.2d 184, 189 (2020) ("As Defendant's consent to his attorney's concession of guilt was knowing and voluntary, he was not denied effective assistance of counsel in violation of *Harbison*.").

B. Jury Instruction

Defendant also argues that she was denied effective assistance of counsel because her attorney did not object to the trial court's jury instruction on not guilty by reason of insanity. Defendant claims her attorney was bound to comply with her desire to object to the instruction. Her ineffective assistance of counsel argument on this basis fares no better than her first. Even if her attorney was bound to follow her request, she cannot show prejudice to her defense. *See Strickland*, 466 U.S. at 671, 104 S. Ct. at 2056 ("With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

We also acknowledge Defendant's alternative argument alleging her attorney's failure to object to the not guilty by reason of insanity jury instruction contributed to structural error under *State v. Payne*, 256 N.C. App. 572, 808 S.E.2d 476 (2017). The dissent similarly suggests *Payne* is applicable to resolve Defendant's IAC claim. But *Payne* does not consider whether the Defendant received IAC. Instead, it addresses whether the trial court erred in "allow[ing] her lawyer to pursue a pre-trial insanity defense against [the defendant's] wishes . . . ." *Id.* at 577, 808 S.E.2d at 480–81.

Even if *Payne* applied, it applied *Harbison*:

> Though *Harbison* dealt with the consequences of a defendant's attorney admitting defendant's guilt to certain charges without the defendant's consent, in light of . . . precedent, we find the following reasoning in *Harbison* applicable to the present case:
>
> This Court is cognizant of situations where the evidence is so overwhelming that a plea of guilty [or NGRI] is the best trial strategy. However, the gravity of the consequences demands that the decision to plead guilty [or NGRI]

> remain in the defendant's hands. When counsel admits his client's guilt [or moves for a pretrial determination of NGRI] 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. . . . [ ] Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Payne, 256 N.C. App. at 584–85, 808 S.E.2d at 485 (citing *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507). But *Payne* is inapplicable to instant case for other reasons.

In *Payne*, the defendant's attorney, against the defendant's express wishes, "moved for a pretrial determination of NGRI pursuant to N.C. [Gen. Stat.] § 15A-959(c), the State consented, and the trial court agreed—purportedly dismissing the charges against Defendant based upon its determination that she was NGRI." *See generally Payne*, 256 N.C. App. at 578, 808 S.E.2d at 480. Then, the trial court "entered 'an order finding that [D]efendant ha[d] been found not guilty by reason of insanity of a crime and committ[ed her] to a Forensic Unit . . .' until such time as Defendant should be released 'in accordance with Chapter 122C of the General Statutes.' " *Id.* (brackets in original). On appeal, this Court concluded, "by allowing Defendant's counsel to seek and accept a pretrial disposition of NGRI, the trial court 'deprived [Defendant] of [her] constitutional right to conduct [her] own defense.' " *Id.* at 585, 808 S.E.2d at 485 (citation omitted) (brackets in original).

The *Payne* Court determined, "[b]y ignoring Defendant's clearly stated desire to proceed to trial rather than moving for a pretrial verdict of NGRI . . . the trial court allowed . . . the 'waiver' of her fundamental rights . . . ." *Id.* at 585, 808 S.E.2d at 485. The Court continued, "[t]he denial of Defendant's right to counsel advocating for her wishes, which resulted in the denial of Defendant's right to trial and her indefinite involuntary commitment pursuant to N.C.G.S. § 15A-959(c) and N.C.G.S. § 15A-1321(b), constituted reversible error." *Id.* at 586, 808 S.E.2d at 486. In this matter, Defendant's attorney made no such concession that led to her commitment. This Court has since followed *Payne*, yet has not extended its ruling to the present situation—IAC by failure to object to jury instructions. *See In re T.S.P.*, 260 N.C. App. 127, 814 S.E.2d 923 (2018); *see also State v. Myrick*, 277 N.C. App. 112, 113, 857 S.E.2d 545, 546 (2021). Given the patent factual and procedural differences, we decline to expand the boundaries of the *Payne* ruling to this case. *Strickland* is the proper paradigm for this analysis. 466 U.S. 668, 687, 104 S. Ct. 2052, 2064.

Here, applying *Strickland*, the cold record does not contain the requisite information to determine whether Defendant's trial counsel's performance was deficient. *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citing *Strickland*, 466 U.S. at 687–88, 104 S. Ct. at 2064) ("An IAC claim must establish both that the professional assistance defendant received was unreasonable and that the trial would have had a different outcome in the absence of such assistance."). Assuming *arguendo*, that Defendant's attorney rendered deficient performance, the record reveals Defendant cannot establish prejudice to her defense. *See State v. Oglesby*, 382 N.C. 235, 248, 876 S.E.2d 249, 260 (2022) ("[The defendant's] IAC claim is properly disposed of on prejudice grounds alone."). Defendant cannot show a reasonable probability that the trial result would have been different absent her attorney's failure to object to this instruction. *See Blakeney*, 352 N.C. at 307–08, 531 S.E.2d at 815 ("Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error."). The jury's verdict likewise supports this outcome since it shows the jury did not find Defendant not guilty by reason of insanity. Since Defendant cannot show her attorney's performance, even if deficient, prejudiced her defense, she cannot meet the second prong of the *Strickland* test. 466 U.S. at 687, 104 S. Ct. at 2064. We therefore hold Defendant has not established a claim for ineffective assistance of counsel.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and affirm the Judgment. We dismiss Defendant's IAC claims.

NO ERROR IN PART; DISMISSED IN PART.

Judge FLOOD concurs.

Judge HAMPSON concurs in part and dissents in part by separate opinion.

HAMPSON, Judge, dissenting in part.

This Court's consistent practice is to dismiss IAC claims without prejudice to allow defendants to have their claims considered through a motion for appropriate relief. *See State v. Dockery*, 78 N.C. App. 190,

192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal."); *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing the defendant's appeal because issues could not be determined from the record on appeal and stating that to "properly advance these arguments, defendant must move for appropriate relief pursuant to G.S. 15A-1415[.]"). This is not to say this Court may never consider IAC claims on direct appeal, but rather that the cases in which direct review is appropriate are limited—particularly in light of the gravity of defendants' interests at stake.

"IAC 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). But a "cold record," however lengthy, does not enable us to ascertain significant, non-verbal aspects of communication, such as tone and body language. Thus, "[s]imply stated, the trial court is in a better position to determine whether a counsel's performance: (1) was deficient so as to deprive defendant of 'counsel' guaranteed under the Sixth Amendment; and (2) prejudiced defendant's defense to such an extent that the trial was unfair and the result unreliable." *State v. Streater*, 197 N.C. App. 632, 649, 678 S.E.2d 367, 378 (2009) (quoting *State v. Duncan*, 188 N.C. App. 508, 517, 656 S.E.2d 597, 603 (2008) (Hunter, J., dissenting), *disc. rev. improvidently allowed*, *reversed*, 362 N.C. 665, 666, 669 S.E.2d 738, 738 (2008) ("For the reasons stated in the dissenting opinion of the Court of Appeals, the decision of the Court of Appeals is reversed[.]")). We have repeatedly recognized the trial court is best positioned to make credibility determinations and, accordingly, we limit our forays into such issues.

Moreover, "because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal." *Fair*, 354 N.C. at 167, 557 S.E.2d at 525. Further, in order to "defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's *thoughts*, *concerns*, *and demeanor*." *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citation omitted) (emphasis added). "Only when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance." *Id.* (quoting *State v. Taylor*, 327 N.C. 147, 161, 393 S.E.2d 801, 810 (1990) (Meyer, J., dissenting) (citation omitted)). I do not believe the issues involved in this case are as clear-cut as the majority

suggests. Recognizing the limitations of our review on appeal, I would dismiss Defendant's IAC claim without prejudice to the filing of a motion for appropriate relief in the trial court.

Here, Defendant's IAC claim is two-fold: first, her colloquy with the trial court regarding her understanding of the requirements to assert a defense of diminished capacity; second, her attorney's acquiescence to the trial court's instruction on NGRI.

As to Defendant's colloquy with the trial court regarding the use of a diminished capacity defense, although I do not believe the trial court's statements were incorrect, the transcript reflects potential confusion on Defendant's part as to the nature of the defense and her admission of guilt. Defendant stated she understood the diminished capacity defense "[f]or the most part," yet when the trial court asked specifically about the admission of guilt required to use that defense, Defendant replied "No. I don't really understand that part." Defendant told the trial court her attorney "didn't explain all that to me" about the admission of guilt. Although the trial court attempted to explain the required admission of guilt to Defendant, her attorney claimed she had done so as well; the Record, however, reflects Defendant had potentially lingering confusion. And, indeed, although Defendant stated at multiple points that her attorney had not explained aspects of diminished capacity to her, her attorney told the trial court "We've been having the conversation for months. . . . My letter explaining [diminished capacity] to her was three weeks ago. . . . I will put on the record that counsel has made every effort possible to explain this to her."

To be sure, the above reflects efforts to explain diminished capacity to Defendant. What it does not clearly and unequivocally show, however, is whether Defendant in fact understood. The Record reflects Defendant's attorney spent weeks attempting to explain diminished capacity to her—yet she expressed continued confusion. To infer she entirely understood the trial court's explanation across ten pages of the transcript when she did not understand after repeated conversations with her attorney is too far of a leap for this Court to make.

I believe this leap is particularly inappropriate in light of the constraints of the conversation between Defendant and the trial court. Defendant expressly stated she needed time to think about the admission of guilt required for diminished capacity, to which the trial court responded: "Well, you don't really have time to think about it[.] This is your day of trial. It starts today." The Record does seem to reflect Defendant wanted the jury to be instructed on a lesser offense than

first-degree murder, as she repeatedly asked about second-degree murder and voluntary manslaughter. Defendant agreed to the admission of guilt only *after* the trial court told her "if you do not make that admission, she cannot utilize the diminished capacity defense, which would mean the jury will not get an instruction for second-degree murder[.]" I do not suggest the trial court behaved improperly here; rather, I believe this transcript alone, considering the pressures Defendant may have felt to decide in the moment—which we cannot know or judge—is not sufficient to definitively dismiss her IAC claim on this issue.

As to Defendant's IAC claim regarding the trial court's instruction on NGRI and her counsel's failure to object to the instruction, the majority quickly disposes of Defendant's claim because, in their view, she cannot show she was prejudiced by the instruction. It is unclear why they believe this is so. But in any event, not every error requires a showing of prejudice. In *Harbison*, our Supreme Court concluded a defendant whose attorney admits guilt without their consent "need not show any specific prejudice in order to establish his right to a new trial due to ineffective assistance of counsel." 315 N.C. at 179, 337 S.E.2d at 507. Whether a trial court instructing the jury on a defense a defendant has affirmatively stated she does not wish to raise is structural error, *Harbison* error, or simply subject to our typical error/plain error analysis is not clear from our caselaw.

In *Harbison*, our Supreme Court acknowledged "there exist 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' " *Id.* (quoting *United States v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 2046, 80 L. Ed. 2d 657 (1984)). *Harbison* merely identified one such circumstance. Then, in *State v. Payne*, 256 N.C. App. 572, 808 S.E.2d 476 (2017), this Court considered whether a competent defendant has the right to refuse to pursue a defense of NGRI. That case presented an issue of first impression for North Carolina Courts, and we looked to other jurisdictions for guidance. The *Payne* Court first noted the D.C. Circuit Court of Appeals had "initially held 'a defendant may not keep the issue of insanity out of the case altogether. He may, if he wishes, refuse to raise the issue of insanity, but he may not, in a proper case, prevent the court from injecting it.' " *Id.* at 579, 808 S.E.2d at 482 (quoting *Whalem v. United States*, 346 F.2d 812, 818 (D.C. Cir. 1965)). However, the D.C. Circuit later overturned *Whalem*, recognizing "[n]o other federal court of appeals has imposed a duty upon the district court to raise the insanity defense; indeed, only a few have even considered the issue." *United States v. Marble*, 940 F.2d 1543, 1545 (D.C. Cir. 1991) (citations omitted).

In concluding a competent defendant has the right to determine whether or not to plead NGRI, the *Payne* Court pointed to the structure of the Sixth Amendment:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make h[er] defense. . . . The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant[.]

Payne, 256 N.C. App. at 581, 808 S.E.2d at 483 (quoting *Faretta v. California*, 422 U.S. 806, 819-20, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975)).

Here, although defense counsel did not enter a plea of NGRI on Defendant's behalf, she did acquiesce without objection to the trial court giving that instruction despite Defendant's repeated, unwavering statements she did not wish to present NGRI to the jury. If, as both federal and North Carolina caselaw make clear, a defendant's counsel is her "assistant," is such a failure to act in contravention of a defendant's known and expressed wishes, ineffective assistance per se? In such circumstances, should a defendant be required to show prejudice? Or is this, as in *Harbison*, a situation "so likely to prejudice the accused that the cost of litigating [its] effect in a particular case is unjustified"? 315 N.C. at 179, 337 S.E.2d at 507 (citation and quotation marks omitted). I do not believe this Court can or should answer that question absent additional proceedings in the trial court. Again, although the trial court's instruction was a correct statement of law, we have no way of knowing what would have happened had Defendant's counsel objected to the NGRI instruction. And the extent to which failing to act in accordance with a defendant's express wishes constitutes prejudice per se is an inquiry properly fleshed out in the trial court.

Further, in my view, the trial court is the proper venue for the parties to make their arguments with respect to whether defense counsel's inaction in this case constitutes structural error or *Harbison* error or neither. These claims should be developed in the trial court to create an adequate record in case of appeal. This is borne out by the majority's failure to reckon with Defendant's contentions regarding structural and *Harbison* error or to meaningfully explain why they believe this is neither structural error nor *Harbison* error.

I would thus conclude further development of the arguments is required before we can properly apply the *Strickland* test or determine whether another test is appropriate in this case. Therefore, I would dismiss Defendant's IAC claims without prejudice to permit Defendant to pursue a motion for appropriate relief in the trial court. Consequently, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
AMARI DIJAI GAMBLE

No. COA24-842

Filed 4 June 2025

1. Robbery—with a dangerous weapon—evidence of endangerment to victim's life—lesser-included offense instruction not warranted

In a prosecution for charges including robbery with a dangerous weapon, the trial court did not abuse its discretion by declining to instruct the jury on the lesser-included offense of common law robbery where the State had presented sufficient evidence that the victim's life was threatened or endangered during the robbery—more specifically, that the victim saw defendant holding a rifle with both hands from the time he entered her bedroom in the middle of the night to steal two purses (after having already entered the home uninvited earlier that evening) until the victim escaped the scene. Further, no conflicting evidence was offered to negate the victim's claim that she felt so threatened by defendant brandishing the rifle that she thought she was going to die that night.

2. Robbery—with a dangerous weapon—sufficiency of evidence—possession of firearm threatening or endangering victim's life—jury instruction on mere possession unwarranted

In a prosecution for charges including robbery with a dangerous weapon, for which one of the essential elements was that the victim's life be threatened or endangered by defendant's use of a dangerous weapon, the trial court did not abuse its discretion by declining to instruct the jury that defendant's mere possession of a weapon during the course of a robbery, without more, is insufficient to support a finding that the victim's life was endangered or threatened. Defendant's request for this instruction was not supported

by the evidence, which showed that defendant brandished a rifle in plain sight throughout the commission of the robbery—which occurred in the middle of the night in the victim's bedroom after defendant had already entered the victim's house uninvited earlier that evening—and the victim was not only aware of defendant brandishing the weapon but also felt so threatened by it that she thought she was going to die.

3. Criminal Law—jury deliberations—court's response to jury's questions—defense counsel's request for clarifying instruction—no prejudicial error

In a prosecution for charges including robbery with a dangerous weapon, the trial court did not commit prejudicial error by declining to answer the jury's questions during deliberations concerning an essential element of armed robbery—whether the victim's life was threatened or endangered—and in declining defense counsel's subsequent request for an instruction aimed at addressing the jury's questions. The issue was preserved for appellate review where defense counsel objected to the court's jury instructions before and after they were given; however, because defendant could not show a reasonable possibility that the jury would have returned a different verdict absent the purported error, such error was harmless.

Appeal by defendant from judgment entered 18 January 2024 by Judge Justin N. Davis in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 April 2025.

Attorney General Jeff Jackson, *by Assistant Attorney General Natalia K. Isenberg*, *for the State.*

Office of the Public Defender, *Assistant Public Defender*, *by Julie Ramseur Lewis*, *for the defendant-appellant.*

TYSON, Judge.

Amari Dijai Gamble ("Defendant") appeals from convictions and judgments entered upon a jury's verdicts of guilty of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon and felonious fleeing to elude. We discern no error.

I. Background

Dorothy Newton ("Newton") resided in her townhome with her eight-year-old son and her seventeen-year-old daughter, Kamya Little

("Little"). Late one evening, Newton was going to lock the back door to her townhouse when she discovered an unknown black male inside of her kitchen. He was dressed in all black and his face was concealed by a mask with only his eyes being visible. When Newton demanded for the man to leave her home, Little asked her mother not to make him leave, and she threatened to go with the man, if she did. Little ultimately left the home with the unknown male, at which point Newton locked the door and went upstairs to bed.

Later that night, Newton awoke to sounds of footsteps coming up the stairs towards her room. Little and the unknown male – still masked and now holding a rifle – entered her room. The male did not speak or make demands and never pointed the rifle directly in her direction. In recalling the incident to responding Charlotte-Mecklenburg Police Officer Alexa Odom, Newton reported the unknown male was "pointing the gun out and it was held by two hands" while he was in her bedroom. Newton testified she pleaded with Little and the unknown male to leave and not harm her, and she "thought she was going to die."

When Newton saw Little walk around the bed and grab her purse, she grabbed her phone, pushed the man to the side to reach the bedroom door, and ran down the stairs. After Newton ran out of her house, she witnessed Little and the unknown male together exited her townhouse with Little carrying two purses belonging to Newton. Little and the male entered Newton's Ford Escape vehicle and drove off. After watching them drive away, Newton re-entered her house and called 911 to report the incident.

Charlotte-Mecklenburg Police Officer Steven Hesseman responded to the 911 call and intercepted the Ford Escape while traveling towards Newton's home. Officer Hessman made a U-turn and followed the vehicle. After an erratic chase involving multiple officers, the vehicle was intercepted at the 800 block of 8th Street in Charlotte and the unknown male was arrested and detained. The male in the vehicle was identified as Defendant.

Defendant was indicted for robbery with a dangerous weapon, felonious fleeing to elude arrest, and conspiracy to commit robbery with a dangerous weapon. The jury convicted Defendant of all indicted charges. Defendant's convictions for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon were consolidated for judgment. He was sentenced as a prior record level I offender with 0 points to an active term of 64 to 89 months imprisonment. Defendant was also sentenced to an active term of 6 to 17 months imprisonment for his conviction for felony fleeing to elude. The sentences were ordered to run consecutively. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) and § 15A-1444(a) (2023).

III. Issues

Defendant argues the trial court erred by refusing to instruct the jury on the lesser-included offense of common law robbery, on mere possession of a firearm, and by the trial court's response to the jury's questions concerning the threatening and endangering element of robbery with a dangerous weapon.

IV. Lesser Included Offense of Common Law Robbery

[1] Defendant argues the trial court erred by refusing to instruct the jury on the lesser-included offense of common law robbery.

A. Standard of Review

Trial court jury instructions are reviewed on appeal *de novo*. *State v. Redmond*, 266 N.C. App. 580, 582, 831 S.E.2d 650, 652 (2019). Under *de novo* review, the appellate court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

"Choice of instruction is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *State v. Nicholson*, 355 N.C. 1, 66, 448 S.E.2d 109, 152 (2002) (citation omitted). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find [the] defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

B. Analysis

1. Lesser-Included Offense

Defendant contends the instruction of the lesser-included offense of common law robbery was warranted by the evidence because the State failed to unequivocally demonstrate Newton's life was threatened or endangered during the course of the robbery. Threatening or endangering the life of a person is an essential element to the crime of robbery with a dangerous weapon. *See State v. Oldroyd*, 380 N.C. 613, 618, 869 S.E.2d 193, 197 (2022) (citation omitted); *see also* N.C. Gen. Stat. § 14-87(a) (2023). Defendant claims the lack of evidence to support those elements warranted the lesser-included instruction on common law robbery.

"If . . . the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of the lesser included offense, it is not error for the trial judge to refuse to instruct the jury on the lesser offense." *State v. Clevenger*, 249 N.C. App. 383, 392, 791 S.E.2d 248, 255 (2016) (citing *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718-19 (1980)) (internal quotation omitted).

It is necessary to instruct the jury of a lesser-included offense "when and only when the jury could find that such [an] included crime of lesser degree was committed." *Id.* at 393, 263 S.E.2d at 255-56 (citation omitted). "Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to elements of the crime charged." *Id.*

2. Armed Robbery

Armed robbery is a three-element offense requiring: (1) the unlawful taking or attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; and, (3) whereby the life of a person is endangered or threatened. *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (citation omitted). This Court has previously held "in cases where the State's evidence establishes that a defendant held a dangerous weapon that was seen by the victim or a witness during the course of the robbery, the third element of armed robbery is satisfied." *State v. Wright*, 252 N.C. App. 501, 508, 798 S.E.2d 785, 790 (2017).

A dangerous weapon in the possession of a defendant held in a "manner and circumstance[]" that alludes to a harmful purpose provides sufficient evidence to support submission of a robbery with a dangerous weapon charge. *See State v. Whisenant*, 249 N.C. App. 456, 459, 791 S.E.2d 122, 125 (2016) (explaining that a defendant wielding an unopened knife during the commission of a robbery along with threats was sufficient to endanger the victim and uphold a charge of robbery with a dangerous weapon).

Following a jury charge conference with counsel, the trial court declined to give the common law robbery instruction in light of the totality of the evidence presented. The trial court noted Defendant's openly brandishing a deadly weapon is different than mere possession and the lesser-included offense instruction was inappropriate in light of the circumstances. *Id.*

Defendant does not contest the evidence produced by the State was sufficient to satisfy elements one and two of the robbery with a

dangerous weapon charge. Defendant argues the State failed to present sufficient evidence tending to show Newton's life was endangered or threatened by the presence of the rifle during the robbery. *Id.* The police report taken after the robbery and the testimony at trial both reflect Newton visibly saw Defendant holding the rifle with both hands from the time he entered her bedroom in the middle of the night until she ran past him in the bedroom and out of the house. No conflicting evidence was offered to negate Newton's assertion she was visually aware of and threatened by Defendant's possession of the rifle during the commission of the robbery to the point Newton "thought she was going to die." Sufficient evidence was proffered to support element three. *Id.*

The State produced sufficient evidence to support each of the three elements of robbery with a dangerous weapon. A lesser-included offense instruction was not warranted or required to be given by the trial court. *Clevenger*, 249 N.C. App. at 392, 791 S.E.2d at 255. The trial court did not err by denying Defendant's request for the instruction on lesser-included common law robbery. *Id.*

V. Mere Possession of a Firearm

[2] Defendant argues the trial court erred by refusing his request to instruct the jury that mere possession of a firearm, in itself, does not constitute endangering or threatening a victim. Defendant requested for the jury instructions to include language distinguishing mere possession of a weapon from possession that endangers or threatens the life of the victim as is referenced in Footnote 7 of the North Carolina Pattern Jury Instructions. N.C.P.I. – Crim. 217.20 fn. 7.

The trial court denied Defendant's request for inclusion of the mere possession language, reasoning the evidence clearly indicated the deadly weapon was brandished by Defendant during the robbery, and instructing the jury on mere possession might cause confusion.

A. Standard of Review

"[C]hoice of instruction[] is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *Nicholson*, 355 N.C. at 66, 558 S.E.2d at 152 (citation omitted). If a request is made for a special instruction, "which is correct in itself and supported by evidence, the court must give the instruction at least in substance." *State v. Blair*, 181 N.C. App. 236, 242, 638 S.E.2d 914, 919 (2007). The evidence must support the defendant's requested instruction, otherwise the trial court is not required to give it. *See id.*

B. Analysis

A "defendant's mere possession of a weapon – without more – during the course of a robbery is insufficient to support a finding that the victim's life was endangered or threatened." *State v. Wright*, 252 N.C. App. at 507, 798 S.E.2d at 789 (citing *State v. Gibbons*, 303 N.C. 484, 488, 279 S.E.2d 574, 577 (1981)). To satisfy the elements of robbery with a dangerous weapon, the State must present evidence "aside from the mere fact of the weapon's presence." *Id.* at 507-08, 798 S.E.2d at 789 (citation omitted). An instruction on mere possession is appropriate in situations where a gun is present but neither the victim nor any bystanders actually saw the weapon during the course of the robbery. *See id.* at 252 N.C. App. at 508, 798 S.E.2d at 790 (citation omitted).

The State's evidence is unequivocal tending to show Defendant was holding the rifle in plain sight during the commission of the robbery in Newton's bedroom during the middle of the night after an earlier home intrusion. Because Newton clearly saw the rifle and was threatened by Defendant's brandishing the firearm, to the point she "thought she was going to die," Defendant's request for a mere possession instruction was not supported by evidence. The trial court did not err in denying Defendant's request for a mere possession of a weapon instruction. *Id.*

VI. Jury Instructions and Response to Jury's Questions

[3] Defendant next argues the trial court committed prejudicial or plain error by failing to answer the jury's questions concerning an essential element of robbery with a firearm.

A. Standard of Review

The trial court's decision to answer a jury question, or to choose to repeat previously given instructions, is reviewed for an abuse of discretion. *See State v. Hazel*, 243 N.C. App. 741, 744, 779 S.E.2d 171, 173-74 (2015); *see also State v. Smith*, 194 N.C. App. 120, 126, 669 S.E.2d 8, 12-13 (2008). After the jury retires for deliberation, the court may provide additional instructions to correct or withdraw an erroneous instruction, clarify an ambiguous instruction, or instruct the jury on a point of law which should have been covered in the original instructions. N.C. Gen. Stat. § 15A-1234(a) (2023). Failure to object to an erroneous instruction or to erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with N.C. Gen. Stat. § 15A-1446(d)(13). N.C. Gen. Stat. § 15A-1231(d) (2023).

Preserved and unpreserved errors are treated differently on appeal. *State v. Lawrence*, 356 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). Issues are preserved for appeal by Defendant's timely objection at trial and are

sufficient to serve as the basis for error. *State v. Black*, 308 N.C. 736, 739, 303 S.E.2d 804, 806 (1983). "No party may [argue] as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection." *Id.* Preserved legal errors are reviewed under the harmless error standard. N.C. Gen. Stat. § 15A-1443(a) (2023).

Plain error review allows appellate courts to bypass preservation rules in certain "exceptional circumstances." *See Lawrence*, 356 N.C. at 514-15, 723 S.E.2d at 332. Our Supreme Court has held the plain error standard applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the unpreserved error rises to the level of plain error. *See State v. Melvin*, 364 N.C. 589, 593-94, 707 S.E.2d 629, 632-33 (2010).

> [T]he plain error rule…is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right or the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial"…or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted).

The plain error standard does not require every improper instruction to mandate reversal of the judgment or set aside the verdict. *Lawrence*, 356 N.C. at 517, 723 S.E.2d at 333-34. It is a rare case where improper instructions will justify reversal of a criminal conviction judgment when no objection has been made in the trial court. *Id.*

B. Analysis

Defendant contends the trial court's response to the jury's questions during deliberation was prejudicial error. Defendant also argues if the jury instruction issue is determined to be improperly preserved, the trial court committed plain error in instructing or responding to the jury.

The trial judge and counsel discussed how to respond to questions presented by the jury during deliberations. The trial judge decided to call the jury back into the courtroom to re-read the initial jury instructions,

to re-watch the police officer's body camera footage, and then address the jury's questions related to the threatening and endangering element of robbery with a firearm. At this time, defense counsel formally objected and requested an instruction to be given stating that mere possession of a weapon alone does not satisfy the elements for robbery with a firearm.

Alternatively, defense counsel argued if mere possession of a weapon was not instructed over objection, the jury should be told arguments by counsel are permitted. The trial judge proceeded with instructing the jury over defense counsel's objection. After the jury was dismissed to deliberate following further instruction, defense counsel verbally renewed his prior objections to preserve the record.

Defendant's argument regarding the purported impropriety of the trial court's response to the jury's question was properly preserved by objection before and after the instruction was given. Preserved legal errors are reviewed under the harmless error standard of review. *State v. Jenrette*, 236 N.C. App. 616, 637, 763 S.E.2d 404, 417 (2014).

A defendant must show a reasonable possibility of a different result at trial had the error in question not been committed. *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331. Defendant has not shown the jury would have reasonably returned a different verdict if the mere possession instruction had been given in response to the jury's questions. Defendant failed to show he was prejudiced by the trial court's jury instructions to award a new trial. We discern no prejudicial error.

VII. Conclusion

No conflicting evidence negates the three elements to establish submission of robbery with a dangerous weapon to require an instruction on mere possession. Defendant cannot demonstrate the evidence required the trial court to instruct the jury on the lesser-included offense of common law robbery. Defendant cannot show he was prejudiced by the trial court's responses to addressing the jury's clarifying questions.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We discern no error in the jury's verdicts or in the judgments entered thereon.

It is so ordered.

NO ERROR.

Chief Judge DILLON and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
JONATHAN LAMONT GARDNER

No. COA24-685

Filed 4 June 2025

1. Appeal and Error—defective notice of appeal—petition for writ of certiorari granted—discretionary decision

In a criminal case in which defendant was found guilty of assault on a female, where defendant's oral notice of appeal was defective because it was made prematurely (prior to entry of the final judgment), the appellate court lacked jurisdiction to hear defendant's appeal. However, because defendant clearly expressed an intent to appeal and lost his right to appeal without fault, the appellate court exercised its discretion to grant defendant's petition for writ of certiorari to consider the merits of his arguments and to prevent manifest injustice.

2. Appeal and Error—preservation of issues—constitutional issues not raised at trial—waiver—lack of extraordinary circumstances

In an appeal from defendant's conviction of assault on a female, where defendant failed to raise two constitutional issues at trial—that the statute under which he was convicted is constitutionally vague and that the provision under which he was convicted impermissibly discriminates on the basis of sex—those issues were waived. The appellate court determined that defendant did not show extraordinary circumstances to support invoking Appellate Rule 2 (suspending the appellate rules in order to reach the merits).

3. Assault—assault on a female—evidence that defendant is a male—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss the charge of assault on a female where the State presented sufficient evidence, even if circumstantial, from which a jury could infer that defendant was a male person for purposes of the offense under N.C.G.S. § 14-33(c)(2). All parties, including defense counsel, referred to defendant using "Mr." and the pronouns "he" and "him"; defense counsel asked the prosecuting witness whether defendant was "not a large man"; and defense counsel raised no objection to any characterization of defendant as a male.

4. Constitutional Law—effective assistance of counsel—failure to raise constitutional issues at trial—dismissed without prejudice to file MAR

In an appeal from judgment entered upon defendant's conviction of assault on a female, defendant's claim that his counsel was constitutionally ineffective for failing to raise two constitutional issues at trial was dismissed without prejudice to reassert the claim in a motion for appropriate relief in the trial court; based on the cold record, the appellate court could not decide the issue on the merits without further development of the facts.

Judge FREEMAN concurring in part and dissenting in part.

Appeal by Defendant from Judgment entered 4 May 2022 by Judge Robert Broadie in Forsyth County Superior Court. Heard in the Court of Appeals 25 February 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Raymond W. Goodwin, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Jonathan Lamont Gardner (Defendant) appeals from a Judgment entered upon a jury verdict finding him guilty of Assault on a Female. The Record before us, including evidence presented at trial, tends to reflect the following:

On 26 June 2021 at approximately 1 p.m. to 2 p.m., Defendant and Lovella Collins, Defendant's girlfriend, were at Defendant's apartment when "an unexpected guest" arrived. This guest was "a female friend" of Defendant. The three began talking and "a lot of disagreements" ensued. After about twenty minutes, the friend left and Collins decided to leave shortly thereafter.

According to Collins, Defendant began yelling at her for letting the friend into the apartment. After some discussion between the two, Defendant physically threw Collins out of the apartment. Collins went back into the apartment and Defendant continued "screaming and

hollering." Defendant then went to Collins and "started choking" her with his hands around her neck. Collins testified Defendant applied "a lot of force[.]" Eventually, Defendant let Collins go and she fell to the floor, struggling to breathe. Collins left the apartment to go to the hospital. At the emergency room, medical personnel called the police.

At trial, the State and its witness repeatedly referred to Defendant as "Mr.," "he," and "him," with no objection by defense counsel. In one such exchange, Collins described beginning her relationship with Defendant: "He [Defendant] had got him a place after that one year and moved out of his mom['s] house. Got his own place. Told me he had his place and that's when I came by. That's how we started talking, when he got his own apartment." Indeed, defense counsel likewise repeatedly and exclusively referred to Defendant using masculine pronouns. During cross-examination of Collins, defense counsel asked: "Mr. Gardner is not a large man, he is not very big and tall, is that correct?"

At the close of the State's case in chief, Defendant moved to dismiss the charge for insufficient evidence. The trial court denied the Motion. Defendant elected not to present any evidence. At the close of all evidence, Defendant again moved to dismiss the charge. Defendant argued specifically that the State had not presented sufficient evidence Defendant was a male. The trial court again denied Defendant's Motion.

On 4 May 2023, the jury returned a verdict finding Defendant guilty of Assault on a Female. Defendant orally entered Notice of Appeal the same day. The trial court entered a Judgment sentencing Defendant to 75 days of imprisonment and suspended that sentence, placing Defendant on supervised probation for 18 months. The trial court also ordered Defendant have no contact with Collins and to participate in a substance abuse program.

Appellate Jurisdiction

[1] "Notice of appeal shall be given within the time, in the manner and with the effect provided in the rules of appellate procedure." N.C. Gen. Stat. § 15A-1448(b) (2023). Rule 4(a) of the North Carolina Rules of Appellate Procedure provides "appeal from a *judgment* or order of a superior or district court" may be taken by "giving oral notice of appeal at trial[.]" (emphasis added). "An oral notice of appeal given before entry of the final judgment violates Rule 4 and does not give this Court jurisdiction to hear the defendant's direct appeal." *State v. Jones*, 296 N.C. App. 512, 515, 909 S.E.2d 373, 376 (2024) (citing *State v. Smith*, 292 N.C. App. 662, 665, 898 S.E.2d 909, 912 (2024) and *State v. Lopez*, 264 N.C. App. 496, 503, 826 S.E.2d 498, 503 (2019)).

The Record in this case reflects that after the jury announced its verdict but prior to sentencing, counsel for Defendant stated, "At the appropriate time we would respectfully give notice of appeal[.]" The trial court responded, "So noted." Thus, as Defendant prematurely entered oral Notice of Appeal before entry of the final Judgment in violation of Rule 4, this Court does not have jurisdiction to hear Defendant's appeal. *See Jones*, 909 S.E.2d at 376; *Lopez*, 264 N.C. App. at 503, 826 S.E.2d at 503. Defendant, acknowledging this defect, filed a petition for writ of certiorari to allow us to hear this appeal. "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1) (2024). Here, it is clear Defendant expressed an intent to appeal although he failed to do so at the proper time. In our discretion, we allow Defendant's Petition for Writ of Certiorari and reach the merits of his appeal.

Our dissenting colleague's concerns about this issue of certiorari are misplaced. Indeed, although he points to *Cryan v. National Council of Young Men's Christian Associations of United States*, 384 N.C. 569, 887 S.E.2d 848 (2023), for the proposition that we are required to find error was probably committed before granting certiorari, a full reading of that case reveals our Supreme Court affirmed this Court's grant of certiorari where the determination looked much the same as here. *Id.* at 573, 887 S.E.2d at 851. In considering whether to grant the defendant's petition for writ of certiorari, this Court in *Cryan* noted certiorari is issued only upon a showing of appropriate circumstances, such as where "there is merit to an appellant's substantive arguments and it is in the interests of justice to treat an appeal as a petition for writ of certiorari." *Cryan v. Nat'l Couns. of Young Men's Christian Assocs. of United States*, 280 N.C. App. 309, 315, 867 S.E.2d 354, 359 (2021) (quoting *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 606, 596 S.E.2d 285, 289 (2004)). In short, *Cryan* simply reaffirms our discretion to allow petitions for writ of certiorari in appropriate cases—the scope of which is guided by our precedent and our understanding of the equitable concerns in each case.

To that end, this Court has routinely granted certiorari in precisely this type of case: where a defendant's intent to appeal was clear and their right to appeal would otherwise be lost through a technical mistake by their attorney. *See*, *e.g.*, *State v. Springle*, 244 N.C. App. 760, 762-64, 781 S.E.2d 518, 520-21 (2016) (granting certiorari where defendant's trial counsel prepared notice of appeal omitting certificate of service on the State); *State v. Smith*, 292 N.C. App. 662, 665, 898 S.E.2d 909,

912 (2024) (granting certiorari where defendant's trial counsel entered oral notice of appeal before entry of final judgment); *Jones*, 296 N.C. App. at 515-16, 909 S.E.2d at 376 (same); *Lopez*, 264 N.C. App. at 503-04, 826 S.E.2d at 503-04 (same); *State v. Robinson*, 279 N.C. App. 643, 645, 865 S.E.2d 745, 748 (2021) (granting certiorari where defendant's trial counsel failed to give timely notice of appeal from denial of motion to suppress); *State v. Perez*, 275 N.C. App. 860, 865, 854 S.E.2d 15, 20 (2020) (granting certiorari where defendant's trial counsel entered oral notice of appeal at sex offender registration hearing rather than at trial); *State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 231-32 (2015) (granting certiorari where defendant's trial counsel entered oral notice of appeal appearing before the trial court six days after entry of judgment); *State v. Hammonds*, 218 N.C. App. 158, 162-63, 720 S.E.2d 820, 822-23 (2012) (granting certiorari where defendant's trial counsel failed to list all convictions from which defendant was appealing in written notice of appeal and attempted to enter oral notice of appeal several days after trial); *State v. Price*, 290 N.C. App. 480, 891 S.E.2d 661, 2023 WL 5938676, *2 (2023) (unpublished) (granting certiorari where defendant's trial counsel entered oral notice of appeal before entry of final judgment); *State v. O'Neil*, 296 N.C. App. 158, 905 S.E.2d 924, 2024 WL 4356330, *1-*2 (2024) (unpublished) (granting certiorari where defendant's written notice of appeal was untimely filed).[1]

These decisions serve as guideposts to help us exercise our discretion and determine in which cases a grant of certiorari is appropriate. The consistent through-line of the above cases demonstrates this Court has repeatedly concluded that minor, technical errors by a defendant's attorney can be such circumstances—not that it necessarily is or always must be. The routineness of this type of grant is far from creating a "per se rule," as the dissent asserts. Rather, it is a reflection of the fact that many members of this Court have long agreed this situation is an "appropriate circumstance" qualifying for relief. Some may disagree and, indeed, they are allowed to do so because this rule is *discretionary.* Granting certiorari in this type of case protects defendants, whose liberty is at stake, from losing their right to judicial review "through no fault of [their] own[.]" *Hammonds*, 218 N.C. App. at 163, 720 S.E.2d at 823. Indeed, in these cases, "failure to issue a writ of certiorari would be

1. While our dissenting colleague takes issue with the longstanding precedent of "panels" of this Court granting certiorari in their discretion, such is the operation of this Court. Indeed, while this Court is authorized to sit *en banc*, by statute this Court operates in three-judge panels. N.C. Gen. Stat. § 7A-16 (2023). There is nothing inherently suspect about a panel of our Court deciding a case or petition.

manifestly unjust[.]" *Id*. As such, this is one of the "appropriate circumstances" in which we may, in our discretion, issue our writ of certiorari. *See* N.C. R. App. P. 21(a)(1) (2024); N.C. Gen. Stat. § 7A-32(c) (2023).

Despite our dissenting colleague's assertions, we are in no way creating a per se rule. To the contrary, our colleague creates a per se rule requiring a showing that error was committed below. However, recognizing the equities in this situation, this Court does not necessarily require a showing of absolute merit on a defendant's part. Moreover, "merit" does not necessarily mean a defendant will win their appeal. "Indeed, it is not uncommon for our Court to issue a writ in order to review a defendant's appeal where there is a jurisdictional defect in his or her notice of appeal, where the State has not been prejudiced by the defect, *even where said defendant's appeal has little, if any merit*." *State v. Ore*, 283 N.C. App. 524, 535, 874 S.E.2d 222, 230 (2022) (Dillon, J., concurring) (emphasis in original), *vacated in part*, *State v. Ore*, 383 N.C. 676, 678, 880 S.E.2d 677, 678 (2022) ("The concurring opinions in the Court of Appeals [regarding certiorari] . . . accurately reflect the law."). *See also State v. Powers*, 288 N.C. App. 272, 884 S.E.2d 505, 2023 WL 2770243, *3 (2023) (unpublished) ("The State does not argue that [defendant]'s appeal is so lacking in merit that allowing his petition would amount to an abuse of discretion; to the contrary, the State acknowledges that we have discretion to grant *certiorari* review in this case. Consistent with the reasoning set forth in the above caselaw and in light of the State's concession, we dismiss [defendant]'s appeal and grant his petition for writ of *certiorari* in our discretion." (citing *Robinson*, 279 N.C. App. at 645, 865 S.E.2d at 748)).

For example, in several of the above cases, this Court granted certiorari but concluded there had been no error in the defendant's trial or otherwise dismissed the appeal after reviewing the merits. *Smith*, 292 N.C. App. at 669, 898 S.E.2d at 914; *Jones*, 909 S.E.2d at 378; *Robinson*, 279 N.C. App. at 647, 865 S.E.2d at 749; *Price*, 2023 WL 5938676 at *6; *O'Neil*, 2024 WL 4356330 at *2. Sometimes, as here, there is good reason for doing so: "Our Court does not always allow such writs, especially where the issues raised have little merit. But we might choose to do so, for instance, where considering and resolving the issues would promote judicial economy by eliminating the need for the trial court to have to consider a subsequent motion for appropriate relief or ineffective assistance of counsel." *Ore*, 283 N.C. App. at 535, 874 S.E.2d at 230 (Dillon, J., concurring).

Such was also the case in one of the opinions our Supreme Court cited in *Cryan* for the proposition that a writ of certiorari "should only

issue if the petitioner can show merit or that error was probably committed below." 384 N.C. at 572, 887 S.E.2d at 851 (quotation marks omitted) (citing *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021) and *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)). In *Grundler*, our Supreme Court allowed a petition for writ of certiorari despite expressly finding the trial court had not committed any error: "We are constrained to allow the petition. We wish to emphasize that we are not induced so to do by reason of any error on the part of [the trial court], for there was none." *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9. The Supreme Court allowed the petition, however, in order to address the merits of the defendant's arguments. *Id.* Thus, our caselaw is clear that "merit" is not synonymous with a likelihood of success on appeal.[2]

Further, our grant of certiorari is neither *sua sponte* nor pursuant to Rule 2, which allows us to suspend the Rules of Appellate Procedure in order to prevent "manifest injustice." Rather, in this case a petition for writ of certiorari was filed because Defendant's right to appeal had been lost—a circumstance expressly set out in our Rules of Appellate Procedure. *See* N.C. R. App. P. 21(a)(1) (2024) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action. . ."). And—although the State opposes issuance of the writ in this case—the State does not argue granting certiorari would be an abuse of our discretion but expressly concedes: "it is within this court's discretion whether to allow the petition for writ of certiorari to review the judgment[.]"[3]

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2. Indeed, in an early decision, our Supreme Court explained:

> The writ of *certiorari* is an extraordinary remedy, and is said to be grantable at the discretion of the Court. The meaning of this is, that it is not a matter of right, like a writ of error or an appeal. It is very often used as a substitute for an appeal, and in so using it, the courts have exercised their discretion, in such a manner as, on the one hand, to prevent a party from being deprived of a just defense, and on the other, to prevent its being made a mere instrument of delay. Where a party has lost his appeal by the neglect of an officer of the law, the contrivance of the opposite party, or the improper conduct of the inferior court, the cause will be re-examined by the Superior Court upon a writ of *certiorari*, without reference to the merits of the case. This is put upon the ground that he has been deprived of a right, to wit, of an appeal, without his fault[.]

McConnell v. Caldwell, 51 N.C. 469, 470 (1859); *see also* N.C. Gen. Stat. § 1-269 (2023).

3. The State's opposition rests on whether Defendant preserved a constitutional issue in the trial court. We address that issue below.

Our caselaw recognizes this Court should err on the side of adjudicating these cases on the merits rather than punishing defendants for mistakes over which they had no control—particularly where, as here, the defendant's intent to appeal was clear. *See Springle*, 244 N.C. App. at 763, 781 S.E.2d at 521 ("[A] defect in a notice of appeal 'should not result in loss of the appeal as long as the intent to appeal . . . can be fairly inferred from the notice and the appellee is not misled by the mistake.' " (quoting *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (citation omitted)); *Robinson*, 279 N.C. App. at 645, 865 S.E.2d at 748 ("Because defendant has lost the right to appeal without fault, we dismiss his appeal and exercise our discretion to grant defendant's petition for *writ of certiorari* and address the merits of defendant's appeal.").

Issues

The issues on appeal are whether: (I) Defendant's constitutional claims are preserved for our review; (II) the trial court erred by denying Defendant's Motions to Dismiss; and (III) the Record is sufficient to review Defendant's ineffective assistance of counsel (IAC) claim on direct review.

Analysis

I. Constitutional Claims

[2] Defendant raises two constitutional claims regarding his conviction. First, he argues the statute under which he was convicted is unconstitutionally vague. Second, he contends the provision under which he was convicted impermissibly discriminates on the basis of sex. We do not reach the merits of either argument as they are waived.

Our Courts have consistently stated, "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citations omitted); *see also State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005) ("[C]onstitutional error will not be considered for the first time on appeal." (citations omitted)). Indeed, "Constitutional errors not raised by objection at trial are deemed waived on appeal." *State v. Forte*, 257 N.C. App. 505, 511, 810 S.E.2d 339, 343, *disc. rev. denied*, 371 N.C. 339, 813 S.E.2d 858 (2018). The Record before us reveals Defendant made no objection or argument as to either constitutional claim before the trial court. Thus, consistent with our caselaw, we conclude Defendant's constitutional claims are waived. Defendant argues, however, this Court should invoke Rule 2 of the North Carolina Rules of Appellate Procedure to adjudicate the merits of his claims.

Rule 2 of our Rules of Appellate Procedures provides this Court may, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]" "Rule 2 discretion should be exercised 'cautiously' and only in 'exceptional circumstances.' " *State v. Baldwin*, 240 N.C. App. 413, 422, 770 S.E.2d 167, 174 (2015) (quoting *State v. Williams*, 201 N.C. App. 161, 173, 689 S.E.2d 412, 418 (2009)). "[W]hether 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." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017) (citations omitted), *disc. rev. allowed on add'l issues*, 371 N.C. 343, 813 S.E.2d 849 (2018). After reviewing Defendant's arguments and the Record on appeal, Defendant has not shown extraordinary circumstances meriting the invocation of Rule 2. In the exercise of our discretion, we decline to invoke Rule 2 and dismiss Defendant's arguments as to the constitutionality of the underlying statute.

II. Motions 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 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). Evidence may be either direct evidence, "that which is immediately applied to the fact to be proved," or circumstantial evidence, "that which is indirectly applied, by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred." *State v. Wright*, 275 N.C. 242, 249-50, 166 S.E.2d 681, 686 (1969). "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 by denying his Motions to Dismiss the charge of Assault on a Female. Our statutes make it unlawful for a defendant, "in the course of the assault, assault and battery, or affray," to "[a]ssault[] a female, he being a male person at least 18 years of age[.]" N.C. Gen. Stat. § 14-33(c)(2) (2023). Thus, the State must prove beyond a reasonable doubt that a defendant (1) assaulted (2) a female, and the defendant was (3) male and (4) at least 18 years of age. In this case, Defendant contends there was insufficient evidence only as to the element of his sex. We disagree.

Every party in this case, including the State, Collins—its witness—, and defense counsel repeatedly referred to Defendant as "Mr." and using masculine pronouns. At no point did defense counsel object to these pronouns or characterizations. Indeed, defense counsel, in cross-examining Collins, asked questions such as: "I mean, you were in a relationship with him [Defendant], right?" and "Now, the lady came to talk to him. You didn't have a gentleman come to speak to you, right?" and "And that was a female friend of Mr. Gardner's, right?" Defense counsel also asked: "Mr. Gardner is not a large man, he is not very big and tall, is that correct?" Collins answered affirmatively to each question. Further, Collins—the only witness presented at trial—consistently testified about Defendant using masculine pronouns, for example: "He [Defendant] was the one that kept saying it was my fault for opening the door. Me and him standing there screaming and shouting" and "No, I didn't say he came up behind me. He came in front of me like this" and "He grabbed me by my neck." Defense counsel also played a recording of Collins' statement to police following the incident in which she told the officer, "He [Defendant] put his hands around my neck[.]" Although this evidence is circumstantial, it is sufficient to go to the jury. *See State v. Davy*, 100 N.C. App. 551, 556, 397 S.E.2d 634, 636-37 (1990) ("In order to overcome a motion to dismiss, the State must introduce more than a scintilla of evidence of each essential element of the offense[.]").

Thus, the evidence, taken in the light most favorable to the State, could support an inference Defendant is male. Therefore, there was sufficient evidence to submit the charge to the jury. Consequently, the trial court did not err in denying Defendant's Motions to Dismiss.

III. Ineffective Assistance of Counsel

[4] Defendant also contends his trial counsel was constitutionally deficient based on her failure to raise the above-noted constitutional challenges to the Assault on a Female statute. In general, claims of IAC should be considered through motions for appropriate relief and not on

direct appeal. *See State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal."); *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing the defendant's appeal because issues could not be determined from the record on appeal and stating that to "properly advance these arguments, defendant must move for appropriate relief pursuant to G.S. 15A-1415[.]"). A motion for appropriate relief is preferable to direct appeal because in order to

> defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor. [O]nly when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance.

State v. Buckner, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citations and quotation marks omitted). "IAC 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 reassert them during a subsequent MAR proceeding." *Id.* at 167, 557 S.E.2d at 525 (citation omitted).

In order to prevail on an IAC claim, Defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability 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, 104 S. Ct. 2052, 2064, 2068, 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 *Strickland* standard for IAC claims under N.C. Const. art. I, §§ 19, 23). Here, we are unable to decide Defendant's IAC claim based on the "cold record" on appeal. *Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (citations omitted). We thus conclude "further development of the facts would be required before application of the *Strickland* test[.]" *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citation omitted). Therefore, we dismiss any IAC claims without prejudice to permit Defendant to pursue a motion for appropriate relief in the trial court.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and affirm the Judgment. We dismiss Defendant's ineffective assistance of counsel claim without prejudice to the filing of a motion for appropriate relief.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Chief Judge DILLON concurs.

Judge FREEMAN concurs in part and dissents in part by separate opinion.

FREEMAN, Judge, concurring in part and dissenting in part.

I concur with the majority's reasoning and conclusions as to the merits of defendant's arguments. However, because defendant's notice of appeal was defective, binding precedent from our Supreme Court instructs us that we cannot reach the merits unless defendant's petition for writ of certiorari establishes both probable error and extraordinary circumstances. As defendant's petition establishes neither, this Court should deny his petition and dismiss his appeal. Because I do not agree with the majority's decision to reach and address the merits of defendant's purported appeal, I respectfully dissent from the majority's grant of certiorari.

Our Supreme Court recently stated:

> The writ of certiorari is one of the prerogative writs that the Court of Appeals may issue in aid of its own jurisdiction. It is intended as an extraordinary remedial writ to correct errors of law.
>
> The procedure governing writs of certiorari is found in Rule 21 of the Rules of Appellate Procedure. But Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued. Instead, the decision to issue a writ is governed solely by statute and by common law.

Cryan v. Nat'l Council of Young Men's Christian Ass'ns of U.S., 384 N.C. 569, 572 (2023) (cleaned up). While our General Statutes grant this

Court authority to issue the writ of certiorari, the "practice and procedure shall be provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law." N.C.G.S. § 7A-32(c) (2023). The common law governing the issuance of the writ has long required two things "to appear on application for *certiorari*: [f]irst, diligence in prosecuting the appeal . . . ; and, second, merit, or that probable error was committed on the hearing." *State v. Angel*, 194 N.C. 715, 717 (1927). While certiorari "is a discretionary writ," it is "to be issued *only* for good or sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right." *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579 (1927) (emphasis added).

Rather, "the party seeking it is required . . . to show merit or that he has reasonable grounds for asking that the case be brought up and reviewed on appeal." *In re Snelgrove*, 208 N.C. 670, 671–72 (1935). "A petition for the writ *must* show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189 (1959) (emphasis added). " 'A writ of certiorari is not intended as a substitute for a notice of appeal' because such a practice would 'render meaningless the rules governing the time and manner of noticing appeals.' " *State v. Ricks*, 378 N.C. 737, 741 (2021) (quoting *State v. Bishop*, 255 N.C. App. 767, 769 (2017)).

In other words:

> Our precedent establishes a two-factor test to assess whether certiorari review by an appellate court is appropriate. First, a writ of certiorari should issue *only* if the petitioner can show merit or that error was probably committed below. This step weighs the likelihood that there was some error of law in the case.
>
> Second, a writ of certiorari should issue *only* if there are extraordinary circumstances to justify it. We require extraordinary circumstances because a writ of certiorari is not intended as a substitute for a notice of appeal. If courts issued writs of certiorari solely on the showing of some error below, it would render meaningless the rules governing the time and manner of noticing appeals.
>
> There is no fixed list of extraordinary circumstances that warrant certiorari review, but this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or wide-reaching issues of justice and liberty at stake.

> Ultimately, the decision to issue a writ of certiorari rests in the sound discretion of the presiding court. Thus, when the Court of Appeals issues a writ of certiorari, we review solely for abuse of discretion, examining whether the decision was manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.

Cryan, 384 N.C. at 572–73 (emphasis added) (cleaned up).

Here, the majority acknowledges this Court does not have jurisdiction to consider defendant's appeal but issues the writ in its "discretion" without applying the two-factor test. *See In re S.D.H.*, 908 S.E.2d 868, 874 (N.C. Ct. App. 2024) ("A petitioner *must* satisfy a two-part test before we will issue a PWC." (emphasis added)). It does so in direct contravention of our common law as expressed by our Supreme Court. This Court may not ignore binding Supreme Court precedent and label such conduct an exercise of its "discretion."[1] While our issuance of the writ is reviewed "solely for abuse of discretion," *id.* at 573, "[a]n error of law constitutes an abuse of discretion," *Slattery v. Appy City, LLC*, 385 N.C. 726, 729 (2024), and this Court abuses its discretion when it fails to apply a legal test mandated by our Supreme Court.

Rather than engage with our Supreme Court's precedent in *Cryan*, the majority asserts that because "[t]his Court has routinely granted certiorari in precisely this type of case," my concerns are "misplaced." While I agree with my colleagues that adjudication on the merits is preferable where a criminal defendant has lost their right to appeal due to their attorney's technical error, our preferences may not trump Supreme Court precedent. The majority's approach is in effect a *per se* rule that, under these circumstances, the writ will issue regardless of any showing of merit.

There is no language in *Cryan* that permits this Court to pick and choose when to apply the test and there is no precedent from our Supreme Court supporting this *per se* rule. As troubling as my colleagues' refusal to engage with *Cryan* is, the majority's apparent belief that the *per se* rule is legally sound because this Court—or, more accurately, a

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1. The discretionary nature of certiorari does not render it outside the bounds of legal tests or frameworks. This Court routinely reviews the discretionary decisions of trial courts, such as those under Rule 403, to ensure the decision was made in accordance with the applicable legal frameworks.

panel of this Court—routinely applies it is even more concerning. The repetition of an error does not transform that error into good law.

If my colleagues have any remaining doubt as to the applicability of *Cryan* or the two-part test to criminal cases, I respectfully direct them to our Supreme Court's unanimous decision in *State v. Lancaster*, 385 N.C. 459 (2023), decided only months after *Cryan*. There, the Supreme Court reviewed an opinion of this Court in which the majority of our Court noted "it [was] not apparent from the record that Defendant properly noticed his appeal." *State v. Lancaster*, 284 N.C. App. 465, 466 n.1 (2022), *rev'd*, 385 N.C. 459 (2023). This Court—in a footnote and apparently sua sponte—issued the writ of certiorari "in aid of [its] jurisdiction" without any elaboration or analysis. *Id.* Our Supreme Court reversed this Court's opinion on the merits and specifically addressed this Court's issuance of the writ:

> The Court of Appeals noted that it was "not apparent from the record that [d]efendant properly noticed his appeal," but that court nevertheless issued a writ of certiorari to remedy any jurisdictional question. *State v. Lancaster*, 284 N.C. App. 465, 466 n.1, 876 S.E.2d 101 (2022). Although the State has not argued that the Court of Appeals abused its discretion in issuing this writ, "a writ of certiorari 'is not intended as a substitute for a notice of appeal.' " *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 573, 887 S.E.2d 848 (2023) (quoting *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835 (2021)). This is so because "[i]f courts issued writs of certiorari solely on the showing of some error below, it would 'render meaningless the rules governing the time and manner of noticing appeals.' " *Id.* (quoting *Ricks*, 378 N.C. at 741, 862 S.E.2d 835).

State v. Lancaster, 385 N.C. at 460 n.1.

This admonishment indicates that my concerns regarding the majority's approach are unanimously shared by our Supreme Court—which is unsurprising given my position is informed by that Court's precedent, not this Court's practice. Unless our Supreme Court says otherwise, I am bound to follow *Cryan*'s test.

The *per se* rule shrugs off our Supreme Court's precedent because it effectively entitles petitioners in these circumstances to certiorari as a matter of right—but only if that petitioner's case falls to a panel applying the *per se* rule. On the other hand, if that petitioner's case falls

to a panel properly applying the two-part test, their petition may be denied. Although I believe *Cryan* is crystal clear in its articulation of the two-part test and its universal applicability, this case demonstrates that at least some of my colleagues prefer to eschew the test in favor of a *per se* rule. To ensure even-handed treatment of parties and consistent application of the law, I would invite our Supreme Court to revisit this issue and provide further guidance.

When binding precedent establishes a two-factor test to assess whether certiorari review by an appellate court is appropriate, following the test in each case is the only way to ensure fairness to all who petition for writ of certiorari. Instead of ignoring binding precedent and effectively treating defendant's petition as a substitute for proper notice of appeal, I would deny defendant's petition for writ of certiorari and dismiss defendant's appeal. Accordingly, I respectfully dissent from the majority's decision to reach the merits of defendant's purported appeal.

STATE OF NORTH CAROLINA
v.
JONATHAN JERMANE HANNAH, DEFENDANT

No. COA23-902

Filed 4 June 2025

1. Appeal and Error—petition for writ of certiorari—voluntariness of guilty plea—no probable error

In an appeal from judgment entered upon defendant's guilty plea to multiple sexual offenses against a minor and obstruction of justice, defendant's petition for writ of certiorari—in which he asserted that his plea was not knowingly, intelligently, and voluntarily made—was denied. Defendant failed to demonstrate probable error by the trial court when advising defendant during the plea colloquy of his right to appeal the denial of his pretrial motion to suppress. Contrary to defendant's assertion that he was led to believe he could appeal from the denial of all of his pretrial motions—some of which were not appealable—the full colloquy demonstrated that the nature and consequences of the plea were explained to defendant in open court and that he received the benefit of his bargain.

2. Appeal and Error—preservation of issues—denial of motion to suppress—probable cause grounds sufficiently raised

In an appeal from judgment entered upon defendant's guilty plea to multiple sexual offenses against a minor and obstruction of justice, defendant preserved for appeal his argument that the trial court erred by denying his pretrial motions to suppress the content of his phone, based on defendant's contention that there was no probable cause for his continued detention at the time he gave consent for his phone to be searched. Defendant sufficiently raised probable cause and relevant search and seizure law in his motions before the trial court.

3. Search and Seizure—consent to search phone—voluntariness—lawful detention—probable cause—lack of coercion

In an appeal from judgment entered upon defendant's guilty plea to multiple sexual offenses against a minor and obstruction of justice, defendant's argument that the trial court erred by denying his motion to suppress content from his phone—based on defendant's contention that probable cause did not exist to continue his detention at the time he gave consent for his phone to be searched—had no merit. Where law enforcement had reasonable suspicion or probable cause of multiple crimes during its investigation of defendant—including gun and drug charges, in addition to the sexual offenses—defendant's continued detention was justified; therefore, since he was not unconstitutionally seized or illegally detained, his consent to the phone search was voluntary. Moreover, officers' statement that they would obtain a search warrant unless defendant consented to the search did not amount to coercion because they had the legal authority to do so under the circumstances of the case.

Appeal by Defendant from judgment entered 16 March 2023 by Judge Thomas H. Lock in Onslow County Superior Court. Heard in the Court of Appeals 20 March 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Meredith L. Britt, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for Defendant-Appellant.

CARPENTER, Judge.

Jonathan Jermane Hannah ("Defendant") appeals from a judgment entered upon his guilty plea to statutory rape of a person fifteen years

old or younger, statutory sex offense of a person fifteen years old or younger, sexual exploitation of a minor, and obstruction of justice. On appeal, Defendant argues his plea was not entered knowingly, intelligently, and voluntarily because certain issues purportedly preserved for appeal as part of his guilty plea are not appealable. Further, Defendant argues the trial court erred in denying his motions to suppress evidence obtained from his cell phone, where consent was unlawfully obtained. After careful review, we deny Defendant's petition for writ of certiorari ("PWC") and affirm the trial court's denial of Defendant's motions to suppress.

I. Factual & Procedural Background

On 10 July 2018, an Onslow County grand jury returned true bills of indictment against Defendant, charging him with: statutory rape of a person fifteen years old or younger, in violation of N.C. Gen. Stat. § 14-27.25(a); statutory sex offense of a person fifteen years old or younger, in violation of N.C. Gen. Stat. § 14-27.30(a); and three counts of first-degree sexual exploitation of a minor, in violation of N.C. Gen. Stat. § 14-190.16. On 7 June 2022, a grand jury returned a subsequent true bill of indictment, charging Defendant with three counts of common-law obstruction of justice.

During pretrial hearings, the trial court ruled on several pretrial motions from Defendant. Specifically, the trial court denied: Defendant's Motion for Bill of Particulars; Defendant's motion in *limine* to prohibit references to indictments against Defendant, in part; and Defendant's motion in *limine* regarding the State's failure to file a notice of expert witness for the Cellebrite extraction of Defendant's cell phone. The trial court later denied Defendant's motions to suppress evidence of: the search and Cellebrite extraction from his cell phone; statements at Jacksonville Police Department on 20 October 2017; and statements to Detective Keith Johnston at Dunkin' Donuts and the Onslow County Sheriff's Office. The trial court allowed Defendant's motion to suppress recorded statements of a conversation between Defendant and his sister in an interview room. On 8 May 2023, the trial court entered a written order with findings and conclusions on Defendant's motions to suppress.

The evidence from the suppression hearing tends to show the following. On 19 October 2017, the Jacksonville Police Department responded to a call from Guerrilla Armament, a gun shop, regarding a suspicious transaction potentially involving a stolen gun. The police ran the serial numbers, found that one of the guns—a Glock 26 pistol—was stolen, and launched an investigation to locate Defendant, who sold it to

Guerrilla Armament. The police were able to identify Defendant's name through the phone number that he used to contact Guerrilla Armament.

The following day, on 20 October 2017, the gun shop provided the police with a description of Defendant and photographs of Defendant's Cadillac and license plate. Officers determined the license plate was fictitious. Later that day, Lieutenant Porter received a call from a fellow detective regarding a red Cadillac matching the description of Defendant's vehicle at an apartment complex. Lieutenant Porter proceeded to the location and surveilled the car, confirmed it was Defendant's car from the photographs, and later initiated a traffic stop based on displaying the fictitious plate.

Inside the Cadillac, Lieutenant Porter discovered Defendant, three other males, and a 14-year-old female, Q.M.[1] A large quantity of drugs was found in the vehicle. Officers arrested and transported Defendant to the Jacksonville Police Department as a suspect in the stolen firearm investigation. Lieutenant Porter placed Defendant in an interview room, read him his *Miranda* rights from a *Miranda* warning form, and had Defendant sign the form.

While investigating the stolen firearm, Lieutenant Porter retrieved Defendant's phone at Defendant's request to support his claim of lack of knowledge about the stolen firearm. Lieutenant Porter noticed the lock screen of Defendant's phone was a photo of Q.M., who was found in the red Cadillac during Defendant's arrest. After consulting with other detectives, he confirmed Q.M.'s name and learned that she was a passenger in a recent car chase with Defendant.

After Lieutenant Porter examined Defendant's text messages exchanged with "yay fein," the individual who supplied him with the gun, Porter requested consent from Defendant to search the phone. Lieutenant Porter informed Defendant that his phone would not be immediately returned without consenting to a search of its contents, or else the police would obtain a search warrant. Defendant signed the consent to search form, which stated the search may extend to any illegal activity found on the phone. Captain Kellum downloaded the contents of Defendant's phone using Cellebrite software and examined its contents.

Lieutenant Porter observed text messages between Defendant and Q.M. that were romantic in nature and saw a thumbnail image of a video

1. A pseudonym used to protect the identity of the juvenile.

depicting Q.M. performing fellatio on a man. Lieutenant Porter informed the Special Victims Unit and the on-call Criminal Investigation Division detective, Vincent Waddell, about the findings from Defendant's phone. Detective Waddell arrived to interview Defendant about the contents of his phone. Before speaking with Defendant, Detective Waddell confirmed with Lieutenant Porter that Defendant had been advised of and waived his *Miranda* rights.

Upon entering the interview room, Detective Waddell verified with Defendant that he had given consent to search his phone and then began questioning him about specific information relating to Q.M. Defendant identified Q.M. as the female in the videos. After Detective Waddell interviewed Defendant, he allowed Defendant to leave.

On 27 February 2018, Defendant voluntarily met with Detective Johnston, with the Onslow County Sheriff's Office, at a Dunkin' Donuts in Jacksonville. During this meeting, Defendant and Detective Johnston discussed Defendant's relationship with Q.M. After inconsistencies emerged in Defendant's story, Detective Johnston ultimately informed Defendant he was under arrest, again advised him of his *Miranda* rights, and transported him to an interview room at the Onslow County Sheriff's Office.

Inside the interview room, officers permitted Defendant to use his cell phone. In the presence of Detective Johnston, Defendant made several calls during which he made incriminating statements about his relationship with Q.M., including that he "got with" an underage girl. Defendant later made incriminating statements to his sister in the interview room in Detective Johnston's presence. Defendant's sister then asked to speak with her brother privately, and Detective Johnston left the room, stating that the conversation would be "as private as I can make it." Defendant made additional incriminating statements during this recorded conversation with his sister.

The matter came on for trial on 13 March 2023 in Onslow County Superior Court. At the outset, the trial court heard and ruled on Defendant's pretrial motions. Following the denial of his motions, pursuant to a plea agreement with the State, Defendant pled guilty to the remaining charges. During his plea colloquy, the trial court stated that, in pleading guilty, "you are, this is very important to you, you are preserving the right to appeal the [c]ourt's denial of your pretrial motions. The ones that the [c]ourt denied. I did allow one of them."

The trial court sentenced Defendant to mitigated sentences of: a minimum term of 204 months and the corresponding maximum term

of 305 months of imprisonment for the statutory rape and statutory sex offense charges; a minimum term of 60 months with a corresponding maximum term of 132 months for the sexual exploitation charges; and a minimum term of five months with a corresponding maximum term of 15 months for the obstruction of justice charges. Additionally, the trial court ordered Defendant to register as a sex offender for a period of 30 years. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

[1] "In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Smith*, 193 N.C. App. 739, 741, 668 S.E.2d 612, 613 (2008). Section 15A-1444(e) provides, "[e]xcept as provided in subsections (a1) and (a2) of this section and [N.C. Gen. Stat. §] 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari." N.C. Gen. Stat. § 15A-1444(e) (2023). "Notwithstanding these statutory guidelines, however, our Supreme Court has held that when a trial court improperly accepts a guilty plea, the defendant may obtain appellate review of this issue only upon *grant* of a writ of certiorari." *State v. Demaio*, 216 N.C. App. 558, 562, 716 S.E.2d 863, 866 (2011) (emphasis added) (quoting *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987)). A PWC is a "prerogative writ[ ]" which we may issue to aid our jurisdiction. *See* N.C. Gen. Stat. § 7A-32(c) (2023).

Here, Defendant filed a PWC contemporaneously with his brief. Since this Court's holding in *Demaio*, our Supreme Court has both dispensed with the fiction that Rule of Appellate Procedure 21 imposes any jurisdictional limits on the General Assembly's grant of authority in our appellate courts to issue writs of certiorari, *State v. Killette*, 381 N.C. 686, 691, 873 S.E.2d 317, 320 (2022); *see* N.C. Gen. Stat. § 7A-32(c), and articulated a two-factor test which provides a mandatory framework for how and when to properly exercise our discretion to issue writs of certiorari, *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 572–73, 887 S.E.2d 848, 851 (2023). To harmonize *Demaio* with recent developments in our common law, we examine Defendant's contention that his guilty plea was not the product of a knowing, voluntary, and informed choice under the *Cryan* test. *See id.* at 572–73, 887 S.E.2d at 851.

First, the appellant must show "merit or that error was probably committed below." *Id.* at 572, 887 S.E.2d at 851. This factor weighs the

likelihood that an error of law occurred below. *Id.* at 572, 862 S.E.2d at 851 (citing *Button v. Level Four Orthotics & Prosthetics, Inc.*, 380 N.C. 459, 465–66, 869 S.E.2d 257, 264 (2022)). Next, "extraordinary circumstances" warranting issuance of the PWC must exist. *Id.* at 572–73, 887 S.E.2d at 851. An extraordinary circumstance "generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice.' " *Id.* at 573, 887 S.E.2d at 851 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23, 848 S.E.2d 1, 11 (2020)).

In his PWC, Defendant maintains the writ should issue to determine whether his guilty plea was knowingly, intelligently, and voluntarily made. Specifically, Defendant argues that his plea was not knowing, intelligent, and voluntary because "he pled guilty on the explicit assurance that he was reserving his right to appeal the denial of pretrial motions – some of which were not appealable." After careful review, we conclude Defendant's PWC fails to demonstrate that an error of law was probably committed below.

> [A] plea of guilty . . . may not be considered valid unless it appears affirmatively that it was entered voluntarily and understandingly. Hence, a plea of guilty . . . unaccompanied by evidence that the plea was entered voluntarily and understandingly, and a judgment entered thereon, must be vacated . . . . If the plea is sustained, it must appear affirmatively that it was entered voluntarily and understandingly . . . [and that] the nature and consequences of the plea [had] been explained to defendant *in open court*.

State v. Tinney, 229 N.C. App. 616, 621, 748 S.E.2d 730, 734 (2013) (emphasis in original) (quoting *State v. Ford*, 281 N.C. 62, 67–68, 187 S.E.2d 741, 745 (1972)).

Generally, "[a] defendant who pleads guilty is entitled to receive the benefit of his bargain." *Demaio*, 216 N.C. App. at 564, 716 S.E.2d at 867 (citation omitted). In *Demaio*, we held that, "[i]f a defendant does not have an appeal as of right . . . on issues the defendant was promised would be preserved for appeal, then the plea agreement violates the law." *Id.* at 565, 716 S.E.2d at 867. In this situation, "the appellate court must place the defendant back in the position he was in before he struck his bargain." *Id.* at 565, 716 S.E.2d at 867 (internal quotation marks and citation omitted). This would require vacating the judgment and remanding "the case to the trial court where defendant may withdraw his guilty plea and proceed to trial on the criminal charges or withdraw his plea and attempt to negotiate another plea agreement that does not violate State law." *Id.* at 565, 716 S.E.2d at 867–68.

On the other hand, in *Tinney*, this Court noted the facts presented were "[u]nlike the situation present in *Demaio* and a number of other cases in which this Court has determined that the inclusion of an invalid provision reserving the right to obtain appellate review of a particular issue had the effect of rendering a plea agreement unenforceable." 229 N.C. App. at 622, 748 S.E.2d at 735. We distinguished *Demaio*, where "the defendant was never advised that the 'preservation of rights' provision in his plea agreement was invalid," reasoning that in *Tinney*,

> the trial court interrupted the taking of [the] [d]efendant's plea, examined the issue of whether a defendant could seek appellate review of the lawfulness of an order transferring a case from the juvenile courts to the Superior Court under such circumstances, and specifically informed [the] [d]efendant that there was a 'good chance, though I can't speak for the Court of Appeals, that the decision by [the trial court judge regarding the transfer order] is not reviewable and—by a later court. And I want to make sure you've had a chance to talk with him about that and [the defendant] understands it.'

Id. at 625, 748 S.E.2d at 736.

In *Tinney*, "[b]oth the prosecutor and the trial court cited the controlling decision of this Court and clearly informed [the] [d]efendant that the likelihood that he would be able to obtain appellate review of the transfer order was extremely low." *Id.* at 625, 748 S.E.2d at 737. Unlike *Demaio*, the defendant in *Tinney* "had ample notice that the provision in his plea agreement reserving his right to challenge the validity of the transfer order on appeal was, in all probability, unenforceable and elected to proceed with his guilty plea in spite of the fact that he knew that the provision in question was of questionable validity." *Id.* at 622, 748 S.E.2d at 735. This Court concluded that, in "light of the steps taken by the trial court to advise [the] [d]efendant of the likelihood that his attempt to reserve his right to seek appellate review of the transfer order would prove unsuccessful," the defendant was "not entitled to relief from the trial court's judgment on the basis of the principle enunciated in *Demaio*." *Id.* at 622, 748 S.E.2d at 735.

Here, at first glance, the portions of transcript found in Defendant's PWC appear to show merit. Indeed, the transcript of plea form clearly indicates Defendant "preserves his right to appeal the denial of all pretrial motions." Several of Defendant's pretrial motions were not appealable. Nevertheless, consistent with *Tinney*, we examine the form alongside Defendant's colloquy with the trial court to contextualize whether it

affirmatively appears that Defendant's plea "was entered voluntarily and understandingly" and whether "the nature and consequences of the plea [were] explained to [D]efendant *in open court*." *See Tinney*, 229 N.C. App. at 621, 748 S.E.2d at 734 (emphasis in original) (citing *Ford*, 281 N.C. at 67–68, 187 S.E.2d at 745).

Evidently, Defendant educated himself on certain principles of criminal law and took an active role in his own defense, including the filing of a pretrial pro se motion to suppress. On 16 March 2023, after an extended colloquy concerning Defendant's opinion of defense counsel and the inherent risks of Defendant proceeding to trial pro se, Defendant and the State reached a last-minute plea agreement. The conversation unfolded, in relevant part:

> THE COURT: Counsel, I understand that you, [defense counsel], need to speak with your client a little further concerning a possibility of a resolution in the case by possible plea. Does anyone have an objection if I have the bailiff releases the jury and have them return at 11:30?
>
> [PROSECUTOR]: No, Judge.
>
> THE COURT: Mr. Sheriff, without any comment release the jury until 11:30. We will be at ease until 11:30.
>
> (The Court was at ease at 10:47 a.m. and resumed at 11:28 a.m.)
>
> [DEFENSE COUNSEL]: Judge, may I approach?
>
> THE COURT: Yes, sir, Counsel. I know that there is a statute that specifically authorizes a defendant to plead guilty and to reserve his right to appeal the motions to suppress. I can't find it. Do either of you know the statutes?
>
> [DEFENSE COUNSEL]: I don't, Judge.
>
> THE COURT: Do you remember, [prosecutor]?
>
> [PROSECUTOR]: I don't, Judge.
>
> THE COURT: I'm trying to find it.
>
> [PROSECUTOR]: I believe it is 15A-979 subsection b.
>
> THE COURT: That is correct. Thank you very much. I understand, [defense counsel], your client wishes to withdraw his plea of not guilty and plead guilty pursuant to this plea transcript?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> THE CLERK: If you will raise your right hand and place your left hand on the bible. Do you swear or affirm to

truthfully answer the questions about to be propounded to you by his honor concerning the matter now before the Court so help you God?

DEFENDANT: Yes, ma'am.

THE COURT: [Defendant], let's go over this transcript of plea. If at any time you don't understand these questions or need to further talk with your lawyer let me know.

. . .

[Defendant], are you able to hear and understand me?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that you have the right to remain silent and that any statement you make may be used against you?

DEFENDANT: Yes, sir.

. . .

THE COURT: Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge?

DEFENDANT: Yes, sir.

THE COURT: Have you and your lawyer discussed the possible defenses, if any, to the charges?

DEFENDANT: Yes, sir.

THE COURT: At this time, sir, are you satisfied with [defense counsel's] legal services?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that you do have the right to plead not guilty and have your case tried before a jury that has been selected in this case?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that at such trial you would have the right to confront and cross-examine the witnesses against you?

DEFENDANT: Yes, sir.

THE COURT: Do you understand by your pleas of guilty you're giving up those and other important constitutional rights relating to a trial by jury?

DEFENDANT: Yes, sir.

> . . .
>
> THE COURT: All right. *Do you understand that following a plea of guilty there are limitations on your right to appeal?*
>
> DEFENDANT: Limitations?
>
> THE COURT: There will be limitations on your right to appeal. *You will have the right to appeal the Court's denial of your motion to suppress* and we will talk about that in a few minutes. Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: *You may not appeal the plea of guilty or the sentence, but you may appeal and I expect based on what your lawyer has told me you probably will appeal, the denial of the motions to suppress; is that correct?*
>
> DEFENDANT: Yes, sir.

(emphasis added). On appeal, Defendant conveniently disregards the above exchange, instead fixating on the following exchange with the trial court, which occurred moments later.

> THE COURT: All right. The sentences imposed today will be in the discretion of the Court after hearing the evidence from the State, and any evidence your lawyer wishes to present in mitigation, either immediately after the adjudication or sometime today. You will receive credit -- this is not in the transcript, but you will receive credit against the sentences imposed for any time spent in confinement awaiting trial. *And you are, this is very important to you, you are preserving your right to appeal the Court's denial of your pretrial motions. The ones that the Court denied. I did allow one of them.* Is that correct as being your full plea agreement?
>
> THE DEFENDANT: Yes, sir. Can I ask a question?
>
> THE COURT: Yes, sir.
>
> THE DEFENDANT: I didn't see that part on the paper that I will appeal the motion. And then when you sign it, I just ask you before I leave that I can get a copy so I can take it with me.
>
> THE COURT: We will make sure you get a copy of it. Yes, sir. I will -- assuming that you do give notice of appeal in open court after you are sentenced, we will make sure that the appellate entries are entered and if you want counsel, I

> will appoint counsel for you. It will be someone other than [defense counsel]. It will be the [P]ublic Defender's office. Any questions about that?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Okay. Do you now personally accept this arrangement?
>
> THE DEFENDANT: Yes, sir.
>
> . . .
>
> THE COURT: You enter this plea of your own free will fully understanding what you're doing?
>
> THE DEFENDANT: Yes, sir.
>
> . . .
>
> THE COURT: All right. At this point do you have any other questions about anything I've said to you or about anything else connected to your case?
>
> THE DEFENDANT: No, sir.

(emphasis added).

Contrary to Defendant's assertions, when considered in context, the trial court's statements in the second exchange provide additional support for our reading of the first exchange. Specifically, the trial court's statement, "I did allow one of them," clearly refers to the one favorable ruling Defendant received on his motions to suppress—the suppression of Defendant's conversation with his sister recorded in the interview room. In light of the foregoing, Defendant cannot show that he failed to receive the benefit of his bargain or that his plea was not knowingly, voluntarily, and intelligently made. Conversely, the record reveals Defendant's plea "was entered knowingly, voluntarily, and understandingly" and "the nature and consequences of the plea [were] explained to [D]efendant *in open court*." *See Tinney*, 229 N.C. App. at 620–21, 748 S.E.2d at 734.

Because Defendant cannot establish merit or probable error below, we deny his PWC in our sound discretion. *See Cryan*, 384 N.C. at 573, 887 S.E.2d at 851 (citing *Ricks*, 378 N.C. at 740, 862 S.E.2d at 838). Nevertheless, as recognized by the trial court, prosecutor, and defense counsel, we have jurisdiction to review the denials of Defendant's motions to suppress. *See* N.C. Gen. Stat. § 15A-979(b) (2023).

III. Issue

The issue is whether the trial court erred in denying Defendant's motions to suppress.

IV. Analysis

Defendant appeals from the trial court's denial of his motions to suppress, arguing his consent to the search of his phone was invalid because: (1) his consent was given during unlawful detention where probable cause no longer existed; and (2) his consent was obtained through coercion. We disagree with Defendant.

A. Preservation

[2] Before addressing the motion to suppress evidence from his cell phone's search, we must first determine if Defendant properly preserved his right to appeal the motions to suppress on probable cause grounds. The State argues that Defendant did not raise the lack of probable cause argument below and therefore Defendant did not preserve the argument for appeal. We disagree with the State.

We have consistently held that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Walker*, 252 N.C. App. 409, 411, 798 S.E.2d 529, 530 (2017) (quoting *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002)). The "swapping horses" rule applies where issues on appeal are "grounded on separate and distinct legal theories than those relied upon at the trial court, or when a sufficiency of the evidence challenge on appeal concerns a conviction different from a charge challenged before the trial court." *See id.* at 411, 798 S.E.2d at 530 (citing *Holliman*, 155 N.C. App. at 123–24, 573 S.E.2d at 685–86 (rejecting the defendant's motion to suppress argument on appeal for lack of probable cause when, at the hearing, he only argued coercion)).

Here, we conclude that Defendant's argument regarding the lack of probable cause for his continued detention does not amount to "swapping horses." *See id.* at 411, 798 S.E.2d at 530. The alleged illegality of Defendant's detention after the gun investigation concluded was a recurring source of pretrial discussion. Defendant's motions to suppress sufficiently referenced search and seizure caselaw, including the topic of probable cause. Therefore, probable cause cannot be said to be a "separate and distinct" legal theory from those relied upon below. *See id.* at 411, 798 S.E.2d at 530.

B. Standard of Review

This Court reviews a trial court's denial of a motion to suppress by determining whether "the trial court's findings are supported by the evidence and whether the findings of fact support the conclusions of

law." *State v. Byrd*, 287 N.C. App. 276, 279, 882 S.E.2d 438, 440 (2022) (quoting *State v. Wiles*, 270 N.C. App. 592, 595, 841 S.E.2d 321, 325 (2020)). "In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State[.]" *State v. Duncan*, 272 N.C. App. 341, 345, 846 S.E.2d 315, 320 (2020) (alteration in original) (quoting *State v. Moore*, 152 N.C. App. 156, 159, 566 S.E.2d 713, 715 (2002)).

Unchallenged findings of fact are binding on appeal. *State v. Fizovic*, 240 N.C. App. 448, 451, 770 S.E.2d 717, 720 (2015) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). The trial court's conclusions of law are reviewed de novo. *Byrd*, 287 N.C. at 279, 882 S.E.2d at 440 (citing *State v. Wiles*, 270 N.C. App. 592, 595, 841 S.E.2d 321, 325 (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, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

C. Motions to Suppress

[3] Under the United States Constitution, the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . . " *State v. Logan*, 278 N.C. App. 319, 323–24, 861 S.E.2d 908, 912 (2021) (quoting U.S. Const. amend. IV). Likewise, Article I, Section 20 of the North Carolina Constitution prohibits unreasonable searches and seizures, requiring that warrants be issued only upon probable cause. *See State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 302–03 (2016) (citing *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260–61 (1984)); N.C. Const. art. I, § 20.

"In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. 373, 382, 134 S. Ct. 2473, 2482, 189 L. Ed. 2d 430 (2014). This Court "recognizes consent searches as an exception to the general warrant requirement." *State v. Duran-Rivas*, 294 N.C. App. 603, 611, 904 S.E.2d 171, 178 (2024) (quoting *State v. Hagin*, 203 N.C. App. 561, 564, 691 S.E.2d 429, 432 (2010)). "Where 'consent to search . . . was the product of an unconstitutional seizure,' it is involuntary." *State v. Johnson*, 279 N.C. App. 475, 484, 865 S.E.2d 673, 680 (2021) (quoting *State v. Cottrell*, 234 N.C. App. 736, 752, 760 S.E.2d 274, 285 (2014)).

A seizure of a person is reasonable if the seizing officer has probable cause to believe the person seized committed a crime. *See U.S.*

v. Watson, 423 U.S. 411, 423–24, 96 S. Ct. 820, 827–28, 46 L. Ed. 2d 598, 608–09 (1976). Similarly, an object is subject to a seizure pursuant to a search warrant if there is "probable cause to believe that the item to be seized constitutes evidence of an offense or the identity of a person who participated in the crime." *State v. Carter*, 322 N.C. 709, 723, 370 S.E.2d 553, 561 (1988) (citing N.C. Gen. Stat. § 15A-242(4)).

"Probable cause is 'a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity.' " *State v. Wilson*, 155 N.C. App. 89, 94, 574 S.E.2d 93, 97–98 (2002) (quoting *State v. Schiffer*, 132 N.C. App. 22, 26, 510 S.E.2d 165, 167 (1999)). Probable cause equates to a "reasonable ground of suspicion," supported by circumstances strong enough to warrant a cautious man to believe the accused person is guilty. *See State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971). Such suspicion is determined by "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 311, 182 S.E.2d at 367 (citation omitted). Probable cause requires our courts to "make a practical, common-sense decision based on the totality of the circumstances, whether there is a fair probability that evidence will be found in the place to be searched." *Byrd*, 287 N.C. App. at 279–80, 882 S.E.2d at 441 (quoting *State v. Worley*, 254 N.C. App. 572, 576, 803 S.E.2d 412, 416 (2017)).

A seizure occurs when an officer "terminates or restrains" a person's movement through "physical force or a show of authority." *State v. Isenhour*, 194 N.C. App. 539, 542, 670 S.E.2d 264, 267 (2008) (quoting *Brendlin v. California*, 551 U.S. 249, 254, 127 S. Ct. 2400, 2405, 168 L. Ed. 2d 132, 138 (2007)). In other words, a seizure means "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 543, 670 S.E.2d at 267 (quoting *U.S. v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497, 509 (1980)). This objective inquiry considers whether physical or psychological barriers erected by law enforcement would cause a reasonable person to believe he was not free to leave. *Id.* at 543, 670 S.E.2d at 268 (citing *State v. Christie*, 96 N.C. App. 178, 184, 385 S.E.2d 181, 184 (1989)).

Here, Defendant first contends that his continued detention was unlawful. He argues that Lieutenant Porter did not have enough evidence to charge him with knowing the gun was stolen after reviewing the texts with "yay fein." Therefore, he maintains that any subsequent detention was illegal, rendering his consent invalid. Defendant's argument is without merit.

The State developed reasonable suspicion or probable cause of multiple crimes at different points in the investigation, justifying Defendant's continued detention. After the traffic stop, Lieutenant Porter had probable cause of gun and drug charges sufficient to arrest Defendant and transport him to the police department for interrogation. During the interrogation, Lieutenant Porter could have charged Defendant with possession of a stolen gun at any point. Defendant incorrectly asserts that Lieutenant Porter had no remaining suspicions about Defendant's gun case after reviewing Defendant's text messages with "yay fein." Rather, Lieutenant Porter still "needed to do some work" to "quell [his] suspicion about [Defendant's] involvement in the gun trade," indicating that probable cause concerning weapons charges had not fully dissipated.

When Lieutenant Porter retrieved Defendant's phone and observed the lock screen, he thought it was "odd" to see an image of a young girl he recognized. After consulting with other detectives, Lieutenant Porter confirmed Q.M.'s identity and presence in the same car during a recent car chase. This information, coupled with the fact that Lieutenant Porter's phone has a "picture of a Chevy because [he] love[s] [his] Chevy truck" and most of his "friends' lock screens are pictures of their wives and kids because they love their wife and kids" led him to develop reasonable suspicion and detain Defendant for further investigation. *See Harris*, 279 N.C. at 311, 182 S.E.2d at 367.

Lieutenant Porter also had probable cause to seize the phone concerning the gun charges, given the significant role it played during the investigation. Defendant was initially identified as the suspect in the gun case through his phone number and later voluntarily handed over his phone, seeking to prove his lack of culpability as to the stolen gun by showing his text messages with "yay fein." These factors contributed to the likelihood that Defendant's phone contained additional evidence related to the gun case. Because Defendant was neither unconstitutionally seized nor illegally detained when he consented to the search of his phone, Defendant cannot establish that his consent was involuntary. *See Johnson*, 279 N.C. App. at 484, 865 S.E.2d at 680.

Defendant next argues that his consent to search his phone was coerced because, even though he was free to leave, officers "held [the] phone hostage" by threatening to obtain a warrant. We disagree.

Lawful consent is an exception to the warrant requirement. *See State v. Kuegel*, 195 N.C. App. 310, 315, 672 S.E.2d 97, 100 (2009) (quoting *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997)). Warrantless searches based on consent are constitutional "as long as the consent is

given freely and voluntarily, without coercion, duress or fraud." *State v. Cummings*, 188 N.C. App. 598, 603, 656 S.E.2d 329, 333 (2008) (quoting *State v. Powell*, 297 N.C. 419, 425–26, 255 S.E.2d 154, 158 (1979)). The determination of whether consent to search was voluntary is made upon the totality of the circumstances. *Id.* at 603, 656 S.E.2d at 333; *see State v. Hernandez*, 170 N.C. App. 299, 310, 612 S.E.2d 420, 427 (2005).

Although not favored, "[t]he use of false statements and trickery by police officers during interrogations is not illegal as a matter of law." *See State v. Barnes*, 154 N.C. App. 111, 114, 572 S.E.2d 165, 167–68 (2002) (quoting *State v. Jackson*, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983)). "As a general rule, it is not duress to threaten to do what one has a legal right to do. Nor is it duress to threaten to take any measure authorized by law and the circumstances of the case." *State v. McMillan*, 214 N.C. App. 320, 331, 718 S.E.2d 640, 648 (2011) (quoting *State v. Paschal*, 35 N.C. App. 239, 241, 241 S.E.2d 92, 94 (1978)); *see also Kuegel*, 195 N.C. App. at 316, 672 S.E.2d at 101 (finding no coercion where the defendant was told that if he did not grant consent, the officers would obtain a search warrant).

Defendant's contention his consent was coerced merely because his phone was his only means of leaving the station is unavailing. Unlike a valid driver's license, which is necessary to lawfully drive a car, Defendant was under no obligation to carry a cell phone. *See State v. Thompson*, 267 N.C. App. 101, 104, 832 S.E.2d 510, 512 (2019). Further, officers had a lawful right to seek a search warrant for the phone if Defendant refused to consent, which, under the facts of this case, was not coercive.

Simply put, Defendant did not *want* to leave the police station without his cell phone, which is understandable. The law, however, distinguishes between subjectively not wanting to leave and objectively not being free to leave. *See State v. Isenhour*, 194 N.C. App. at 543, 670 S.E.2d at 268; *State v. Hall*, 268 N.C. App. 425, 430, 836 S.E.2d 670, 674 (2019) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness.") (quoting *State v. Romano*, 369 N.C. 678, 691, 800 S.E.2d 644, 652 (2017)). Thus, Defendant cannot assert that his ability to leave the police station was unreasonably restricted solely due to officers' retention of his phone.

Accordingly, under the totality of the circumstances, Defendant's consent to the search of his phone was voluntary and without illegal duress or coercion. Defendant's attempts to challenge the lawfulness of his consent to search his phone are without merit.

V. Conclusion

In sum, we deny Defendant's PWC and affirm the trial court's denial of Defendant's motions to suppress.

AFFIRMED.

Judges TYSON and STADING concur.

STATE OF NORTH CAROLINA
v.
LAKEVIS ANTRUAN MALOYE, DEFENDANT

No. COA24-772

Filed 4 June 2025

Assault—assault with deadly weapon inflicting serious injury—gunshot—serious injury element—sufficiency of evidence

In defendant's trial for assault with a deadly weapon with intent to kill inflicting serious injury (defendant was ultimately convicted of the lesser included offense of assault with a deadly weapon inflicting serious injury) arising from an incident in which defendant shot the victim in the leg, the trial court properly denied defendant's motion to dismiss where the State presented substantial evidence from which a jury could infer that the victim suffered a serious injury. The victim suffered a physical or bodily injury as a result of defendant's assault with a revolver; although the victim did not go to a hospital for treatment, his gunshot wound was treated at the scene after an ambulance was called; he experienced "a lot of pain" and took daily pain medication after the incident; with his wife's help, he cleaned the wound with hydrogen peroxide and changed "nasty bandages" regularly; he had trouble sitting, walking, and laying down; and he was out of work for over a month.

Appeal by Defendant from judgment entered 26 January 2024 by Judge Matthew Osman in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 April 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Kimberly M. Lott, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David S. Hallen, for defendant-appellant.

STADING, Judge.

Lakevis Antruan Maloye ("Defendant") appeals from final judgment after a jury convicted him of assault with a deadly weapon inflicting serious injury ("AWDWISI") and possession of a firearm by a felon. Defendant pled guilty to obtaining habitual felon status. On appeal, Defendant asserts the trial court committed error by denying his motion to dismiss since there was insufficient evidence he inflicted serious injury. For the reasons below, we discern no error.

I. Background

A Mecklenburg County grand jury returned true bills of indictment charging Defendant with assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), possession of a firearm by a felon, and having obtained habitual felon status. *See* N.C. Gen. Stat. §§ 14-7.1, 14-32(a), and 14-415.1 (2023). Defendant's trial commenced on 23 January 2024, and the evidence tended to show the following:

At around 10:30 p.m. on 17 May 2022, Ruby and Jerome Stewart drove to a local convenience store to "get some cigarettes and a case of beer." Mrs. Stewart remained in the front passenger seat of the vehicle while Mr. Stewart went into the store; at the time, Mr. Stewart possessed a .380 caliber handgun holstered on his person. After purchasing "a pack of Newports and a 12-pack of Coronas," Mr. Stewart exited the store and walked back to his vehicle. Mr. Stewart heard "somebody say . . . something" while walking, prompting him to turn his head. Immediately after, Mr. Stewart saw a masked assailant pointing a revolver at his face.

Mr. Stewart attempted to grab the assailant's gun without success. In doing so, the assailant's "gun went off," striking Mr. Stewart in the leg. Mr. Stewart then threw his beer at the assailant, ran away, and started shooting at the assailant with his own firearm. Throughout this time, the assailant continued firing shots at Mr. Stewart while ducking behind a car. The assailant eventually "took off and ran around the building" before the police arrived. However, Mr. and Mrs. Stewart instantly identified the assailant as Defendant. Mr. Stewart recognized Defendant based on his voice, beard, and eyes, and Mrs. Stewart recognized Defendant based on prior dealings at her place of employment. Officer Mario Soares of the Charlotte-Mecklenburg Police Department also "immediately recognized" Defendant as the masked assailant upon reviewing the surveillance footage based on "prior history" and "daily interactions."

Law enforcement arrived on the scene shortly after the firefight ceased. Officer James Tindall of the Charlotte-Mecklenburg Police Department was the first to arrive, observing "a broken case of beer in the center of the parking lot" and Mr. Stewart "leaning on his right leg." Upon closer inspection, Officer Tindall saw "a bullet graze wound" to Mr. Stewart's left thigh, prompting him to call for medical assistance. The paramedics placed Mr. Stewart in an ambulance to treat his gunshot wound. However, Mr. Stewart did not go to the hospital at this time because he was worried about his "son that was at home and had seizures . . . ."

Following the incident, Mr. Stewart "went to the doctor," but treated the injury by himself at home; he never attended a hospital for treatment. Mr. Stewart testified he treated the gunshot wound daily by taking 800 milligrams of ibuprofen and cleaning it with hydrogen peroxide. He also testified to missing "a little over a month" of work because of the injury. Mr. Stewart added the gunshot wound did not "start hurting [until] the next day," attributing it to a surge of adrenaline at the time of the shooting. Mrs. Stewart similarly noted that following the incident:

> [MRS. STEWART]: [Mr. Stewart] was in a lot of pain. It hurt to walk being that it was his inner thigh. We had to clean it a whole lot, a whole lot being that he didn't go to the hospital. So it was a lot of cleaning, a lot of nasty bandages. It was pretty bad. It was -- he had a lot of trouble walking like.
>
> [PROSECUTOR]: For about how long afterwards?
>
> [MRS. STEWART]: Maybe a month.
>
> [PROSECUTOR]: Okay. And when you're saying trouble walking because that kind of – you can take that one of two ways.
>
> [MRS. STEWART]: Right. He could walk. He could walk. It just hurts to walk because it rubbed that wound.

By the time of trial, Mr. Stewart still felt "burning" and "tingling" sensations in his thigh as a result of the shooting.

At the close of the State's evidence, Defendant moved for dismissal of his AWDWIKISI charge, arguing the State failed to present sufficient evidence as to each element of the offense. Defendant maintained "the State ha[d] not proven that [he] was the person who committed the crime," and there was a "lack of evidence" demonstrating Mr. Stewart suffered a serious injury—a necessary element of AWDWIKISI. The trial

court denied the motion. Defendant elected not to present evidence in his defense, rested, and renewed his motion to dismiss at the close of all evidence. Again, the trial court denied the motion.

Upon deliberation, the jury convicted Defendant of AWDWISI, a lesser included offense of AWDWIKISI, and possession of a firearm by a felon. Defendant then pled guilty to obtaining habitual felon status. The plea arrangement provided the following pertinent details:

> Defendant was found guilty by a jury of the class E felony of Assault with Deadly Weapon Inflicting Serious Injury (22 CR 215746) and the class G felony of Possession of Firearm by Felon (22 CR 215747). Defendant admits his status as an Habitual Felon (23 CR 9591), statutorily enhancing his sentence under the North Carolina Structured Sentencing Act to a Class C felony for both of the underlying felonies. The underlying felonies will be consolidated for sentencing under 22 CR 215746. Defendant will be sentenced in the presumptive range in the discretion of the Court.

Accounting for Defendant's habitual felon status and prior record level, he received a consolidated sentence of 131 to 170 months imprisonment for all offenses. Defendant entered an oral notice of appeal in open court.

II. Jurisdiction

This Court has jurisdiction over Defendant's appeal pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) ("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 submits one issue for our consideration: Whether the trial court committed error by denying his motion to dismiss the AWDWIKISI charge. Defendant maintains "the State failed to present substantial evidence demonstrating he inflicted serious injury." After careful consideration, we disagree.

"Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Tucker*, 380 N.C. 234, 236, 867 S.E.2d 924, 927 (2022) (quoting *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016)). " 'Under a *de novo* review, the court

considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation omitted).

"The question for a court on a motion to dismiss for insufficient evidence '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.' " *Tucker*, 380 N.C. at 236, 867 S.E.2d at 927 (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980); *see also State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) ("Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion."). When there is substantial evidence, "the motion is properly denied." *Powell*, 299 N.C. at 98, 261 S.E.2d at 117. But "[i]f 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 should be allowed." *Id.*

"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." *Tucker*, 380 N.C. at 237, 867 S.E.2d at 927. "Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) (citation omitted); *see also Tucker*, 380 N.C. at 237, 867 S.E.2d at 927 ("Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve."). In determining whether evidence is substantial, a court must apply the following test:

> The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying the defendant's motion to dismiss. The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both. That test is whether a reasonable inference of the defendant's guilt may be drawn from the evidence. If so[,] the evidence is substantial and the defendant's motion to dismiss must be denied.

State v. Malloy, 309 N.C. 176, 178–79, 305 S.E.2d 718, 720 (1983) (internal citations omitted). "Thus, the evidence need only give rise to a

reasonable inference of guilt for the case to be properly submitted to the jury." *State v. Barnett*, 141 N.C. App. 378, 383, 540 S.E.2d 423, 427 (2000).

In the instant case, Defendant was charged with AWDWIKISI, but convicted of AWDWISI—a lesser included offense of AWDWIKISI. *Compare* N.C. Gen. Stat. § 14-32(a) ("Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon."), *with* N.C. Gen. Stat. § 14-32(b) ("Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon."); *see also State v. Nickerson*, 365 N.C. 279, 282, 715 S.E.2d 845, 847 (2011) (In determining whether a crime is a lesser-included offense, "the test is whether the essential elements of the lesser crime are essential elements of the greater crime. If the lesser crime contains an essential element that is not an essential element of the greater crime, then the lesser crime is not a lesser included offense."); *see also State v. Cromartie*, 177 N.C. App. 73, 76, 627 S.E.2d 677, 680 (2006) ("The only difference in what the State must prove for the offense of assault with a deadly weapon inflicting serious injury and assault with a deadly weapon with intent to kill inflicting serious injury is the element of intent to kill."). "The elements of AWDWISI are: (1) an assault, (2) with a deadly weapon, (3) inflicting serious injury, (4) not resulting in death." *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000). Defendant solely contests the sufficiency of the evidence as to the serious injury element—a necessary element to support a conviction for both AWDWISI and AWDWIKISI. *See* N.C. Gen. Stat. § 14-32(a)–(b); *see also Cromartie*, 177 N.C. App. at 76, 627 S.E.2d at 680.

"We have repeatedly defined the serious injury element of N.C. [Gen. Stat.] § 14-32 to mean a physical or bodily injury." *State v. Everhardt*, 326 N.C. 777, 780, 392 S.E.2d 391, 392 (1990); *see also State v. Alexander*, 337 N.C. 182, 188–89, 446 S.E.2d 83, 87 (1994) (citations omitted) ("The term 'inflicts serious injury,' under G.S. 14-32(b), means physical or bodily injury resulting from an assault with a deadly weapon."); *see also State v. Bagley*, 183 N.C. App. 514, 526, 644 S.E.2d 615, 623 (2007); *see also State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 373 (1978); *see also State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962). "[W]hether an injury is serious within the meaning of AWDWISI is usually a factual determination that rests with the jury." *Bagley*, 183 N.C. App. at 526, 644 S.E.2d at 623; *see also State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997) ("Whether serious injury has been inflicted turns on the facts of each case and is generally a determination for the jury.").

"A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury

is serious. Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury." *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991) (internal citation omitted); *see also Woods*, 126 N.C. App. at 592, 486 S.E.2d at 261; *see also Joyner*, 295 N.C. at 65, 243 S.E.2d at 374. "[A]s long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious." *Alexander*, 337 N.C. at 189, 446 S.E.2d at 87; *see also Joyner*, 295 N.C. at 65, 243 S.E.2d at 374 ("[T]here being evidence of physical or bodily injury to the victim, the question of the nature of these injuries was also properly submitted to the jury.").

Contrary to Defendant's urging, the State presented substantial evidence, allowing a juror to reasonably infer he inflicted a serious injury upon Mr. Stewart. *See Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318; *see also Smith*, 300 N.C. at 78, 265 S.E.2d at 169. The record evidence shows Defendant shot Mr. Stewart in the leg with a revolver during the altercation and suffered a "physical or bodily injury resulting from" Defendant's "assault with a deadly weapon." *Alexander*, 337 N.C. at 188–89, 446 S.E.2d at 87. In addition, Mr. Stewart testified to missing "a little over a month" of work because of the injury—one of the pertinent factors a jury may consider in determining whether the injury was serious. *See Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318. Moreover, when discussing the gunshot wound, Mr. Stewart testified to being in pain following the incident, including having trouble walking, sitting, and laying down. *See Tucker*, 380 N.C. at 237, 867 S.E.2d at 927; *see also Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318.

Mrs. Stewart similarly testified as a result of the gunshot wound: Mr. Stewart "was in a lot of pain"; Mr. Stewart had trouble walking; her and Mr. Stewart had to clean the wound "a whole lot being that he didn't go to the hospital"; and the cleaning produced "a lot of nasty bandages." This testimony speaks to several other pertinent factors a jury may consider when determining whether an injury was serious. *See Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318. Although Defendant challenges the lack of evidence demonstrating Mr. Stewart was hospitalized, our previous decisions reflect "[e]vidence of hospitalization . . . is not necessary for proof of serious injury." *Woods*, 126 N.C. App. at 592, 486 S.E.2d at 261; *see also Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318; *see also Joyner*, 295 N.C. at 65, 243 S.E.2d at 374.

Viewing the evidence in the light most favorable to the State, resolving any contradictions in the evidence in favor of State, substantial evidence demonstrates Mr. Stewart sustained a serious injury as a result of

Defendant's assault with a deadly weapon. *Tucker*, 380 N.C. at 237, 867 S.E.2d at 927; *see also Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347; *see also Smith*, 300 N.C. at 78, 265 S.E.2d at 169. Substantial evidence includes the testimonies of Mr. and Mrs. Stewart articulating his pain, "nasty bandages," difficulty with daily tasks, and time lost at work. *See also Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318; *see also Alexander*, 337 N.C. at 189, 446 S.E.2d at 87. Accordingly, we hold the trial court did not commit error by denying Defendant's motion to dismiss and submitting the charge for the jury's consideration.

IV. Conclusion

Since the State presented substantial evidence demonstrating Defendant inflicted a serious injury on Mr. Stewart, the trial court did not commit error by denying Defendant's motion to dismiss.

NO ERROR.

Chief Judge DILLON and Judge WOOD concur.

STATE OF NORTH CAROLINA
v.
CARROL LEE OWENS

No. COA24-699

Filed 4 June 2025

Criminal Law—guilty pleas—recitation of specific information from allegations in indictments—minor misstatements and omissions—factual basis sufficient

Where defendant's notice of appeal from the judgment entered after he pled guilty to twenty-five offenses was defective, but his intent to appeal was clear and the State was not misled, the Court of Appeals, in its discretion, allowed defendant's petition for writ of certiorari to reach the merits of defendant's argument and reject it; the prosecutor's recitation of specific details and information from the allegations in the indictments was sufficient for the trial court to determine that there was a factual basis for defendant's guilty pleas, despite minor misstatements and omissions by the prosecutor in the recitation.

Judge FREEMAN concurring in part and dissenting in part.

Appeal by defendant from judgment entered 30 January 2024 by Judge William T. Stetzer in Superior Court, Henderson County. Heard in the Court of Appeals 13 February 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Maria Bruner Lattimore, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for defendant.

ARROWOOD, Judge.

Carrol[1] Lee Owens ("defendant") appeals from judgment entered after pleading guilty to twenty-five offenses. Defendant contends the trial court erred by accepting his guilty plea where the State "merely read the indictments" in presenting the factual basis for the offenses. Defendant has additionally filed a petition for writ of certiorari requesting appellate review. For the following reasons, we grant defendant's petition for writ and affirm the trial court's judgment.

I. Background

Defendant was charged with a total of twenty-five offenses on the following dates: 19 March 2018; 8 November 2021; 15 December 2021; 1 March 2023; and 5 May 2023. Defendant filed a motion to proceed pro se on 28 July 2023,[2] which the trial court granted by order entered 6 September 2023.

The matter came on for trial on 29 January 2024, with defendant representing himself and his formerly appointed counsel on standby. Defendant filed several pretrial motions which were heard and ruled upon.

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1. We note that the warrants for arrest, defendant's motion to proceed pro se, waiver of counsel form, defense counsel's motion to withdraw, transcript of plea, prior record worksheet, and pro se notice of appeal each list defendant's first name as "Carrol," while the orders for arrest, indictments, order granting motion to proceed pro se, judgment and commitment, and appellate entries list defendant's first name as "Carroll." Additionally, it appears several of defendant's underlying felonies were addressed by this Court in *State v. Owens*, 178 N.C. App. 742 (2006) (unpublished), which lists defendant's first name as "Carrol." Although this spelling differs from the judgment on appeal, we recognize and adopt the spelling from defendant's motions and prior proceedings.

2. Defendant's trial counsel filed a motion to withdraw on 15 August 2023, and defendant signed a waiver of counsel form on 18 August 2023.

On 30 January 2024, the State offered defendant the opportunity to plead guilty as charged and be sentenced to a term of 117 to 153 imprisonment for common law robbery, elevated from a Class G to a Class C by nature of habitual felon charges. Defendant agreed to plead guilty, and the trial court conducted a plea colloquy, explaining the charges and the maximum sentences associated with each charge.

Following the plea colloquy, the prosecutor recited a factual basis for each of the twenty-five charges. The prosecutor proceeded to provide a brief description of defendant's conduct and details of the offense relevant to each specific charge. For the habitual felon offenses, the prosecutor read aloud the three underlying convictions, including the case file numbers, and the counties of arrest and conviction. Several recitations are included in relevant part:

> In 21 CRS 347 as to habitual felon, having completed this date of offense being July 25th of 2021, he did, on May 26th of 1997, commit the felony larceny in 97 CRS 23344, was convicted of same on December 10th of 1997. That on November 26, 2004, as to the felony flee to arrest[sic] in 04 CRS 57653, he did commit the offense of felony flee to elude, conviction date of May 4th, 2005. Date of offense of that was 11/26/04.
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> . . . .
>
> In 18 CRS 159, as to habitual felon, completed on January 18th of 2018. Defendant was convicted on December 10th of 1997 of felony larceny in File Number 97 CRS 23344, date of offense being on 5/26, 1997. The second offense being convicted on November 26th of 2004, a felony flee to elude arrest in File Number 4 CRS 57653. Date of . . . conviction would have been on May 4th of 2005, date of offense on November 26th of '04.
>
> And, finally, in felony forgery of an instrument in 07 CR 56348, conviction date of that of December 21st of 2007, date of occurrence of that of October 21st of 2007.
>
> In 18 CRS 153, as to habitual felon, the defendant having committed that offense on January 10th of 2018. He did commit felony larceny on May 26th of 1997, was convicted of same on December 10th of 1997 in the Superior Court of Henderson County. That on the date of offense of 11/26/04, he did commit that felony flee to elude arrest in File Number 4 CRS 57653, being convicted of same on May 4th of 2005

> in the Superior Court of Henderson County. And that on October 21st of 2007, as to felony forgery of an instrument, in 07 CR 56348, being convicted of same on December 21st of 2007, in the District Court of Henderson County.
>
> Finally, in 18 CRS 156 as to habitual felon, the defendant did commit this offense on January 10th of 2018, in that he did commit the crime of felony larceny on May 26, 1997, in File Number 97 CRS 23344, being convicted of the same on December 10th of 1997, in the Superior Court of Henderson County. That on November 26, 2004, he did commit the crime of felony flee to elude arrest in File Number 04 CRS 57653, being convicted of same on May 4th of 2005 in the Superior Court of Henderson County. And that on August 18th of 2013, did commit the offense of felony larceny of a motor vehicle in 13 CR 59399, being convicted of same on November 13, 2013, in the District Court of Buncombe County.

Based on the record and factual presentation, the trial court found that there was a factual basis for defendant's guilty plea. The trial court asked defendant if there was anything he would like to say about the factual basis; defendant responded, "No, sir. That covers it." The trial court sentenced defendant to an active sentence of 117 to 153 months imprisonment.

Defendant filed a written notice of appeal *pro se* on 31 January 2024. Defendant additionally filed a petition for writ of certiorari on 23 September 2024.

II. Discussion

Defendant contends the trial court erred in accepting his guilty plea where the State "merely read the indictments" as its presentation of the factual basis. We first address defendant's petition for writ of certiorari.

A. Petition for Writ of Certiorari

A criminal defendant's notice of appeal must comply with Rule 4 for this Court to have jurisdiction over a defendant's appeal. *State v. Hughes*, 210 N.C. App. 482, 484 (2011). When considering a defective notice of appeal,

> The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right

> to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21(a)(1).

"The Court of Appeals has jurisdiction . . . to issue the prerogative writs, including . . . certiorari, . . . in aid of its own jurisdiction[.]" N.C.G.S. § 7A-32(c) (2024). "This statute empowers the Court of Appeals to review trial court rulings on motions for appropriate relief by writ of certiorari unless some other statute restricts the jurisdiction that subsection 7A-32(c) grants." *State v. Thomsen*, 369 N.C. 22, 25 (2016) (citing *State v. Stubbs*, 368 N.C. 40, 42–43 (2015)). "The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law." N.C.G.S. § 7A-32(c).

Certiorari is a discretionary writ which may "be issued only for good or sufficient cause shown," and must "show merit or that [petitioner] has reasonable grounds for asking that the case be brought up and reviewed on appeal." *In re Snelgrove*, 208 N.C. 670, 671–72 (1935) (citation omitted). Additionally, a writ of certiorari "should issue only if there are 'extraordinary circumstances' to justify it." *Cryan v. Nat'l Council of Young Men's Christian Ass'ns of U.S.*, 384 N.C. 569, 572 (2023) (quoting *Moore v. Moody*, 304 N.C. 719, 720 (1982)). "There is no fixed list of 'extraordinary circumstances' that warrant certiorari review, but this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Id.* at 573 (citation omitted).

Although our Courts have not specifically defined what is required to show extraordinary circumstances, substantial harm may be shown where "the fundamental rights of a [party] are at stake" in the balance of the appeal. *See In re S.D.H.*, 908 S.E.2d 868, 875 (N.C. Ct. App. 2024) ("Further, the gravity of such error, where the fundamental rights of a parent are at stake, could result in substantial harm to both Respondent-Father and the Juveniles."). An assessment of judicial economy and efficient use of judicial resources may include considering "the need for the trial court to have to consider a subsequent motion for appropriate relief or ineffective assistance of counsel." *See State v. Ore*, 283 N.C. App. 524, 535 (Dillon, J., concurring), *vacated in part*, 383 N.C. 676, 678 (2022) ("The concurring opinions in the Court of

Appeals [regarding certiorari] . . . accurately reflect the law.").[3] Wide-reaching issues of justice and liberty at stake may include allegations of "serious misconduct and abuse of power by the government in violation of both the U.S. Constitution and our State's common law." *Doe v. City of Charlotte*, 273 N.C. App. 10, 23 (2020); *see also State v. Hamrick*, 110 N.C. App. 60, 63 (1993) ("Nonetheless, because of the important issues raised by this appeal, we allow defendant's petition for writ of certiorari[.]").

"A writ of certiorari is not intended as a substitute for a notice of appeal because such a practice would render meaningless the rules governing the time and manner of noticing appeals." *State v. Ricks*, 378 N.C. 737, 741 (2021) (cleaned up). "Ultimately, the decision to issue a writ of certiorari rests in the sound discretion of the presiding court[,]" and such decision is reviewed solely for abuse of discretion. *Cryan*, 384 N.C. at 573 (citing *Ricks*, 378 N.C. at 740).

In *State v. Killette*, this Court determined the defendant's petition showed "no basis to grant his requested discretionary writ[,]" where the defendant filed a pro se handwritten notice of appeal which failed to identify this Court or properly notice the State. 268 N.C. App. 254, 258 (2019) ("The fact this Court possesses the jurisdictional power to allow in our discretion, does not compel us to do so under Defendant's burden to show prejudicial reversible error and the clearly unmeritorious facts before us."), *vacated and remanded*, 381 N.C. 686 (2022). The Supreme Court overruled *Killette* and several other Court of Appeals decisions which held or implied that this Court lacked jurisdiction or authority to issue a writ of certiorari or which suggested "that Rule 21 limited its jurisdiction or authority to do so."[4] *State v. Killette*, 381 N.C. 686, 691 (2022). The Supreme Court emphasized that the Court of Appeals erred in "concluding it is procedurally barred from exercising its jurisdiction"

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3. Judge Dillon further noted that "it is not uncommon for our Court to issue a writ in order to review a defendant's appeal where there is a jurisdictional defect in his or her notice of appeal, where the State has not been prejudiced by the defect, *even where said defendant's appeal has little, if any merit*." *Ore*, 283 N.C. App. at 535 (Dillon, J., concurring) (emphasis in original).

4. The Supreme Court agreed with the State's brief, which acknowledged the Supreme Court had "made clear in *Stubbs*, *Thomsen*, and *Ledbetter* that the Court of Appeals 'maintains broad jurisdiction to issue writs of certiorari unless a more specific statute revokes or limits that jurisdiction' and that 'Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued.' "

and by setting "its own limitations on its jurisdiction to issue writs of certiorari." *Id.* at 690 (quoting *State v. Ledbetter*, 371 N.C. 192, 196 (2018)).

We further note that this Court has permitted review of appeals where it could be "fairly inferred that Defendant intended to appeal to this Court" and where the State has not been misled by this deficiency. *See State v. Rankin*, 257 N.C. App. 354, 356 (holding that "failure to designate this Court in her notice of appeal does not warrant dismissal" and denying petition for writ of certiorari as moot), *writ allowed*, 370 N.C. 570 (2018), and *aff'd*, 371 N.C. 885 (2018). Similarly, this Court has granted petitions for writ of certiorari where petitioners demonstrated good faith efforts in making a timely appeal and because the appeal had merit. *State v. Myrick*, 277 N.C. App. 112, 114 (2021).

Defendant dated his written notice of appeal 31 January 2024 and filed on 8 February 2024, which was timely. The notice contained file numbers "23 CRS 41-44," and stated that defendant was appealing "Judgment entered against the defendant in Superior Court finding the defendant guilty of Common Law Robbery etc. and Sentencing under habitual felon statute on 1-30-24." The record includes a letter directing the Clerk of Superior Court to "transmit [the notice of appeal] to [the] Court of Appeals[,]" however there is no indication that notice was served upon the State.

Defendant's notice of appeal does not include all of the file numbers from his underlying cases, does not state the court to which the appeal was being taken, and does not appear to have been served on the State. However, the pro se written notice of appeal was timely filed, listed some of the file numbers including the lead charge of common law robbery, and the supplemental cover letter did direct the Clerk to transmit the notice to this Court. It does not appear that the State has suffered any prejudice by not being served with the original written notice of appeal.

Defendant's petition for writ of certiorari alleges the prosecutor misspoke several times during the factual basis with differences from the indictments, which is a sufficient showing of meritorious issue for review on appeal. Furthermore, in the interest of judicial economy, considering and resolving the issues presented in this case eliminates the potential need for the trial court to consider any subsequent motions or further proceedings in this matter. Although defendant's notice of appeal does not comply with Rule 4, defendant demonstrated a good faith effort to appeal his case to this Court, and we exercise our discretion under Rule 21 to address the merits of defendant's appeal.

The dissent characterizes this discretionary decision as following a per se rule to issue writ where a criminal defendant fails to properly notice an appeal despite making a good faith effort to do so. "Our Court does not always allow such writs, especially where the issues raised have little merit. But we might choose to do so" in appropriate circumstances, including in the interest of judicial economy. *Ore*, 283 N.C. App. at 535 (Dillon, J., concurring).

> Our Supreme Court in *Stubbs* recognized that our Court has been granted the authority by our General Assembly to issue a writ of certiorari to review an order in a situation where our General Assembly provided the party no *right* to appeal. Just like in *Stubbs*, the fact that the General Assembly has expressly stated that the defendant here has *no right* to appeal does not strip *our Court* of our authority to issue a writ of certiorari, which was granted to us by the General Assembly.

Id. at 536 (Dillon, J., concurring) (cleaned up).

The dissent relies on *Cryan*, which directs that "a writ of certiorari should issue only if the petitioner can show merit or that error was probably committed below." *Cryan*, 384 N.C. at 572. However, *Cryan* also reaffirms that the decision to issue writ "rests in the sound discretion of the presiding court[,]" and notably affirmed this Court's decision to issue writ of certiorari in that matter. *Id.* at 573. Furthermore, our Supreme Court affirmed this Court's "authority to review [the] issue by certiorari," in *State v. Ore* in accordance with the concurring opinions. *State v. Ore*, 383 N.C. 676 (2022); *see also Killette*, 381 N.C. at 690 ("the Court of Appeals possessed jurisdiction and authority to exercise its discretion in reviewing and deciding to allow or deny defendant's petition."). We do not establish a per se rule that any good faith effort may be rewarded by issuance of writ following a defective appeal; we simply exercise our discretion to address the merits of this case.

B. Factual Basis

Defendant contends there was an insufficient factual basis for the trial court to accept his guilty plea, arguing the prosecutor's recitation only consisted of him reading allegations from the indictments, with incomplete or incorrect recitations on four of the charges. We disagree.

"Because a guilty plea waives certain fundamental constitutional rights such as the right to a trial by jury, our legislature has enacted laws

to ensure guilty pleas are informed and voluntary." *State v. Agnew*, 361 N.C. 333, 335 (2007).

> The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.
>
> (4) Sworn testimony, which may include reliable hearsay.
>
> (5) A statement of facts by the defense counsel.

N.C.G.S. § 15A-1022(c) (2024).

The trial court "may consider any information properly brought [its] attention[,] [but] such information must appear in the record, so that an appellate court can determine whether the plea has been properly accepted." *Agnew*, 361 N.C. at 336, (citations and interior quotations omitted). Further, in enumerating these five sources, the statute "contemplate[s] that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty." *Id.* (citing *State v. Sinclair*, 301 N.C. 193, 199 (1980)). Additionally, this Court has held that indictments providing significant factual details beyond the charge alleged contained enough information for an independent judicial determination of defendant's guilt. *State v. Crawford*, 278 N.C. App. 104, 118 (2021).

In *Agnew*, there was an insufficient factual basis to accept a defendant's guilty plea when "the trial court had before it the indictment, defendant's Transcript of Plea, and defense counsel's oral stipulation that a factual basis existed." 361 N.C. at 336. "[T]he indictment simply stated the charge and did not provide any further factual description of defendant's particular alleged conduct." *Id.* Thus, the trial court had insufficient information to make "an independent judicial determination of defendant's actual guilt[.]" *Id.* In *Crawford*, however, the indictment provided a "factual description of defendant's particular alleged conduct[,]" including the year, make, and model of a stolen vehicle and the names of the rightful owners. *Crawford*, 278 N.C. App. at 118.

In this case, for defendant's non-habitual felon charges, including financial card theft and larceny of a motor vehicle, the prosecutor recited specific information, such as a description of the item that was stolen, the name of the rightful owner, the dates that defendant committed the

offenses, and addresses of buildings broken into. Although much of the prosecutor's recitations were taken from the indictments, the factual details go beyond the charge alleged and were sufficient to show independent of the plea that defendant was guilty.

Defendant asserts the trial court erred in accepting recitations that were incomplete or incorrect, specifically as to 21 CRS 347, 18 CRS 159, 18 CRS 153, and 18 CRS 156.[5] Although it appears the prosecutor made several minor misstatements, we decline to find the trial court erred because all of the necessary information for the factual bases was presented at some point during the recitations.

In the factual basis for 21 CRS 347, the prosecutor did not state the counties of conviction for two of the three underlying offenses. However, the prosecutor had already recited the counties of conviction for those underlying offenses in the factual basis for 23 CRS 41. Similarly, in 18 CRS 159, the prosecutor failed to specify the courts of conviction for the underlying offenses; however, those were the same underlying offenses as in 18 CRS 153 and 18 CRS 156, and the prosecutor recited the courts of conviction for each offense during the factual basis for 18 CRS 153. In 18 CRS 153, although the prosecutor did not recite a file number for the first felony in the habitual felon indictment, the prosecutor had already stated the file number for that offense in previous factual bases. And finally regarding 18 CRS 156, although the prosecutor misstated that felony forgery was the underlying offense and not felony larceny of a motor vehicle, the trial court had heard the correct statement of the underlying felony in the immediately preceding recitation for 18 CRS 153. Accordingly, the trial court had enough information to determine there was a sufficient factual basis to support the charges.

Although several of the prosecutor's statements included minor inaccuracies or omissions, the trial court was presented with all of the necessary information throughout the factual presentations, several of which related to each other as underlying offenses. The factual basis was sufficient for the trial court to make an independent judicial determination of defendant's guilt. Furthermore, defendant has not shown that he was prejudiced by the prosecutor's misstatements and omissions, and offered no facts to show that he would have pled otherwise.

III. Conclusion

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

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5. We address the recitations in the order they were presented to the trial court.

AFFIRMED.

Judge STROUD concurs.

Judge FREEMAN concurs in part and dissents in part by separate opinion.

FREEMAN, Judge, concurring in part and dissenting in part.

I concur with the majority's reasoning and conclusion as to the merits of the case. However, the majority correctly notes that because defendant failed to properly notice his appeal, this Court may only obtain jurisdiction over defendant's purported appeal by issuing a writ of certiorari. A writ of certiorari "is not intended as a substitute for a notice of appeal," *State v. Ricks*, 378 N.C. 737, 741 (2021), and "should issue *only* if the petitioner can show merit . . . [and] extraordinary circumstances to justify it." *Cryan v. Nat'l Council of Young Men's Christian Ass'ns of U.S.*, 384 N.C. 569, 572–73 (2023) (cleaned up). As defendant's petition fails to show extraordinary circumstances justifying issuance of the writ, I would deny defendant's petition and dismiss this appeal. Because I would not reach the merits of this case, I respectfully dissent from the majority's decision to grant defendant's petition for writ of certiorari.

Our Supreme Court recently stated:

> The procedure governing writs of certiorari is found in Rule 21 of the Rules of Appellate Procedure. But Rule 21 does not prevent the court of appeals from issuing writs or have any bearing upon the decision as to whether a writ of certiorari should be issued. Instead, the decision to issue a writ is governed solely by statute any by common law.

Cryan, 384 N.C. at 572 (cleaned up).

Our General Assembly has provided that this Court may issue the writ of certiorari subject to "statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of common law." N.C.G.S. § 7A-32(c) (2023). Though we may exercise our discretion in granting the writ of certiorari, it is "to be issued only for good or sufficient cause shown, and it is not one to which the moving party is entitled to as a matter of right." *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579 (1927). "A writ of certiorari is not intended as a substitute for a notice of appeal because such a practice would

render meaningless the rules governing the time and manner of noticing appeals." *Ricks*, 378 N.C. at 741 (citations omitted).

Thus, to determine whether this Court should issue the writ of certiorari, we must apply the following two-factor test:

> First, a writ of certiorari should issue *only* if the petitioner can show merit or that error was probably committed below. This step weighs the likelihood that there was some error of law in the case.
>
> Second, a writ of certiorari should issue *only* if there are extraordinary circumstances to justify it. We require extraordinary circumstances because a writ of certiorari is not intended as a substitute for notice of appeal. If court issued writs of certiorari solely on the showing of some error below, it would render meaningless the rules governing the time and manner of noticing appeals.
>
> There is no fixed list of extraordinary circumstances that warrant certiorari review, but this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or wide-reaching issues of justice and liberty at stake.

Cryan, 384 N.C. at 572–73 (cleaned up) (emphasis added).

Here, defendant's petition for writ of certiorari fails to identify any extraordinary circumstances justifying issuance of the writ. Though I commend the majority for addressing whether defendant's petition shows merit, the majority nevertheless appears to fall back on a per se rule that the writ shall issue where a criminal defendant fails to properly notice an appeal despite his or her "good faith effort to appeal." Although I understand the temptation of this sympathetic approach, a "writ of certiorari is not intended as a substitute for a notice of appeal," *Ricks*, 378 N.C. at 741, nor is it a writ "to which the moving party is entitled to as a matter of right," *Womble*, 194 N.C. at 579. Neither our preferences nor our outdated caselaw trump current Supreme Court precedent. I therefore respectfully dissent from the majority's decision to reach the merits of defendant's asserted appeal.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 JUNE 2025)

CARLSON v. J.E. DUNN CONSTR. CO. No. 24-180	Mecklenburg (21CVS20535)	Affirmed
HORST v. ROBINSON No. 24-1026	Wake (24CV004000-910)	Dismissed
IN RE B.A.S. No. 24-954	Davie (22JB000062-290)	No prejudicial error.
IN RE K.J.B.L. No. 24-1040	Henderson (23JT000018-440)	Affirmed
IN RE L.D.E. No. 24-783	Cabarrus (24JA000042)	Vacated and Remanded
IN RE M.S. No. 24-570	Buncombe (19JA000165)	Affirmed
MOONEY v. N.C. DEP'T OF HEALTH & HUM. SERVS. No. 24-613	Transylvania (23CVS000222)	AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERRORS.
STARLING v. STARLING No. 24-667	Orange (21CVD000974)	Affirmed
STATE v. BLISS No. 24-92	Buncombe (21CRS90691) (21CRS90695)	No Error
STATE v. ELLIS No. 24-806	Randolph (21CRS053240)	No Error.
STATE v. GRAY No. 24-389	Mecklenburg (18CRS238325) (20CRS15595-97)	No Error
STATE v. HAHN No. 24-424	Buncombe (21CRS89660-64)	Dismissed
STATE v. HARKEY No. 23-811	Cabarrus (19CRS53376)	New Trial
STATE v. HATLEY No. 24-612	Rowan (21CRS051631) (21CRS051632)	No Error

STATE v. KELLY No. 24-313	Cabarrus (20CRS51099) (21CRS50005-6) (22CRS693)	No Error in Part; No Plain Error in Part
STATE v. LEOPARD No. 24-244	Stanly (21CRS265) (21CRS268-69)	No Error
STATE v. WHITE No. 24-534	Iredell (20CR053638-480) (20CR054286-480)	Dismissed

CHRISTOPHER G. CABLE, EMPLOYEE, PLAINTIFF
v.
CONSOLIDATED METCO, INC., EMPLOYER, ACE, USA, CARRIER,
(ESIS, INC., THIRD PARTY ADMINISTRATOR), DEFENDANTS

No. COA24-413

Filed 18 June 2025

Workers' Compensation—disability determination—lower back injury—unreasonable job search—wage-loss compensation denied

The Full Commission properly determined that defendant was not entitled to wage-loss compensation for a specified two-year period based on competent evidence and sufficient findings of fact where plaintiff, who had filed a claim for benefits after injuring his lower back while working as a molding production supervisor, failed to apply for any job for a year and a half after his injury, even though he had been laid off from his job (unrelated to his injury) and had not been assigned any written work restrictions. Further, plaintiff voluntarily removed himself from the job market in order to pursue an associate degree in business. Given that plaintiff was capable of work, a job search would not have been futile and, therefore, plaintiff failed to make an initial showing of disability for the relevant time period. Finally, the Full Commission did not err by relying on an unpublished appellate opinion to reach its conclusion because the case was factually similar (regarding a claimant pursuing education rather than employment) and no published opinion of stronger persuasive value had been identified.

Appeal by Plaintiff from opinion and award entered 5 February 2024 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 October 2024.

The Harper Law Firm, PLLC, by Joshua O. Harper and Richard B. Harper, for Plaintiff-Appellant.

Roberts & Stevens, P.A., by Charles E. McGee, for Defendants-Appellees.

CARPENTER, Judge.

Christopher G. Cable ("Plaintiff") appeals from an "Opinion and Award" entered 5 February 2024 by the North Carolina Industrial Commission (the "Full Commission"). On appeal, Plaintiff argues the Full Commission erred by not awarding him wage-loss compensation from 3 April 2020 to 20 April 2022. After careful review, we affirm.

I. Factual & Procedural Background

On 21 January 2020, Plaintiff injured his low back while working as a molding production supervisor for Consolidated Metco, Inc. ("Defendant-Employer") at their facility in Bryson City, North Carolina. Plaintiff was lifting a wooden pallet when he "felt and heard a pop in [his] back as [he] was twisting and lifting." The following day, Plaintiff reported his injury to his supervisor, Chris Burch, and took a vacation day due to his back pain. At the time, Defendant-Employer was in the process of "shutting down their Bryson City facility in favor of the Canton plant and other facilities."

On 23 January 2020, Plaintiff saw Nicole Foxworth, a physician assistant at Everside Health, for an annual appointment and complained about back pain stemming from the 21 January 2020 work injury. Foxworth diagnosed Plaintiff with a lumbar strain and recommended Plaintiff continue taking ibuprofen, advised Plaintiff that he could continue his regular work duties, and ordered an x-ray which Plaintiff completed the same day at Smoky Mountain Urgent Care. The radiologist who interpreted the x-ray film included in the "impression" section of her report that Plaintiff had "mild degenerative disc disease."

On 24 January 2020, Plaintiff texted Burch asking if he could take another vacation day. Burch responded, "Sure. That's fine. I'll see you on Monday." According to Burch, when Plaintiff returned to work he did "a little bit of everything," including running presses, setting tools, and working as a material handler and process tech—a job that involved lifting, bending, twisting, and stooping. According to Plaintiff, however, when he returned to work he only performed computer tasks and did not engage in any heavy lifting due to his back pain.

On 28 January 2020, on behalf of Defendant-Employer, Ace USA, and ESIS, Inc. (collectively, "Defendants"), Burch completed a Form 19 Employer's Report of Employee's Injury or Occupational Disease for the Industrial Commission, which indicated that Plaintiff's specific injury was "sprain trunk – spinal cord." On 11 February 2020, Plaintiff visited his family physician, Dr. David Johnston, for a neurology referral because Plaintiff "want[ed] to go to flight school and need[ed] [an]

ok to go." Plaintiff did not mention his work injury or back pain to Dr. Johnston during the visit.

In March 2020, when Burch asked Plaintiff to "pull the tools out of the press [to] send back over to Canton," Plaintiff informed Burch that his back was bothering him again. According to Burch, Plaintiff did not take the news that tools were being moved to Canton very well.

On 3 April 2020, Plaintiff was laid off by Defendant-Employer. Plaintiff's layoff was unrelated to his 21 January 2020 work injury. On 20 April 2020, Plaintiff signed a document entitled "Separation and General Release of all Claims," in which he agreed to no longer render services to Defendant-Employer and acknowledged that he may be denied further employment with Defendant-Employer should he later re-apply. When Plaintiff returned to collect his personal belongings after being laid off, he told Burch he was still experiencing back pain.

On 15 April 2020, Plaintiff texted Everett Lynch, Defendant-Employer's Human Resources Director, saying he would "be willing to go back to hourly to keep [his] job" at either the Bryson City or Canton facility. Lynch responded: "Okay. I will keep you posted. It's just unclear right now."

That same day, Plaintiff saw Dr. David R. Castor at Smoky Mountain Urgent Care. Plaintiff complained of low back pain and was diagnosed with "Lumbago with sciatica, right side" and "chronic pain." Defendant-Employer requested an MRI, which Plaintiff underwent on 26 June 2020. On 20 July 2020, Plaintiff reviewed the results of the MRI with Dr. Castor, who reported that Plaintiff had "Lumbar degenerative disc disease" and "Foraminal stenosis of lumbar region." At that time, Plaintiff was advised to "avoid heavy lifting or repetitive motion of the affected area."

On 22 July 2020, Plaintiff completed an application for the Trade Adjustment Assistance program ("TAA") to obtain tuition assistance so he could enroll in the two-year Business Administration program at Southwestern Community College. In the application, Plaintiff checked "yes" when asked if he could return to his former occupation and former industry. In the section "Barriers to employment (if any)," Plaintiff simply noted that he was seeking a degree to obtain employment to support his family.

Plaintiff's application was endorsed by Sheila Traub, a local TAA representative. Traub determined Plaintiff was eligible for the program because: (1) "[s]uitable employment [was] not available;" (2) he would "benefit from appropriate training;" (3) "a reasonable expectation for

employment following training exists;" (4) "training is reasonably available;" (5) he was "qualified to undertake and complete his training;" and (6) the "training [was] suitable and available at a reasonable cost." Plaintiff was admitted to Southwestern Community College on 24 July 2020 and began classes on 17 August 2020.

On 19 August 2020, Smoky Mountain Sports Medicine & Physical Therapy recommended that Plaintiff participate in six weeks of physical therapy, one to two times per week. Plaintiff attended one physical therapy appointment, but did not return because he was "in so much pain" after the appointment that he "didn't go back."

On 25 September 2020, Plaintiff filed a Form 18 Notice of Accident to Employer and Claim of Employee, Representative, or Dependent. On 27 October 2020, Defendants filed a Form 63 Notice to Employee of Payment of Compensation [or Payment of Medical Benefits Only] Without Prejudice. On 5 May 2021, Plaintiff filed a Form 33 Request That Claim be Assigned for Hearing, and Defendants filed a Form 33R Response to Request That Claim be Assigned for Hearing on 21 June 2021. On 3 August 2021, Plaintiff filed a corrected Form 33 and Form 18.

On 14 September 2021, Plaintiff applied to work for Defendant-Employer as a Process Engineer. According to Plaintiff's job-search log, he applied for twenty-four jobs between 14 September 2021 and 18 October 2021.

On 21 March 2022, Plaintiff's workers' compensation claim came before Deputy Commissioner Jesse M. Tillman, III. On 19 December 2022, Deputy Commissioner Tillman entered an opinion and award concluding Plaintiff was "entitled to have Defendants provide medical compensation" and "vocational rehabilitation" because Plaintiff "sustained a compensable injury by accident (specific trauma incident) to his low back on January 21, 2020." Deputy Commissioner Tillman found that Plaintiff was "totally, and after an eventually successful reasonable effort to return to work, partially disabled." Deputy Commissioner Tillman further found that "Plaintiff's total disability . . . began on April 3, 2020 and continued until the Plaintiff successfully returned to work on June 6, 2022."

Defendants appealed to the Full Commission, and the matter was heard on 11 May 2023. On 5 February 2024, the Full Commission issued its Opinion and Award, concluding, in relevant part, that Plaintiff was not entitled to any wage-loss compensation from 3 April 2020 to 20 April 2022. On 20 February 2024, Plaintiff filed written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 97-86 (2023).

III. Issues

The issues are whether the Full Commission erred by: (1) determining that Plaintiff was not disabled from 3 April 2020 to 20 April 2022; and (2) relying on an unpublished opinion and "deficient" findings of fact to support conclusion of law 7.

IV. Standard of Review

Our review of an opinion and award of the Full Commission is "limited to reviewing whether *any* competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (emphasis added). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Church v. Bemis Mfg. Co.*, 228 N.C. App. 23, 26, 743 S.E.2d 680, 682 (2013). The Full Commission "is the sole judge of the weight and credibility of the evidence[,]" *Deese*, 228 N.C. App. at 116, 530 S.E.2d at 553, and its findings of fact "are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding," *Murray v. Associated Insurers, Inc.*, 341 N.C. 712, 714, 462 S.E.2d 490, 491 (1995).

In making its determinations, the Full Commission cannot "wholly disregard or ignore the competent evidence before it." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 601, 532 S.E.2d 207, 212 (2000). It is "not required, however, to find facts as to all credible evidence," as such a mandate "would place an unreasonable burden on the Commission." *London v. Snak Time Catering, Inc.*, 136 N.C. App. 473, 476, 525 S.E.2d 203, 205 (2000). Instead, the Full Commission must make findings regarding "those crucial and specific facts upon which the right to compensation depends so that a reviewing court can determine on appeal whether an adequate basis exists for the Commission's award." *Johnson v. Southern Tire Sales & Service*, 358 N.C. 701, 705, 599 S.E.2d 508, 511 (2004).

V. Analysis

Plaintiff's primary argument is that the Full Commission erred by failing to award him wage-loss compensation from 2 April 2020 to 20 April 2022. Specifically, Plaintiff challenges the Full Commission's disability determination and its conclusion of law 7. Although Plaintiff

advances four theories in support of his contention that the Full Commission erred by determining he was not disabled from 2 April 2020 to 20 April 2022, all of Plaintiff's challenges pertain to one overarching issue: whether the Full Commission erred by determining Plaintiff's job search during this time period was unreasonable. Accordingly, we address Plaintiff's contentions below.

A. Disability Determination

First, Plaintiff argues the Full Commission erred by determining his job search was unreasonable. Specifically, Plaintiff asserts that when making this determination, the Full Commission failed to consider his pain, disregarded the jobs he applied to while he was not under any formal work restrictions, and failed to shift the burden to Defendants to show that suitable jobs were available to Plaintiff. We disagree.

To receive compensation under the Workers Compensation Act, " 'the claimant has the burden of proving the existence of his disability and its extent.' " *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 7, 562 S.E.2d 434, 439 (2002) (quoting *Saums v. Raleigh Cnty. Hosp.*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997) (citation omitted)). "[O]nce the claimant meets this initial burden, the defendant who claims that the plaintiff *is* capable of earning wages must come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990) (emphasis in original).

"The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2023). "Although the pain caused by an injury is not compensable . . . , the degree of pain experienced must be considered by the Commission in determining the extent of the employee's incapacity to work and earn wages." *Matthews v. Petroleum Tank Service, Inc.*, 108 N.C. App. 259, 264, 423 S.E.2d 532, 535 (1992).

"A determination of disability is a conclusion of law that must be supported by specific findings which show: (1) plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment; (2) plaintiff was incapable after his injury of earning the same wages he had earned before his injury at any other employment; and (3) the incapacity to earn was caused by plaintiff's injury." *Griffin v. Absolute Fire Control, Inc.*, 269 N.C. App. 193, 199,

837 S.E.2d 420, 425 (2020). A claimant can offer proof to support the first two findings in several ways, including by producing:

> (1) medical evidence that the employee is physically or mentally, as a consequence of the work-related injury, incapable of work in any employment; or
>
> (2) evidence that the employee is capable of some work, but after reasonable effort on the part of the employee has been unsuccessful in efforts to obtain employment; or
>
> (3) evidence that the employee is capable of some work but that it would be futile because of preexisting conditions, i.e. age, inexperience, lack of education, to seek other employment; or
>
> (4) evidence that the employee has obtained other employment at a wage less than that earned prior to the injury.

Id. at 199–200, 837 S.E.2d at 425.

Although the Commission is required to "explain its basis" for its determination that a claimant's job search was unreasonable, *see Patillo v. Goodyear Tire & Rubber Co.*, 251 N.C. App. 228, 240, 749 S.E.2d 906, 914 (2016), "no general rule exists for determining the reasonableness of an injured employee's job search," *Gonzalez v. Tidy Maids, Inc.*, 239 N.C. App. 469, 480, 768 S.E.2d 886, 894 (2015). Instead, the Commission is "free to decide whether an employee made a reasonable effort to obtain employment[,]" provided, of course, that such determination is supported by competent evidence. *Id.* at 480, 768 S.E.2d at 894 (*purgandum*); *see also Patillo*, 251 N.C. App. at 240, 794 S.E.2d at 914 (explaining conclusory findings that the "[p]laintiff's search for employment was unreasonable" are insufficient).

Here, the Full Commission concluded Plaintiff was not disabled from 2 April 2020 until 20 April 2022 because Plaintiff's job search during this time period was unreasonable. Specifically, the Full Commission found, based on the preponderance of evidence on the record, that:

> 41. Plaintiff's job search log documents that he applied for twenty-four jobs between 14 September 2021 and 18 October 2021. The Full Commission finds . . . that Plaintiff's failure to apply for any job until September of 2021, having been laid off in April 2020 and not assigned any written work restrictions, was not reasonable. The Full Commission further finds that Plaintiff's post-layoff

> text communications with Defendant-Employer during 2020, while an effort to obtain reemployment, is not sufficient to constitute a reasonable job search.
>
> . . .
>
> 85. . . . Plaintiff's 3 April layoff from Defendant-Employer was unrelated to his 21 January 2020 injury.
>
> 86. . . . [S]tarting at the beginning of Southwestern Community College's fall semester of 2020, Plaintiff voluntarily removed himself from the labor market to pursue an associate degree in business.
>
> 87. . . . [P]rior to voluntarily removing himself from the labor market to pursue an associate degree . . . Plaintiff had not conducted a reasonable job search.
>
> 88. . . . [G]iven Plaintiff's lack of formal work restrictions and work history, that it would not have been futile for Plaintiff to seek employment subsequent to being laid off by Defendant-Employer prior to enrolling at Southwestern Community College. The Full Commission finds that, to the extent the 20 July 2020 Smoky Mountain Urgent Care medical note imposed physical restrictions, those restrictions were not sufficient to render a job search futile or render Plaintiff's subsequent search reasonable.
>
> 89. . . . Plaintiff was assigned no formal work restrictions consequent of the 21 January 2020 specific traumatic incident until March 2022, approximately two months prior to his graduation from Southwestern Community College.

The Full Commission's findings were supported by competent evidence and supported its determination that Plaintiff's job search was unreasonable. According to Plaintiff's job-search log, Plaintiff did not apply to any jobs prior to enrolling in community college in August 2020 and submitted his first job application to his former employer, Defendant-Employer, on 14 September 2021. Although Plaintiff applied to twenty-four jobs between 14 September 2021 and 18 October 2021, Plaintiff did not apply for any jobs from 18 October 2021 until 20 April 2022, at which time Plaintiff was nearing the end of his community college program. Moreover, Plaintiff testified that he "could do" a process engineer job following his 21 January 2020 work injury and was not prevented from working "all jobs."

Therefore, the Full Commission was free to find that Plaintiff's job search was unreasonable based on Plaintiff's job-search history, his decision to enroll in community college full-time rather than remain in the workforce, and his testimony indicating he was able to work during this time frame. Because competent evidence supports the Full Commission's determination that Plaintiff did not conduct a reasonable job search, and the findings sufficiently explain how Plaintiff failed to conduct a reasonable job search, we conclude the Full Commission did not err by concluding Plaintiff was not disabled from 2 April 2020 to 20 April 2022. *See Patillo*, 251 N.C. App. at 240, 794 S.E.2d at 914. Accordingly, the Full Commission did not err by concluding Plaintiff was not entitled to wage-loss compensation for this time period.

Our conclusion regarding the Full Commission's disability determination forecloses Plaintiff's remaining arguments pertinent to this issue. Plaintiff cannot demonstrate the Full Commission failed to consider or weigh the evidence regarding his pain when determining Plaintiff's disability. Indeed, although it was not required to make specific findings regarding Plaintiff's pain, the Full Commission made several findings of fact considering Plaintiff's pain. For example, the Full Commission found that Dr. Albright determined Plaintiff's back pain was causally-related to his work injury and that the work restrictions Dr. Albright imposed "reflect[ed] his opinions regarding Plaintiff's physical restrictions as of 9 March 2022, consequent of [Plaintiff's] back pain." In other words, the Full Commission did not disregard Plaintiff's pain when determining that his job search was unreasonable and did not err by failing to make more specific findings regarding Plaintiff's pain. *See Garrett v. Goodyear Tire & Rubber Co.*, 260 N.C. App. 155, 174, 817 S.E.2d 842, 856 (2018); *Matthews*, 108 N.C. App. at 265, 423 S.E.2d at 535. Finally, because Plaintiff did not make an initial showing of disability for the relevant time period, the Full Commission did not err by failing to shift the burden to Defendants to show suitable jobs were available to Plaintiff. *See Kennedy*, 101 N.C. at 33, 398 S.E.2d at 682. Accordingly, the Full Commission did not err in its disability determination.

B. Conclusion of Law 7

Next, Plaintiff challenges conclusion of law 7. Specifically, Plaintiff argues the Full Commission's findings in support of this conclusion are "deficient" because they do not explain how Plaintiff failed to conduct a reasonable job search. Plaintiff further asserts that the Full Commission improperly relied on *Ward v. Floors Perfect*, 151 N.C. App 752, 567 S.E.2d 465 (2002) (unpublished) because the facts of *Ward* are "extremely different from this case."

Having determined Plaintiff's findings of fact 41, 85, 86, 87, 88, and 89 are supported by competent evidence and sufficiently explain how Plaintiff failed to conduct a reasonable job search, we next examine Plaintiff's remaining argument: that the Full Commission's reliance on *Ward* was improper.

"An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority[,]" and citation to an unpublished opinion is "disfavored . . . ." N.C. R. App. P. 30(e)(3). Nevertheless, an exception exists and citation to an unpublished opinion is generally permissible "where the persuasive value of a case is manifestly superior to any published opinion." *State ex rel. Moore County Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005). This principle applies at both the appellate and trial court level. *See Zurosky v. Shaffer*, 236 N.C. App. 219, 233–34, 763 S.E.2d 755, 764 (2014) (explaining that the trial court may rely on persuasive authority in the same way as an appellate court "if the case is properly submitted and discussed and there is no published case on point"). Consistent with *Zurosky*, we conclude the Industrial Commission may rely on persuasive authority in the same manner as a trial or appellate court. *See id.* at 233–34, 763 S.E.2d at 764.

Here, the Full Commission concluded that from 3 April 2020 until 20 April 2022, "Plaintiff was capable of work [and] did not put forth reasonable effort to obtain employment [when] . . . it would not have been futile for him to seek employment." In conclusion of law 7, the Full Commission cited to *Ward* stating: "In *Ward v. Floors Perfect*, the Court of Appeals of North Carolina held that an injured worker who had not conducted a reasonable job search prior to attending community college full-time voluntarily removed himself from the job market and was not entitled to temporary total disability compensation." Analogizing to *Ward*, the Full Commission stated, "[s]imilarly, in the case at bar, Plaintiff enrolled in a full-time community college curriculum in the fall semester of 2020, not having conducted a reasonable job search before beginning classes."

Plaintiff asserts that, unlike the claimant in *Ward*, he did not voluntarily stop working at a company he owned, but was instead laid off by Defendant-Employer and was under more limiting work restrictions. Plaintiff also highlights the fact that he presented testimony from a vocational professional indicating Plaintiff needed re-training. He further notes that from 14 September 2021 until 15 May 2022, he unsuccessfully sought employment. These factual distinctions, however, do not undermine the "persuasive value" of *Ward*. *See Moore Cnty. Bd. of*

Educ., 168 N.C. App. at 222, 606 S.E.2d at 909. Indeed, *Ward* specifically analyzes how a claimant's decision to voluntarily exit the workforce in pursuit of an education impacts the reasonableness of his job search. Further, Plaintiff has not directed our attention to a published opinion with stronger persuasive value than *Ward*.

In *Ward*, this Court held the Commission's determination that the claimant "voluntarily removed himself from the job market and chose to enter community college" was supported by the evidence. *Ward*, at *14. This Court noted that "none of [claimant's] doctors opined that [he] could not work, and [he] presented no medical evidence that he was unable to work." *Ward*, at *14.

Similarly here, Plaintiff did not re-enter the job market, but instead chose to attend community college at a time when he was not unable, due to his injury, to work. Although Plaintiff was advised by Dr. Castor in July 2020 to "avoid heavy lifting," he was not under any formal work restrictions for the relevant time period. Because *Ward* is factually similar and there appears to be no other case equally as persuasive, we conclude it was not improper for the Full Commission to rely on *Ward* in conclusion of law 7. *See Moore County Bd. of Educ.*, 168 N.C. App. at 222, 606 S.E.2d at 909.

VI. Conclusion

The Full Commission's conclusion that Plaintiff was not entitled to wage-loss compensation from 2 April 2020 until 20 April 2022 is supported by the findings which are supported by competent evidence. Accordingly, we affirm the Opinion and Award.

AFFIRMED.

Chief Judge DILLON and Judge COLLINS concur.

CAULEY v. CAULEY

[299 N.C. App. 315 (2025)]

JULIANA CAULEY, PLAINTIFF
v.
MICHAEL CAULEY, DEFENDANT

No. COA24-200

Filed 18 June 2025

Attorney Fees—subject matter jurisdiction—delay after entry of domestic violence protective order—pending custody proceedings—award vacated

Where plaintiff was granted an ex parte domestic violence protection order (DVPO) (pursuant to Chapter 50B of the General Statutes) against defendant in March 2021 and defendant later filed a separate action for child custody (pursuant to Chapters 50 and 50A), but the parties agreed to numerous continuances and no further action was taken until January 2023, when plaintiff was allowed to amend her DVPO complaint—followed by the trial court's dismissal of her complaint and defendant's filing of a motion for attorney fees—the trial court's award of attorney fees to defendant was vacated. The trial court lacked subject matter jurisdiction for any award of attorney fees under Chapters 50 or 50A because causes of action under those statutes remained pending; as to Chapter 50B, jurisdiction to award relief expired 18 months after entry of the DVPO. As to an award of attorney fees pursuant to N.C.G.S. § 6-21.5, the trial court did not make findings regarding whether there was a complete absence of a justiciable issue or if either party prevailed; accordingly, the matter was remanded for further proceedings. Finally, plaintiff's arguments regarding the denial of her Civil Procedure Rule 59 and 60 motions were moot.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by Plaintiff from orders entered 7 August 2023 by Judge Hal G. Harrison in Watauga County District Court. Heard in the Court of Appeals 8 October 2024.

King Law Offices, by Krista S. Peace and Patrick K. Bryan, for plaintiff-appellant.

Andrew C. Brooks, for defendant-appellee.

STADING, Judge.

Juliana Cauley ("Plaintiff") appeals from orders granting Michael Cauley ("Defendant") attorney's fees and denying her Rule 59 and 60 motions. For the following reasons, we vacate the attorney's fees order and remand for further proceedings. We also vacate the trial court's order denying Plaintiff's Rule 59 and 60 motions.

I. Background

This case has a complex procedural history. The action commenced when Plaintiff filed a complaint under Chapter 50B for a domestic violence protective order ("DVPO") against Defendant on 29 March 2021. Defendant filed an answer and counterclaims, but later voluntarily dismissed all counterclaims. Defendant later filed a separate action for child custody under Chapters 50 and 50A of the General Statutes.

With respect to the Chapter 50B action, on 29 March 2021, the trial court entered an order granting Plaintiff an *ex parte* DVPO. The trial court set the return hearing for 21 April 2021. Thereafter, the parties mutually agreed to continue the matter several times and leave the *ex parte* order in effect. On 27 October 2021, the trial court granted an additional continuance and scheduled a new court date of 3 December 2021. The record contains no indication that any action was taken on the new court date.

Nothing happened with Plaintiff's Chapter 50B action until she sought to revive the matter under N.C. Gen. Stat. § 1A-1, Rule 15 (2023) by requesting leave to amend her complaint on 5 January 2023, over a year after the last scheduled court date. In response, Defendant moved for attorney's fees and sanctions under N.C. Gen. Stat. §§ 1A-1, Rule 11, 50B-3(a)(10), and 6-21.5 (2023). The trial court granted Plaintiff's request for leave to amend her complaint but denied Defendant's requests for attorney's fees and sanctions on this occasion. Plaintiff filed her amended complaint on 23 January 2023, and on 15 March 2023, Defendant filed an answer to the amended complaint, a motion to dismiss and again moved for sanctions as well as reasonable expenses and attorney's fees under N.C. Gen. Stat. §§ 1A-1, Rule 11, 50B-3(a)(10), and 6-21.5. On 23 May 2023, the trial court conducted a hearing and dismissed Plaintiff's complaint, having determined she "failed to prove grounds for issuance of a domestic violence protective order."

On 26 May 2023, Defendant moved for return of his weapons surrendered under the *ex parte* DVPO. The trial court conducted a hearing and ordered Defendant's weapons returned to him on 31 May 2023. On

20 July 2023, Plaintiff was served with Defendant's motion for attorney's fees and a notice of hearing, but "forgot to mark the hearing on her calendar." On 7 August 2023, the hearing for attorney's fees was scheduled but Plaintiff did not appear. The trial court awarded Defendant $21,105.00 in expenses and $75,258.00 in attorney's fees in an order citing N.C. Gen. Stat. §§ 50B-3(a)(10), 50A-312, and 50-13.6 (2023).

On 17 August 2023, Plaintiff moved the trial court, under Rules 59 and 60 of the North Carolina Rules of Civil Procedure, for a new trial, or alternatively, for the attorney's fees order to be set aside or amended. *See* N.C. Gen. Stat. § 1A-1, Rules 59, 60. The trial court denied Plaintiff's Rule 59 and 60 motions in an order dated 21 September 2023. Plaintiff entered her written notice of appeal on 18 October 2023.

II. Subject Matter Jurisdiction

Plaintiff maintains the trial court lacked subject-matter jurisdiction to award attorneys' fees under N.C. Gen. Stat. §§ 50B-3(a)(10), 50A-312, and 50-13.6.

A. Chapters 50 and 50A

The trial court ordered attorney's fees under N.C. Gen. Stat. § 50-13.6:

> In an action or proceeding for the custody or support, or both, of a minor child . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

It also ordered attorney's fees under N.C. Gen. Stat. § 50A-312, relevant here:

> (a) The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorneys' fees, investigative fees, expenses for witnesses, travel expenses, and child care during the

> course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

As acknowledged by the trial court in its denial of Plaintiff's DVPO on 23 May 2023, determinations of custody "remain[ed] with the Watauga County Department of Social Services pending further orders in that case." To the extent the awards included fees incurred from the actions under Chapters 50 and 50A, the trial court could not award attorney's fees since those causes of action were stayed by statute. *See* N.C. Gen. Stat. § 7B-200(c)(1) (2023) ("When the court obtains jurisdiction over a juvenile as the result of a petition alleging that the juvenile is abused, neglected, or dependent . . . [a]ny other civil action in this State in which the custody of the juvenile is an issue is automatically stayed as to that issue . . . ."); *see also McMillan v. McMillan*, 267 N.C. App. 537, 542, 833 S.E.2d 692, 696 (2019). Accordingly, we vacate the trial court's award of attorney's fees attributed to the actions under Chapters 50 and 50A.

B. Chapter 50-B

The trial court cited N.C. Gen. Stat. § 50B-3—the statute enumerating relief available for a protective order—as an additional basis to award attorney's fees. In relevant part, that provision states, "[a] protective order may include [an] . . . [a]ward [of] attorney's fees to either party." N.C. Gen. Stat. § 50B-3(a)(10).

In *Rudder v. Rudder*, a prior panel from our Court considered the validity of a one-year DVPO entered by the trial court after the associated *ex parte* DVPO had expired by more than one-year. 234 N.C. App. 173, 175, 759 S.E.2d 321, 324 (2014). With respect to the trial court's *ex parte* order, the *Rudder* Court initially concluded, "[b]ased upon the orders entered continuing the ex parte DVPO and setting this matter for hearing, upon expiration of the ex parte order after more than a year, the trial court no longer had jurisdiction under the original complaint to enter an order further extending the DVPO." *Id.* at 184, 759 S.E.2d at 329. Then, the Court extended its reasoning to the associated one-year DVPO: "Because the trial court, in this case, lacked authority to enter the [one-year] order after the ex parte DVPO expired more than 18 months after its original entry, we vacate the [one-year] DVPO and remand for a hearing on defendant's motion for return of firearms." *Id.* at 186, 759 S.E.2d at 330.[1]

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1. The *Rudder* Court reached this determination after acknowledging a plaintiff could seek a one-year DVPO even without requesting an *ex parte* DVPO: "This case also

N.C. Gen. Stat. § 50B-3(a)(10) characterizes attorney's fees as "relief" available in the order resulting from a request for a DVPO. An application of the *Rudder* ruling results in the trial court losing jurisdiction to enter the order and therefore any relief available under the statute. *Rudder*, 234 N.C. App. at 175, 759 S.E.2d at 324. The *Rudder* decision produces an unintended consequence when considering this particular set of facts. Regardless, we are bound by precedent. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). We vacate the trial court's award of attorney's fees attributed to N.C. Gen. Stat. § 50B-3(a)(10).

C. N.C. Gen. Stat. § 6-21.5

In his "Motion to Dismiss; Answer to Amended Complaint," Defendant requested the trial court award reasonable expenses and attorney's fees, citing N.C. Gen. Stat. §§ 1A-1, Rule 11, 50B-3(a)(10), and 6-21.5. Defendant's request for attorney's fees did not cite any provisions from Chapters 50 or 50A. Yet, as noted above, in its order awarding attorney's fees, the trial court's order referenced N.C. Gen. Stat. §§ 50B-3(a)(10), 50A-312, and 50-13.6. The trial court's order does not cite N.C. Gen. Stat. §§ 1A-1, Rule 11, and 6-21.5 in awarding reasonable expenses and attorney's fees, nor does the record reveal whether the trial court considered these statutes. Plaintiff argues on appeal, "the only statutory authority arguably authorizing entry of any attorney's fees award . . . would be N.C. Gen. Stat. §6-21.5," but the trial court's order did not contain "the requisite findings of fact." Neither party argues on appeal for or against remedial measures available under Rule 11.

The relevant portions of N.C. Gen. Stat. § 6-21.5 provide:

> In any civil action, special proceeding, or estate or trust proceeding, the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading . . . . The court shall

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does not present the issue whether a hearing upon a domestic violence complaint or motion, when no ex parte order was entered, could be continued repeatedly, even for more than a year, and we do not address that situation." *Id.* at 185, 759 S.E.2d at 330.

> make findings of fact and conclusions of law to support its award of attorney's fees under this section.

"The purpose behind N.C. Gen. Stat. § 6-21.5 is to 'discourage frivolous legal action.' " *McLennan v. Josey*, 247 N.C. App. 95, 98, 785 S.E.2d 144, 148 (2016) (citation omitted). To support an award of attorney's fees under section 6-21.5, "a plaintiff must either":

> (1) 'reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue'; or (2) be found to have 'persisted in litigating the case after the point where [he] should reasonably have become aware that pleading [he] filed no longer contained a justiciable issue.' "

Id. at 99, 785 S.E.2d at 148 (citations omitted). "[A] 'prevailing party,' as used in Section 6-21.5, is a party who prevails on a claim or issue in an action, not a party who prevails *in the action*." *Persis Nova Constr. v. Edwards*, 195 N.C. App. 55, 66, 671 S.E.2d 23, 30 (2009) (citation omitted). A prevailing party is one who succeeded "on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit." *House v. Hillhaven, Inc.*, 105 N.C. App. 191, 196, 412 S.E.2d 893, 896 (1992) (citation omitted). Although section 6-21.5 is outside of Chapter 50B, a party is permitted to pursue other remedies under N.C. Gen. Stat. § 50B-7(a)(1): "The remedies provided by this Chapter are not exclusive but are additional to remedies provided under Chapter 50 and elsewhere in the General Statutes."

Here, the trial court could have assessed attorney's fees under other statutes which Defendant included in his motion before the trial court. *See id.* Although there is no precedent directly addressing the exact issue before us, our Court has previously determined a trial court possessed jurisdiction to award attorney's fees under section 6-21.5 even though "the motion seeking such payment was filed more than a year after summary judgment was entered for the defendants and more than a month after the judgment was affirmed on appeal." *Brooks v. Giesey*, 106 N.C. App. 586, 590, 418 S.E.2d 236, 238 (1992). An analogous application of *Brooks* to the present matter would be neither inconsistent with *Rudder* nor contradictory to the general statutes. The *Rudder* Court limited its analysis to the trial court's jurisdiction in entering a permanent protective order under section 50B-3 after the relevant *ex parte* DVPO expired. 234 N.C. App. at 182, 759 S.E.2d at 328. Unlike *Rudder*, the issuance of a DVPO by the trial court is not in question here. Rather, the material issue in this case is whether the trial court's jurisdiction persists to award attorney's fees after Plaintiff's *ex parte* DVPO expired. The

plain language of section 50B-7(a) incorporates the "remedies provided under Chapter 50 and elsewhere in the General Statutes." N.C. Gen. Stat. § 50B-7. Not only law, but logic also supports the conclusion that the trial court retained its ability to consider attorney's fees under N.C. Gen. Stat. § 6-21.5. Under a scenario whereby a party wrongfully brings an action, and a trial court lacks jurisdiction to consider the claim, depriving a blameless party's request of attorney's fees for want of jurisdiction in the underly claim creates a perplexing result.

When awarding attorney's fees in the instant case, the trial court did not make findings of whether there was a complete absence of a justiciable issue; nor did it make findings of whether either party prevailed. *See id.* § 6-21.5. We therefore vacate and remand the trial court's underlying order for further proceedings consistent with this opinion.

III. Post-Trial Motions

Plaintiff argues the trial court's denial of her Rule 59 and 60 motions "are devoid of reason and amount to a substantial miscarriage of justice." Since we vacate a portion of the trial court's order and remand it for further findings of fact and conclusions of law, the trial court's Rule 59 and 60 order should be vacated as moot. *See Geoghagan v. Geoghagan*, 254 N.C. App. 247, 251–52, 803 S.E.2d 172, 176 (2017) (holding review of the defendant's Rule 60 issue as moot since "the order from which movant sought relief through the Rule 60 motion had been" vacated); *see also Khwaja v. Khan*, 239 N.C. App. 87, 92, 767 S.E.2d 901, 904 (2015) ("Based on the foregoing, we reverse the orders of the trial court entered 29 October 2013 granting Plaintiff summary judgment and costs; we vacate the 25 April 2014 order denying Defendants' Rule 60(b) motion as moot . . . ."). We thus decline to address Plaintiff's arguments with respect to the trial court's Rule 59 and 60 order.

IV. Conclusion

For the reasons above, we vacate and remand the trial court's order for attorney's fees, but hold the trial court could award attorney's fees if supported by appropriate statutory authority and a sufficient order. On remand, if the trial court deems appropriate, it may hold an evidentiary hearing and consider additional evidence on the issue of attorney's fees. *See Shropshire v. Shropshire*, 284 N.C. App. 92, 103–04, 875 S.E.2d 11, 20 (2022). Consequently, we vacate the trial court's subsequent order denying Plaintiff's Rule 59 and 60 motions. Since we vacate the orders and remand this matter to the trial court, consideration of Plaintiff's arguments about the trial court's findings of fact and conclusions of law are unnecessary at this time.

VACATED AND REMANDED.

Judge WOOD concurs.

Judge ARROWOOD concurs in part and dissents in part by separate opinion.

ARROWOOD, Judge, concurring in part and dissenting in part.

I concur with the decision to vacate the order on attorney fees in accordance with the statutes and *Rudder v. Rudder*. The trial court lacked jurisdiction to enter the DVPO after the *ex parte* order expired without proper renewal. However, I dissent from the majority's analysis with respect to N.C.G.S. § 6-21.5, as I believe remanding with instructions on these grounds is unnecessary.

It is well-settled that "the Court of Appeals may not address an issue not raised or argued by [the appellant] for it is not the role of the appellate courts to create an appeal for an appellant." *Bottoms Towing & Recovery, LLC v. Circle of Seven, LLC*, 386 N.C. 359, 362, 905 S.E.2d 14, 16–17 (2024) (quoting *In re R.A.F.*, 384 N.C. 505, 512, 886 S.E.2d 159 (2023)).

In the order on attorney's fees, the trial court concluded defendant was entitled to be reimbursed pursuant to N.C.G.S. §§ 50B-3(a)(1), 50A-312, and 50-13.6. The trial court did not make any findings of fact or conclusions of law with respect to N.C.G.S. § 6-21.5, nor did it find that there was a complete absence of a justiciable issue. Although plaintiff states in her brief that § 6-21.5 may be "the only statutory authority arguably authorizing entry of any attorney's fees award," plaintiff contends that "[w]ithout any of the requisite findings in the Fees Order, the trial court could not" award attorney's fees to defendant under § 6-21.5.

The majority cites § 50B-7 which allows for parties to pursue other remedies outside Chapter 50B. Although this may be true, the parties here did not pursue remedies under § 6-21.5, at trial or on appeal. I believe we should not address the same, and that the appropriate action in this case is to vacate the orders without reaching beyond the proceedings before the trial court and the parties' arguments on appeal.

COLLINS v. HOLLEY

[299 N.C. App. 323 (2025)]

LISA M. COLLINS, PLAINTIFF
v.
COREY T. HOLLEY, DEFENDANT

No. COA24-516

Filed 18 June 2025

1. Contempt—civil—failure to pay attorney fees—findings unsupported by evidence—improper modification of attorney fee order

In plaintiff mother's appeal from an order in a child custody case, in which the trial court found her in civil contempt for failing to pay attorney fees pursuant to a prior order, the Court of Appeals disregarded three findings of fact in the contempt order that were unsupported by competent evidence: that all of plaintiff's child support payments had been late; that plaintiff had the ability to comply with the terms of the order for attorney fees and child support; and that defendant father had insufficient means to defray his attorney fees. Additionally, the Court of Appeals rejected a conclusion of law (labeled as a finding of fact in the contempt order) that grounds existed to modify the prior order by increasing the amount of attorney fees and child support that plaintiff would have to pay; civil contempt is not a proper mechanism for modifying an underlying order, but rather is an enforcement mechanism used to compel obedience to that order.

2. Contempt—civil—failure to pay attorney fees—willfulness—insufficiency of factual findings

After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, the contempt order was reversed because the court's factual findings failed to support the conclusion that plaintiff willfully violated the prior order. To the contrary, the evidence showed that plaintiff's income was insufficient to cover both her regularly recurring expenses and her court-ordered payments; since she lacked the ability to comply with the order for attorney fees, her noncompliance could not be deemed willful. Additionally, the contempt order lacked certain statutorily required findings: that the attorney fee order remained in force and that the purpose of that order might still be served by compliance with it.

3. Contempt—civil—failure to pay attorney fees—amount owed increased under the contempt order—improper modification

After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, under which she was also required to pay child support, the contempt order was reversed where it improperly increased the amounts in attorney fees and past-prospective child support that plaintiff was required to pay. The trial court erred in using the contempt order to modify its prior order, as well as to punish plaintiff for noncompliance, since the purpose of civil contempt is to coerce compliance with an underlying order.

4. Contempt—civil—failure to pay attorney fees—purge conditions—increase in amount owed—improper

After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, under which she was also required to pay child support, the contempt order was reversed where its purge conditions required plaintiff to pay even greater amounts in attorney fees and past-prospective child support than what the prior order originally required. The evidence at trial indicated that plaintiff lacked the present ability to comply with the purge conditions, since she already made insufficient income to cover both her monthly expenses and the court-ordered payments (in the original amounts, let alone in the new increased amounts). Further, the increase in those court-ordered payment obligations was an improper use of civil contempt to punish plaintiff rather than to coerce compliance with the underlying order.

5. Contempt—civil—failure to pay attorney fees—automatic incarceration in case of missed payment—improper

After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, under which she was also required to pay child support, the contempt order was reversed where it required that plaintiff be automatically incarcerated if she failed to make any of her court-ordered payments as scheduled. Under settled law, plaintiff could only be incarcerated after a determination that she was capable of complying with the underlying court order; however, the trial court had no way of projecting out and assuming what income, expenses, or assets plaintiff would have in the future.

Judge STADING concurring in result only.

Appeal by Plaintiff from Order entered 29 August 2023 by Judge W. David McFadyen, III, in Carteret County District Court. Heard in the Court of Appeals 30 January 2025.

Miller & Audino, LLP, by Jay Anthony Audino, for Plaintiff-Appellant.

Schulz Stephenson Law, by Sundee G. Stephenson and Bradley N. Schulz, for Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Lisa M. Collins (Plaintiff) appeals from an Order finding her in contempt and granting Corey T. Holley's (Defendant) Motion to Increase Attorney's Fees, Motion to Increase Arrears, and Motion to Order Plaintiff Incarcerated. The Record before us tends to reflect the following:

The parties are parents of one minor child. On 16 February 2021, Plaintiff initiated this proceeding by filing a Complaint for child custody and child support in Carteret County District Court. A Temporary Child Custody Order was entered with the consent of the parties on or about 9 March 2021. That Order granted the parties joint legal custody and awarded Plaintiff primary physical custody, while Defendant had visitation. The trial court entered a permanent Custody Order on 5 April 2022, which maintained the parties' joint legal custody but awarded Defendant primary physical custody of the minor child and granted Plaintiff visitation.

Defendant filed a Motion seeking attorney fees on 22 September 2022. The trial court heard arguments on Defendant's Motion, temporary child support, and "arrears"[1] on 22 May 2023. At that hearing,

1. The trial court repeatedly identifies certain amount as "arrears." However, this award is properly considered past-prospective child support. Arrears are past-due child support payments that have already been ordered and are vested as they accrue. *See* N.C. Gen. Stat. § 50-13.10 (2023). In contrast, past-prospective child support is child support that is ordered for the time period between the filing of a claim for child support and entry of an order for child support. *Miller v. Miller*, 153 N.C. App. 40, 48, 568 S.E.2d 914, 919 (2002) ("[O]ur court has previously held that child support which is awarded from the time a party files a complaint for child support to the date of trial is not retroactive child support, but is in the nature of prospective child support representing that period from the time a complaint seeking child support is filed to the date of trial." (citation and quotation marks omitted)). Here, the "arrears" identified by the trial court had not previously been

Defendant requested $48,866.92 in attorney fees. The trial court entered an Attorney Fees Order on 19 July 2023 determining the appropriate amount of attorney fees was $30,000.00. The trial court ordered Plaintiff to pay $2,500.00 per month toward the total award amount on the first day of each month beginning 1 August 2023 until the award was paid in full.

The same day, 19 July 2023, the trial court entered an Order on Temporary Child Support; Arrears (Child Support Order). In the Child Support Order, the trial court determined the parties' respective monthly gross incomes and health insurance expenses for the minor child. Specifically, the trial court found Plaintiff's monthly gross income was $5,739.07. The trial court calculated Plaintiff's child support obligation using our Child Support Guidelines, which set a monthly child support payment of $795.00. The trial court also determined Plaintiff owed Defendant $6,447.34 in past-prospective child support based on a monthly payment of $882.34 for November 2022 through May 2023. However, the trial court ordered Plaintiff pay only $3,500.00 in past-prospective child support according to the following schedule: $1,000.00 on 1 July 2023, 1 October 2023, and 1 January 2024; and $500.00 on 1 April 2024.

Defendant filed his first Contempt Motion on 25 July 2023. Defendant alleged Plaintiff had paid a total of $1,800.00 in child support in June and July 2023 but owed $790.00 for that time period. Defendant filed a second Contempt Motion on 8 August 2023, alleging Plaintiff had failed to pay the first attorney fee payment of $2,500.00. The trial court held a hearing on Defendant's Contempt Motions on 24 August 2023. At the time of the hearing, Plaintiff had paid her outstanding child support and was current on her child support obligations; however, she had not paid any of the attorney fee payment.

At the hearing, Defendant's case-in-chief was exclusively Plaintiff's testimony. Defendant did not testify nor offer other evidence. Plaintiff testified she earned approximately $1,800.00 every two weeks and had less than $100.00 per month remaining for her own expenses after fulfilling her court-ordered child support payments. Plaintiff stated she lived with her grandmother and did not have a mortgage nor any kind of rental agreement. When asked about her credit score, Plaintiff responded, "I am not sure." She further testified she had not applied for any loan to pay the

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ordered and were unpaid; rather, they were newly established child support obligations for the time period prior to the child support hearing through entry of the Child Support Order. Accordingly, what the trial court refers to as "arrears" we refer to as past-prospective child support in this opinion.

attorney fee award because she "would have to get a co-signer" to obtain a loan for the full amount of $30,000.00. Plaintiff testified her current, recurring monthly expenses included: $150.00 for electricity, $40.00 for water, $180.00 for Spectrum services, $600.00 for a personal loan payment, $105.00 for car insurance, $68.00 for cell phone service, $442.00 for credit card payments, and $120.00 for therapy. Plaintiff declined to present evidence.

The day of the hearing, Defendant filed a Motion to Increase Attorney Fees Award and a Motion seeking to have Plaintiff incarcerated. Defendant requested the trial court increase the attorney fee award from $30,000.00 to $50,163.06 and to increase the past-prospective child support award from $3,500.00 to $6,447.34.

The trial court entered its Contempt Order on 29 August 2023. In that Order, the trial court found Plaintiff in contempt of the Attorney Fees Order for her failure to satisfy the $2,500.00 payment. The trial court further found "Plaintiff's actions were willful and intentional. The Plaintiff has an ability to comply with the terms of the July 19, 2023 Order, and she has willfully disobeyed the Orders of this Court." In the Contempt Order, the trial court granted Defendant's Motion to Increase Attorney Fees Award, Motion to Increase the Arrears (Past-Prospective Child Support), and Motion to Order Plaintiff Incarcerated. To purge her contempt, the trial court ordered Plaintiff pay $51,600.00 in three installments of $17,200.00 each on 15 October, 15 November, and 15 December 2023, and to pay $6,000.00 in past-prospective child support in six installments of $1,000.00 per month beginning 1 September 2023. The trial court also provided, "If Plaintiff fails to make any payment as scheduled, on the date so scheduled, Plaintiff shall be arrested and held in the Carteret County Jail until payment in full is made." Plaintiff timely filed Notice of Appeal on 26 September 2023.

Issues

The issues on appeal are whether the trial court erred by: (I) making Findings of Fact unsupported by competent evidence; (II) concluding Plaintiff was in contempt of the Attorney Fee Order; (III) ordering Plaintiff to pay additional attorney fees and past-prospective child support; (IV) entering its purge conditions; and (V) ordering Plaintiff's automatic incarceration if she failed to comply with future payments.

Analysis

I. Findings of Fact

[1] "We review a trial court's determination of civil contempt to determine 'whether there is competent evidence to support the findings of

fact and whether the findings support the conclusions of law.' " *Deanes v. Deanes*, 269 N.C. App. 151, 162, 837 S.E.2d 404, 412 (2020) (quoting *Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citation omitted)). "When the trial court fails to make sufficient findings of fact and conclusions of law in its contempt order, reversal is proper." *Thompson v. Thompson*, 223 N.C. App. 515, 518, 735 S.E.2d 214, 216 (2012) (citation omitted). Here, Plaintiff challenges the trial court's Findings 5, 12, 14, and 15 as not supported by competent evidence presented at trial.

Plaintiff contends the following portion of Finding 5 is not supported by competent evidence: "Defendant detailed that Plaintiff had not made a single child support payment or arrears payment on time. All payments had been late." The only evidence elicited during the contempt hearing regarding Plaintiff's child support payments was the following exchange with Plaintiff:

> [Attorney]: Are you current on your child support?
>
> [Plaintiff]: Yes.

Although Defendant alleged Plaintiff's child support payments were late in his first Contempt Motion, that Motion was not introduced into evidence nor did Defendant request the trial court take judicial notice of that Motion. In the absence of additional evidence beyond Plaintiff's statement above, the challenged portion of Finding of Fact 5 was not supported by the evidence.

Plaintiff challenges Finding 12, which states: "The Plaintiff's actions were willful and intentional. The Plaintiff has an ability to comply with the terms of the July 19, 2023 Order, and she has willfully disobeyed the Orders of this Court. The Plaintiff's actions have defeated, impaired, impeded, and prejudiced the rights and remedies of the Defendant." Our caselaw consistently defines "willfulness" as "(1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002) (citation omitted). Thus, to establish willfulness, Defendant had to show Plaintiff had the ability to comply with Attorney Fees Order.

At the contempt hearing, Plaintiff testified she earned approximately $3,600.00 per month. She also testified her regular recurring monthly expenses were $1,705.00 and she also paid monthly prospective child support of $795.00 and needed $250.00 per month to go toward past-prospective child support payments of $1,000.00 due every four months. Those expenses alone leave Plaintiff with approximately $850.00—significantly less than the monthly attorney fee payment she

owed of $2,500. Thus, the evidence showed Plaintiff did not have the ability to pay the monthly attorney fee award.

Although perhaps Plaintiff could have obtained a loan to satisfy the attorney fee award, *see Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318 ("Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply." (citation omitted)), there was not sufficient evidence adduced at trial to show this is the case. The only evidence presented on this issue showed Plaintiff did not know what her credit score was, and she had not applied for a loan because she believed she would need a co-signer given the amount needed. In *Henderson v. Henderson*, our Supreme Court affirmed this Court's vacatur of a civil contempt order where "[n]o evidence was adduced at the hearing with respect to any assets or liabilities of the defendant, any inventory of his property, his present ability to work, nor even his present salary." 307 N.C. 401, 409, 298 S.E.2d 345, 351 (1983). Similarly, in the present case, there was no evidence produced at the hearing regarding Plaintiff's assets. Indeed, even more compellingly, the evidence revealed only liabilities and a present salary that is not sufficient to cover all of her expenses and court-ordered payments. Thus, Finding 12 is unsupported by the evidence.

Plaintiff challenges Finding 14, which states: "Defendant is an interested party acting in good faith who has insufficient means to defray the expense of this action, including but not limited to his reasonable attorney fees. Defendant is in need of an award of reasonable attorney's fees. Plaintiff has the ability to pay these attorney fees." At the contempt hearing, Defendant presented no evidence whatsoever as to his own financial status. In the absence of any evidence as to Defendant's finances, the trial court erred in finding he has insufficient means to defray his attorney fees. Further, as we discussed in addressing Finding 12, there was insufficient evidence to show Plaintiff had the ability to satisfy all of her current financial obligations at the time of the hearing; thus, the trial court had no basis on which to find Plaintiff had the ability to pay even more attorney fees. Accordingly, Finding 14 is erroneous.

Finally, Plaintiff challenges Finding 15: "Grounds also exist to warrant modification of the Court's prior Orders as more specifically detailed below." Although labeled a finding of fact, whether grounds exist to warrant modification requires the trial court to weigh and judge the evidence. Thus, it is properly considered a conclusion of law. *See In re K.J.M.*, 288 N.C. App. 332, 339, 886 S.E.2d 589, 595 (2023) ("Any determination requiring the exercise of judgment or the application of legal principles is more properly classified as a conclusion of law." (quoting

In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997)) (internal citations omitted)); *see also In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018) ("The labels 'findings of fact' and 'conclusions of law' employed by the lower tribunal in a written order do not determine the nature of our standard of review. If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion *de novo*." (internal citation omitted)). We review it as such below.

But in any event, this statement reflects a fundamental misunderstanding and misuse of contempt. Civil contempt is an enforcement mechanism used to "compel obedience" to court orders. *Hardy v. Hardy*, 270 N.C. App. 687, 690, 842 S.E.2d 148, 151 (2020) (citation omitted). It is not a substitute for procedures to modify an underlying court order. *See generally Jackson v. Jackson*, 192 N.C. App. 455, 459, 665 S.E.2d 545, 548 (2008) (discussing confusion between contempt and modification of an order in the context of child custody).

Reviewing the Record and transcripts, the challenged Findings of Fact are unsupported by the evidence. "[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." *In re A.J.*, 386 N.C. 409, 410, 904 S.E.2d 707, 710 (2024) (citing *In re A.J.L.H.*, 384 N.C. 45, 52, 884 S.E.2d 687, 693 (2023)). Accordingly, we disregard the above Findings and consider whether the remaining Findings support the trial court's Conclusions.

II. Contempt and Willfulness

[2] Plaintiff contends the trial court erred in concluding she was in willful violation and contempt of the Attorney Fee Order. Specifically, she argues the Findings of Fact do not support the Conclusion she "has willfully and intentionally violated the Orders of the Court issued on July 19, 2023."

In civil contempt proceedings, our review is limited to "determining whether competent evidence supports the findings of fact and whether those findings support the conclusions of law." *Blanchard v. Blanchard*, 279 N.C. App. 280, 284, 865 S.E.2d 693, 697 (2021) (citing *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997)). If the findings are supported by competent evidence, they are conclusive on appeal. *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990) (citing *Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E.2d 391, 394 (1966)).

Under our statutes, failure to comply with a court order is continuing civil contempt so 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)(1)-(3) (2023).

"Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power." *Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318 (citing *Henderson*, 307 N.C. at 408, 298 S.E.2d at 350). "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Sowers*, 150 N.C. App. at 118, 562 S.E.2d at 596 (citation omitted). Ability to comply may mean the present means to comply or the ability to take reasonable measures to comply. *Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318 (citing *Teachey v. Teachey*, 46 N.C. App. 332, 334, 264 S.E.2d 786, 787 (1980)).

Here, Plaintiff testified about her finances at the contempt hearing. Plaintiff reported earning approximately $3,600.00 per month, and she testified to her recurring personal expenses, prospective child support, and past-prospective child support, which totaled $2,750.00. Her remaining attorney fee obligation under the Attorney Fee Order is $2,500.00. She also explained she resided with her grandmother and was not listed on any lease or rental agreement. There was no other evidence presented at the hearing as to Plaintiff's finances. Based on this evidence, the trial court concluded Plaintiff was in willful violation of the Attorney Fee Order.

At the conclusion of a contempt hearing, the trial court "must enter a finding for or against the alleged contemnor on *each of the elements* set out in G.S. 5A-21(a)." N.C. Gen. Stat. § 5A-23(e) (2023) (emphasis added). The Contempt Order in this case does not contain any Finding that the Attorney Fee Order remains in force, nor does it contain a Finding stating the purpose of the Attorney Fee Order may still be served by compliance with that Order. Thus, as to the Attorney Fee Order, the

trial court's Findings of Fact do not support its Conclusion that Plaintiff was in contempt of the Order.

Further, as we have explained, the Findings regarding Plaintiff's ability to pay were not supported by the evidence presented. The only evidence presented at trial showed Plaintiff had $100.00 per month left over after expenses and she did not believe she could obtain a loan without a co-signer. There was no basis upon which to conclude Plaintiff had the ability to pay $2,500.00 in attorney fees to comply with the Attorney Fee Order. Without the ability to comply with an order, a party cannot be held in contempt of that order. *See Sowers*, 150 N.C. App. at 118, 562 S.E.2d at 596 (citation omitted). Thus, the trial court's Findings of Fact are insufficient to support its Conclusion Plaintiff was in contempt of the Attorney Fee Order. Therefore, the trial court erred in holding Plaintiff in contempt.

III. Attorney Fees and Past-Prospective Child Support

[3] Plaintiff argues the trial court erred in ordering her to pay additional attorney fees for which the court previously found her not responsible and ordering her to pay increased past-prospective child support. We agree.

"Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties." *Hardy*, 270 N.C. App. at 690, 842 S.E.2d at 151 (quoting *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985)). "A major factor in determining whether contempt is civil or criminal is *the purpose for which the power is exercised*. Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil." *O'Briant*, 313 N.C. at 434, 329 S.E.2d at 372 (emphasis added).

This Court has previously concluded a trial court acted erroneously by using a civil contempt order to punish or amend a prior court order. *See Jackson*, 192 N.C. App. at 464, 665 S.E.2d at 551 (concluding provisions in contempt order impermissibly modified a prior child custody order); *Parker v. McCoy*, 291 N.C. App. 693, 895 S.E.2d 481, 2023 WL 8746469 (2023) (unpublished) (trial court erred in suspending existing permanent custody order and entering new custodial provisions within a contempt order).

In *Jackson*, although neither party had a pending motion to modify the underlying custody order, the trial court entered a contempt order which modified a provision of the existing custody order and imposed several new custody provisions. 192 N.C. App. at 460, 665 S.E.2d at 549. The trial court later amended the contempt order to make several additional findings and conclusions regarding child custody and recaptioned it "Order Modifying Custody Order and for Contempt, and for the Appointment of a Parenting Coordinator." *Id.* at 462, 665 S.E.2d at 550. Although in the child custody context, this Court noted the distinction between "the purposes of modification and contempt" and concluded the trial court abused its discretion by modifying the prior custody order via contempt. *Id.* at 463-64, 665 S.E.2d at 551. In *Parker*, this Court looked to *Jackson* and concluded the trial court had erred by suspending the underlying permanent custody order and entering a temporary order with new custodial provisions within its contempt order. 291 N.C. App. at *3.

The consistent teaching of these cases is that civil contempt may not be used to modify a prior court order. This is precisely what occurred in the case *sub judice*. Here, the Attorney Fee Order mandated Plaintiff pay $30,000.00 in attorney fees. However, the trial court later increased this amount to $51,600.00 in the Contempt Order. In doing so, the trial court impermissibly modified its prior Order. *See Jackson*, 192 N.C. App. at 464, 665 S.E.2d at 551. Moreover, increasing the amount of attorney fees Plaintiff is required to pay is clearly unrelated to coercing her to pay the attorney fees previously awarded and, thus, is impermissible. *See Hardy*, 270 N.C. App. at 690, 842 S.E.2d at 151 (civil contempt is a mechanism "to compel obedience to orders and decrees made for the benefit of such parties").

Likewise, the trial court's use of contempt to grant Defendant's Motion to Increase Arrears is erroneous. In the Child Support Order, the trial court "adjudicate[d] the arrears at $3,500.00[.]" Thus, the trial court had already determined the amount of past-prospective child support. As with the attorney fees, contempt is not a proper mechanism to modify an award of past-prospective child support. *See Jackson*, 192 N.C. App. at 464, 665 S.E.2d at 551. Nor is increasing the amount of past-prospective child support Plaintiff owes related to coercing her to pay the ordered amount. *See Hardy*, 270 N.C. App. at 690, 842 S.E.2d at 151.[2] Thus, the

2. Even if we were to accept Defendant's characterization of the underlying amount as "arrears," this modification would be erroneous. Under our statutes, "Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, *or otherwise modified in any way* for any reason . . . except that a child support obligation may be modified as otherwise provided by law" subject to the requirements

trial court lacked authority to modify the past-prospective child support award and the attorney fee award.

IV. Purge Conditions

[4] Plaintiff contends the purge conditions set out in the Contempt Order were improper. We agree.

The trial court set out the conditions Plaintiff must satisfy to purge herself of the contempt as follows:

> a. Plaintiff shall pay attorney's fees to Defendant in the amount of $51,600.00, payable under the following schedule:
>
> i. $17,200.00 payable on or before October 15, 2023.
>
> ii. $17,200.00 payable on or before November 15, 2023.
>
> iii. $17,200.00 payable on or before December 15, 2023.
>
> b. Plaintiff shall pay child support arrears in the amount of $6,000.00, payable at $1,000.00/month until satisfied. This is in addition to what Plaintiff has paid in arrears to date. The first arrears payment of $1,000.00 shall be paid on or before September 1, 2023.

Plaintiff specifically argues the trial court failed to determine whether she had the ability to satisfy the purge conditions and the purge conditions impermissibly escalated her financial obligations beyond what was previously ordered. We address each argument in turn.

A. *Ability to Satisfy Purge Conditions*

"[T]he trial court must find that [the obligor] has the ability to *fully comply* with any purge conditions imposed upon him." *Spears v. Spears*, 245 N.C. App. 260, 278, 784 S.E.2d 485, 497 (2016) (emphasis added). Indeed, "a person in civil contempt holds the key to his own jail by virtue of his ability to comply [with the court order]." *Jolly v. Wright*, 300 N.C. 83, 93, 265 S.E.2d 135, 143 (1980), *overruled on other grounds by*

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set out in that statute. N.C. Gen. Stat. § 50-13.10(a) (2023) (emphasis added). Indeed, this Court has recognized "[c]hild support cannot generally be retroactively increased back to date before the filing of a motion to increase child support." *Crenshaw v. Crenshaw*, 296 N.C. App. 1, 18, 907 S.E.2d 743, 753 (2024). Here, Defendant made no argument, either before the trial court or in briefing to this Court, that modification of the "arrears" was warranted under N.C. Gen. Stat. § 50-13.10(a) or that Defendant had satisfied the statutory requirements under that Section. Thus, Defendant has not established this modification was warranted under any view of the amount.

McBride v. McBride, 334 N.C. 124, 431 S.E.2d 14 (1993). This Court has previously vacated a contempt order where the findings of fact "[did] not support the conclusion of law that defendant has the *present ability* to purge himself of the contempt[.]" *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985) (citation omitted) (emphasis added). "Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply." *Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318 (citing *Teachey*, 46 N.C. App. at 334, 264 S.E.2d at 787). "A general finding of present ability to comply is sufficient when there is evidence in the record regarding [the contemnor]'s assets." *Id.* (citing *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986)).

Here, the evidence before the trial court showed Plaintiff lacked sufficient income to cover her expenses and court-ordered payments. Again, Plaintiff testified her net income was approximately $3,600.00 per month, while she owed $3,545.00 total in prospective and past-prospective child support and attorney fees. Additionally, Plaintiff testified her recurring monthly personal expenses totaled $1,705.00. Thus, Plaintiff could not pay both her expenses and court-ordered payments. Further, the only evidence as to Plaintiff's assets was her testimony that she lives in her grandmother's house and thus does not own a home.

It would be illogical to conclude, based on this evidence, Plaintiff had the present ability to pay even greater attorney fees and past-prospective child support than already ordered or that Plaintiff could have taken reasonable measures to comply. Thus, the evidence is insufficient to support the trial court's Finding that Plaintiff had the ability to comply with the purge conditions. Therefore, the trial court erred in finding Plaintiff had the ability to comply with the purge conditions.

B. *Escalation of Financial Obligations*

"The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt." N.C. Gen. Stat. § 5A-22(a) (2023). Again, our Courts have consistently affirmed the "statutory definition of civil contempt makes clear that civil contempt is not a form of punishment; rather, it is a civil remedy to be utilized *exclusively to enforce compliance* with court orders." *Atassi v. Atassi*, 122 N.C. App. 356, 360, 470 S.E.2d 59, 61 (1996) (quoting *Jolly*, 300 N.C. at 92, 265 S.E.2d at 142) (emphasis added). As a result, purge conditions must be used to coerce compliance with an underlying court order, not to modify such an order. *See Robinson v. Robinson*, 273 N.C. App. 407, 846 S.E.2d 595, 2020 WL 5154040, *3 (2020) (unpublished) (concluding

civil contempt purge conditions modifying parties' prior equitable distribution consent order were improper).

Here, as a purge condition, the trial court ordered Plaintiff to pay $21,600.00 in attorney fees beyond what it had previously ordered. Although we have already concluded the trial court's award of increased attorney fees and past-prospective child support were impermissible as a modification of a prior order, they are likewise impermissible as purge conditions. Given that the purpose of a purge condition is to compel compliance, it is illogical to conclude ordering Plaintiff to pay more money could coerce her to pay the amounts already ordered where she does not have the ability to pay the original amounts. Thus, under our caselaw, the trial court did not have the authority to modify the past-prospective child support or attorney fees through purge conditions or modification order.

Even if these escalations were viewed as fines rather than modifications of prior orders, they would still be inappropriate here. Although a fine may be an appropriate sanction for civil contempt, this is so only "when the [contemnor] can avoid paying the fine simply by performing the affirmative act required by the court's order." *Bishop v. Bishop*, 90 N.C. App. 499, 504, 369 S.E.2d 106, 109 (1988) (quoting *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632, 108 S. Ct. 1423, 1429, 99 L. Ed. 2d 721 (1988)). Here, the Record reflects Plaintiff *cannot* comply with the underlying order. Thus, she has no way to avoid such a sanction. Therefore, viewed in any light, the trial court's purge conditions here exceeded the scope of its authority. Consequently, the purge conditions are impermissible.

V. Automatic Incarceration

[5] "A trial court may not hold a person in civil contempt indefinitely." *Spears*, 245 N.C. App. at 282, 784 S.E.2d at 499 (citing *Wellons v. White*, 229 N.C. App. 164, 181-83, 748 S.E.2d 709, 722-23 (2013)). Moreover, it is well-established that a "defendant in a civil contempt action will be fined or incarcerated *only after* a determination is made that defendant is capable of complying with the order of the court." *Jolly*, 300 N.C. at 92, 265 S.E.2d at 142 (emphasis added).

Here, the trial court ordered: "If Plaintiff fails to make any payment as scheduled, on the date so scheduled, Plaintiff shall be arrested and held in the Carteret County Jail until payment in full is made." This too is error.

Our caselaw makes clear an alleged contemnor may only be incarcerated *after* a trial court determines he is capable of complying with

the underlying court order. *E.g.*, *Jolly*, 300 N.C. at 92, 265 S.E.2d at 142; *Hodges v. Hodges*, 64 N.C. App. 550, 552, 307 S.E.2d 575, 577 (1983) (citation omitted); *Hartsell*, 99 N.C. App. at 385, 393 S.E.2d at 574 (citations omitted); *Adkins*, 82 N.C. App. at 292, 346 S.E.2d at 222. And this makes absolute sense given how our courts define "willfulness": a present ability to comply and deliberate decision not to do so. *Sowers*, 150 N.C. App. at 118, 562 S.E.2d at 596 (citation omitted); *Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318 (citing *Teachey*, 46 N.C. App. at 334, 264 S.E.2d at 787). Thus, for each alleged violation, a trial court must consider whether the contemnor indeed can comply with the order. Here, although Plaintiff testified to her income and some of her regular expenses, there is simply no way the trial court can project out and assume her income, expenses, or assets in the future; and our law requires a fact-specific inquiry for each alleged violation. Therefore, the trial court erred in ordering Plaintiff be automatically incarcerated if she fails to make any scheduled payment.[3]

Thus, for all the reasons set forth herein, the trial court erred both in holding Plaintiff in civil contempt and by impermissibly modifying its prior orders. Consequently, the trial court's Contempt Order was entered erroneously.

Conclusion

Accordingly, for the foregoing reasons, we reverse the Contempt Order.

REVERSED.

Judge FLOOD concurs.

Judge STADING concurs in result only.

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3. We note Defendant additionally argues Plaintiff failed to preserve most of these issues for appellate review because she did not object during the contempt hearing. This argument lacks merit. Our Rules of Appellate Procedure provide: "Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings . . . *or taken without any such action*, including, but not limited to, *whether the judgment is supported by the verdict or by the findings of fact and conclusions of law* . . . may be made the basis of an issue presented on appeal." N.C. R. App. P. 10(a)(1) (2024) (emphasis added). Further, "an order is not final until 'it is reduced to writing, signed by the judge, and filed with the clerk of court[.]' " *In re L.G.A.*, 277 N.C. App. 46, 54, 857 S.E.2d 761, 767 (2021) (quoting N.C. Gen. Stat. § 1A-1, Rule 58). Thus, "[a] party would have no way of 'objecting' to a provision of the order until after the order is written, signed, and filed; that is the purpose of an appeal." *Id.* at 54, 857 S.E.2d at 768.

SHAYA GHASSEMI AS THE ADMINISTRATOR OF THE ESTATE OF ARMIN ROSHDI, AND SHAYA GHASSEMI, INDIVIDUALLY, PLAINTIFFS
v.
CENTREX PROPERTIES, INC., HAMED A. ALAWDI, JEHAN A. ALI AHMED, ALI ZAID, AND WESTWOOD PROPERTY GROUP, LLC, DEFENDANTS

No. COA24-717

Filed 18 June 2025

1. Negligence—off-property car accident—legal duty by property owner—harm not foreseeable

The trial court properly granted summary judgment to defendants—the owner and the management company of a shopping center—on plaintiff's negligence claim alleging that her husband's death in a car accident was the result of defendants' failure to prevent car meets in the shopping center's parking lot, which sometimes entailed car racing. Defendants could not be held liable for negligence where the accident and resulting harm were not reasonably foreseeable; the accident occurred two miles from the shopping center and the relationship between the teen driver's actions—deciding, after he left a car meet at the shopping center, to test his car's limits by accelerating to nearly ninety miles per hour and failing to stop at a stop sign before entering the intersection where he hit decedent's car—and the car meets were attenuated.

2. Nuisance—private and public—car meets in parking lot—single instance of injury

The trial court properly granted summary judgment to defendants—the owner and the management company of a shopping center—on plaintiff's nuisance claims (both public and private) alleging that her husband's death from a car accident resulted from defendants' failure to prevent car meets in the parking lot of the shopping center, which sometimes entailed car racing. Plaintiff failed to allege facts to support each essential element of a nuisance claim since, although she asserted that the car meets repeatedly occurred, there was no continuous injury but, rather, a single physical injury—her husband's death. Notably, plaintiff sought damages as a result of the accident but did not seek abatement of the alleged nuisance.

3. Contracts—third-party-beneficiary breach of contract—commercial lease—services agreement—lack of direct benefit to general public

The trial court properly granted summary judgment to defendants—the owner and the management company of a shopping center—on plaintiff's third-party-beneficiary breach of contract claim, in which she asserted that her husband's death in a car accident (that, although it occurred two miles away, was caused by a teen driver who had attended car meets in the parking lot of the shopping center, which sometimes entailed car racing) constituted a breach of defendants' contracts—a commercial lease agreement between the owner and its tenants and the services agreement between defendants—that set forth certain responsibilities for providing security and traffic control. Plaintiff could not show that she and her husband were intended third-party beneficiaries of the contracts despite language in the lease requiring tenants to carry liability insurance "for the protection of the general public," a term which was intended to set forth the rights and responsibilities between the landlord and its tenants.

Appeal by Plaintiff from orders and judgments entered 28 March 2024 and 1 April 2024 by Judge Vince M. Rozier, Jr., in Wake County Superior Court. Heard in the Court of Appeals 12 February 2025.

Law Offices of James Scott Farrin, by Coleman M. Cowan, Kaitlyn E. Fudge, and Hannah L. Lavender, for the Plaintiffs-Appellants.

Cranfill Sumner LLP, by Steven A. Bader, for Defendants-Appellees Centrex Properties, Inc., and Westwood Property Group, LLC.

GRIFFIN, Judge.

Plaintiff Shaya Ghassemi, in her capacity as administrator of her husband's estate and in her individual capacity, appeals from the trial court's orders granting summary judgment in favor of Defendants Centrex Properties, Inc, and Westwood Property Group, LLC. Plaintiff contends the trial court erred in summarily dismissing each of her claims for negligence, private and public nuisance, and third-party-beneficiary breach of contract. We affirm.

I. Factual and Procedural Background

Armin Roshdi, Plaintiff's husband, passed away following a motor vehicle accident between his vehicle and another vehicle driven by Defendant Hamed A. Alawdi, after Alawdi left the Cornerstone Village shopping center in Cary.

A. Motor Vehicle Accident

Alawdi, then sixteen years old, attended a car meet with his cousins in a parking lot at Cornerstone Village on 30 June 2021. On Wednesday nights, large numbers of car enthusiasts would meet in the Cornerstone Village parking lot to show off their customized vehicles, hang out, and sometimes compare their vehicles by street racing.

That evening, other attendees began to compare Alawdi's new sports car with another teen's car. They insisted Alawdi and the other teen should street race to prove whose car was better. Though Alawdi had previously agreed to the race, he made excuses that night to avoid racing. Alawdi left the car meet after fifteen to thirty minutes when his aunt called for him and his cousin to return home.

Alawdi's cousins were driving another vehicle, so he followed them to his aunt's house because he did not know the way there. On the way to his aunt's house, Alawdi pulled over and waited because he got separated from his cousins. Forensic evidence showed that, while he waited for his cousins, Alawdi was in communication with a friend who insisted he should have raced at the car meet. Alawdi then resumed traveling to his aunt's house, following his cousins. Alawdi was upset that he "couldn't prove [his] point to the people" at the car meet, and "wanted to test the limits of [his] car [himself] in what [he] thought was a safe area[.]" Alawdi sped up, passed his cousins' vehicle, and accelerated to a speed of nearly ninety miles per hour as he entered the intersection of Creek Park Drive and Morrisville Parkway in Morrisville. Roshdi was entering the intersection from Alawdi's right at that time, and Alawdi did not stop at the stop sign before entering the intersection. Alawdi crashed into the driver's side of Roshdi's vehicle. Roshdi succumbed to injuries sustained in the motor vehicle collision later that night.

B. Centrex and Westwood Own Cornerstone Village

At all times relevant to this appeal, Westwood owned and operated Cornerstone Village, and hired Centrex as the property manager of Cornerstone Village. In January 2021, Cary police notified Centrex it had received multiple reports over the preceding six months that car meets were occurring in the Cornerstone Village parking lot on Wednesday nights. Centrex consulted with Cary police, then responded to the reports by posting "no trespassing" and "no loitering or soliciting" signs in the parking lot and had their employees visit the Cornerstone Village parking lot on Wednesday evenings to monitor activity. The employees did not report any car meets during January and February of 2021, and stopped monitoring the lot on Wednesdays thereafter.

In March 2021, Charles Butler, a Cary resident who lived near Cornerstone Village, called Centrex's property manager and informed him that the car meets were still occurring in the parking lot. Butler told Centrex that drivers often sped recklessly down nearby roads when leaving the car meets. Butler also contacted Cary police, who informed him that they had already spoken with Centrex but could not otherwise intervene with car meets occurring on private property without Centrex's approval. David Dilts, another Cary resident, also contacted both Centrex and Cary police to complain about the Cornerstone Village car meets in June 2021. Centrex told Dilts that it had given Cary police permission to intervene in the car meets, but Cary police told Dilts that they did not have the property manager's permission to intervene.

On 1 July 2021, Richard Kim, an attorney for H Mart Companies, Inc., contacted Centrex to complain about the car meets. H Mart was an "anchor tenant" in Cornerstone Village, and, on behalf of H Mart, Kim expressed a desire for the car meets to be stopped. Centrex then met with Cary police to give them explicit authority to intervene in their parking lot, and began to dispatch private security to the parking lot on Wednesday nights.

C. Procedural Timeline

On 18 November 2021, Plaintiff filed a complaint commencing this action against Alawdi,[1] the owners of Alawdi's vehicle, and Centrex. Plaintiff later amended her complaint to add Westwood as a defendant. Relevant to this appeal, the amended complaint alleged negligence claims—negligence, premises liability, and loss of consortium—against Centrex and Westwood. On 29 June 2023, Plaintiff filed a motion for leave to amend her complaint to add claims for nuisance and third-party breach of contract against Centrex and Westwood.

On 21 August 2023, Centrex and Westwood filed a motion for summary judgment on Plaintiff's negligence claims. The trial court held a hearing on 4 October 2023 to hear Plaintiff's motion for leave to amend and Centrex and Westwood's motion for summary judgment. On 11 October 2023, the trial court entered a written order allowing Plaintiff to amend her complaint and deeming the second amended complaint formally filed as of June 29. The following day, the trial court entered

1. Plaintiff also named the owners of the sports car Alawdi was driving, Jehan A. Ali Ahmed and Ali Zaid, as defendants. Zaid has been dismissed from this case. Alawdi and Ahmed are not parties to this appeal.

a written order granting Centrex and Westwood's motion for summary judgment against Plaintiff's negligence claims.

On 25 October 2023, Centrex and Westwood filed an answer to Plaintiff's second amended complaint. On 31 October 2023, Centrex and Westwood filed a motion for summary judgment against the claims for nuisance and breach of contract added against them.

On 16 January 2024, Plaintiff filed a motion for reconsideration of the trial court's 12 October 2024 order granting Centrex and Westwood's motions for summary judgment against her negligence claims. On 25 March 2024, the trial court held a hearing on Plaintiff's motion for reconsideration and on Centrex and Westwood's second motion for summary judgment. On 1 April 2024, the trial court entered written orders granting Centrex and Westwood summary judgment against Plaintiff's added claims for nuisance and breach of contract, and denying Plaintiff's motion for reconsideration. The trial court certified each of its orders for immediate appellate review under Rule 54(b) of the North Carolina Rules of Civil Procedure.[2]

Plaintiff timely appeals.

II. Analysis

Plaintiff appeals from the trial court's orders granting Centrex and Westwood's motions for summary judgment against each of her claims for negligence, private and public nuisance, and breach of contract. We address the trial court's ruling as to each claim below.

A. Interlocutory Review

Plaintiff appeals from the trial court's orders fully resolving each of her claims against Centrex and Westwood, but her claims against Alawdi and Ahmed are still unresolved. Plaintiff's appeal is therefore interlocutory, *see Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted), and ordinarily not ripe for immediate appeal, *Travco Hotels, Inc. v. Piedmont Nat. Gas Co.*, 332 N.C. 288, 291, 420 S.E.2d 426, 428 (1992) (citation omitted). However, the trial court

2. On 28 March 2024, the trial court filed an amended order granting summary judgment against Plaintiff's claims for negligence against Centrex and Westwood, amending the prior 12 October 2023 order on the same to include a Rule 54(b) certification that there is no just reason to delay immediate appeal. Plaintiff timely appeals from the amended order. *See Doe v. City of Charlotte*, 273 N.C. App. 10, 20, 848 S.E.2d 1, 9 (2020) (discussing interlocutory appealability of retroactive Rule 54(b) certification through newly filed amended orders).

certified each of the orders from which Plaintiff appeals for immediate appellate review under Rule 54(b) of the North Carolina Rules of Civil Procedure. N.C. R. Civ. P. 54(b) (2023); *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998) ("Rule 54(b) provides that in an action with multiple parties . . . , if the trial court enters a final judgment as to a party . . . and certifies there is no just reason for delay, the judgment is immediately appealable."). Plaintiff's appeal is properly before this Court.

B. Summary Judgment

"This Court reviews decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review." *Cummings v. Carroll*, 379 N.C. 347, 358, 866 S.E.2d 675, 684 (2021) (citation omitted). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c) (2023). "An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense." *Lowe v. Bradford*, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citation omitted). "There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Harrison v. City of Sanford*, 177 N.C. App. 116, 118, 627 S.E.2d 672, 675 (2006) (citation omitted). "When evaluating a trial court's decision to grant or deny a summary judgment motion in a particular case, we view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor." *Beavers v. McMican*, 385 N.C. 629, 633, 898 S.E.2d 690, 694 (2024) (citations and internal quotation marks omitted).

1. Negligence

[1] Plaintiff contends the trial court erred by summarily dismissing her negligence claims against Centrex and Westwood. A claim for negligence has three essential elements: "(1) a legal duty owed by the defendant to the plaintiff, (2) a breach of that legal duty, and (3) injury proximately caused by the breach." *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450, 873 S.E.2d 567, 574 (2022) (citations omitted). These elements share a recursive relationship; "[n]o legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care[,]"

and foreseeability "depends on the facts of the particular case." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006) (citations omitted). "[I]t is only in exceptional negligence cases that summary judgment is appropriate, since the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court." *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980) (citation omitted).

To establish a legal duty owed by Centrex and Westwood in this case, Plaintiff directs us to the standard adopted by our Supreme Court in *Benton v. Montague*, 253 N.C. 695, 117 S.E.2d 771 (1961). In *Benton*, a pre-school-aged child was injured when the defendant allowed a licensee to clear property adjacent to the child's family's property, and the licensee chose to set a fire which spread into an area where the child was playing. *Id.* at 699–700, 117 S.E.2d at 774. The plaintiff, the injured child's family, argued the defendant was negligent in allowing the licensee's actions on their property. *Id.*

Our Supreme Court began its analysis by concluding with certainty that the licensee acted negligently, and acknowledged well-established precedent that, " '[a]s a general rule, the owner of land is not liable for injury caused by the acts of a licensee unless such acts constitute a nuisance which the owner knowingly suffers to remain.' " *Id.* at 702, 117 S.E.2d at 776 (citation omitted). With that in mind, the Supreme Court in *Benson* established a two-part analysis whereby a landowner could be held liable for the torts of his licensee which cause injury off his property:

> With reference to negligence of a landowner in controlling the activities of third persons on the land, where there is injury to persons outside the premises and where there is no vicarious liability . . . [,] [i]t is not enough . . . to show that the [licensee's] conduct foreseeably and unreasonably jeopardized [the] plaintiff. [The p]laintiff must also show that the [landowner]
>
> (a) had knowledge or reason to anticipate that the [licensee] would engage in such conduct upon the [landowner]'s land, and
>
> (b) thereafter had a reasonable opportunity to prevent or control such conduct.

Id. at 703, 117 S.E.2d at 777 (citations and internal marks omitted).

Plaintiff's allegations ultimately contend that the *Benton* analysis applies here because Centrex and Westwood were aware that licensees of their parking lot were holding recurring car meets there, knew or should have known that allowing the car meets to occur would cause motor vehicle accidents two or more miles away from their property, and had a duty to stop the car meets to prevent those remote accidents. Plaintiff also advances two additional avenues through which Centrex and Westwood had a duty to prevent the car meets: expert opinion testimony introducing a duty in Centrex and Westwood's area of work, and a factor-balancing test for the imposition of a duty.

Nonetheless, even if we were to hold that the *Benton* analysis, or one of Plaintiff's other theories, created a duty of care for Centrex and Westwood under these circumstances, Centrex and Westwood are not liable in negligence because Alawdi's conduct and the resulting injury to Roshdi were not reasonably foreseeable. The facts of this case, in the light most favorable to Plaintiff, present a tenuous relationship between the events occurring at Cornerstone Village and the motor vehicle accident between Alawdi and Roshdi, and we are unwilling to create a duty where the resulting harm was not a foreseeable result of the duty's alleged breach. *See Stein*, 360 N.C. at 328, 626 S.E.2d at 267 ("No legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care." (citation omitted)).

To succeed on a negligence claim, the plaintiff must show the injury complained was proximately caused by the defendant's breach of duty. *Keith*, 381 N.C. at 450, 873 S.E.2d at 574. A proximate cause is one " 'that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed.' " *Ward v. Carmona*, 368 N.C. 35, 37, 770 S.E.2d 70, 72 (2015) (quoting *Mattingly v. N.C. R.R. Co.*, 253 N.C. 746, 750, 117 S.E.2d 844, 847 (1961)). "It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected." *Slaughter v. Slaughter*, 264 N.C. 732, 735, 142 S.E.2d 683, 686 (1965) (citations omitted). Though, "[a] defendant is not required to foresee events which are merely possible but only those which are reasonably foreseeable." *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 234, 311 S.E.2d 559, 565 (1984) (citation omitted).

"Whether the harm was foreseeable depends on the particular facts." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 226, 695 S.E.2d 437, 440 (2010) (citation omitted). "It is only when the facts are all

admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an injury or not." *Conley v. Pearce-Young-Angel Co.; Rutherford v. Pearce-Young-Angel Co.*, 224 N.C. 211, 214, 29 S.E.2d 740, 742 (1944) (citations omitted).

Plaintiff contends that her negligence claim was erroneously dismissed because the evidence showed a genuine issue of material fact exists regarding whether the motor vehicle accident and Roshdi's death were foreseeable results of a "series of events which began on [Centrex and Westwood's] property as a result of the dangerous condition they allowed to persist." We disagree.

Contrary to Plaintiff's assertion, the evidence shows the motor vehicle accident did not occur in continuous sequence from an event that began at Cornerstone Village or that was otherwise inexorably connected to the car meet at Cornerstone Village. Alawdi chose to "test the limits of [his] car [himself] in what [he] thought was a safe area," after continued instigation that he should race another teen. His act of reckless driving began and ended approximately two miles away from Cornerstone Village. Further, the record reflects Alawdi received text messages from other teens before and after his attendance at the car meet, all of which factored into his desire to test the limits of his vehicle. Plaintiff does not contend that a race began at Cornerstone Village, or that Alawdi was racing against the teen he was dared to race while attending the car meet. Based on the undisputed facts of this case, Alawdi could have elected to test his sports car without attending the car meet.

We hold Alawdi's reckless conduct two miles away from Cornerstone Village was not a reasonably foreseeable result proximately caused by Centrex and Westwood's decisions. Our holding is based on the specific facts of the case before us. The attenuated relationship between Alawdi's actions and the car meets and the distance between the intersection where the motor vehicle accident occurred and Cornerstone Village both weigh against the foreseeability of the accident. Under the facts of this case, we cannot hold that Centrex and Westwood had a duty to prevent a frustrated driver from causing a motor vehicle accident two miles away.

2. Nuisance

[2] Plaintiff next contends "[t]he trial court erred in summarily dismissing Plaintiff's nuisance claim against [] Centrex and Westwood[,]" arguing Centrex and Westwood committed both private nuisance *per accidens* and public nuisance.

" 'The term nuisance means literally annoyance; anything which works hurt, inconvenience, or damage, or which essentially interferes with the enjoyment of life or property.' " *Holton v. Nw. Oil Co.*, 201 N.C. 744, 747, 161 S.E. 391, 393 (1931) (citation omitted). "A nuisance may be both public and private." *Swinson v. Cutter Realty Co.*, 200 N.C. 276, 279, 156 S.E. 545, 547 (1931) (citation omitted). Private nuisance *per accidens* occurs when an act, omission, or thing is not a nuisance at all times, "but may become so by reason of its locality and surroundings." *Id.* at 279, 156 S.E. at 547. " 'A public nuisance exists wherever acts or conditions are subversive of public order, decency, or morals, or constitute an obstruction of public rights.' " *Twitty v. State*, 85 N.C. App. 42, 49, 354 S.E.2d 296, 301 (1987) (quoting *State v. Everhardt*, 203 N.C. 610, 617, 166 S.E. 738, 741–42 (1932)). In either case, liability turns on whether the defendant's conduct was a reasonable use of his property when weighed against the resulting harms. *See Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953) (citations omitted); *Swinson*, 200 N.C. at 279, 156 S.E. at 547.

Our Courts have frequently held, "where the damage the plaintiffs complained of arose out of single physical injury, instead of an on-going injury, the action sounds in negligence and not nuisance." *Wagner v. City of Charlotte*, 269 N.C. App. 656, 671, 840 S.E.2d 799, 809 (2020) (citation modified); *see Boldridge v. Crowder Const. Co.*, 250 N.C. 199, 202, 203, 108 S.E.2d 215, 217, 218 (1959) (holding "the evidence in this case was insufficient to establish [the] plaintiff's right to recover on the basis of nuisance, either public or private[,]" where the evidence disclosed "a single physical injury of the type sustained by the plaintiff" (citations omitted)). "[T]aking the evidence according to its reasonable inferences, the nuisance, if it may be called such, was negligence-born, and must, in the legal sense, make obeisance to its parentage." *Butler v. Carolina Power & Light Co.*, 218 N.C. 116, 121, 10 S.E.2d 603, 606 (1940) (holding "no transmutation of negligence to nuisance" in wrongful death action where the defendant's improperly maintained electrical wires electrocuted the plaintiff's husband).

The trial court did not err in summarily dismissing Plaintiff's claim for nuisance, both private and public, because Plaintiff does not attest to facts which could support each essential element of a nuisance claim. Plaintiff contends that Centrex and Westwood have allowed the car meets to repeatedly occur, interfering with the enjoyment of their property and unreasonably endangering the public. However, Plaintiff does not assert that she, or Roshdi, suffered continuous injury from the car meets occurring at Cornerstone Village. Rather, her nuisance claim

submits a single physical injury, Roshdi's death, resulting from a single occurrence, Alawdi's conduct on 30 June 2021, and requests only compensation for expenses and suffering incurred because of Roshdi's death. Notably, Plaintiff does not request abatement of the alleged nuisance.[3] It is conceivable that a plaintiff living near Cornerstone Village could complain of on-going injuries stemming from the weekly car meets, but Plaintiff has not presented those circumstances in the present case.

3. Breach of Contract

[3] Plaintiff's final argument asserts "[t]he trial court erred in summarily dismissing Plaintiff's third-party beneficiary breach of contract claim against [] Centrex and Westwood."

This Court has often affirmed that, to assert their rights as third-party beneficiary of a contract, a plaintiff must show: "(1) that a contract exists between two persons or entities; (2) that the contract is valid and enforceable; and (3) that the contract was executed for the direct, and not incidental, benefit of the third party." *Town of Belhaven, NC v. Pantego Creek, LLC*, 250 N.C. App. 459, 471, 793 S.E.2d 711, 719 (2016) (citations and internal marks omitted). "Ordinarily the determining factor as to the rights of a third-party beneficiary is the intention of the parties who actually made the contract." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 329 N.C. 646, 651, 407 S.E.2d 178, 181 (1991) (citations and internal quotations marks omitted). The mere fact that a contract refers to a third-party does not inherently show the parties' intent to make the third-party a direct beneficiary of the contract. *Revels v. Miss Am. Org.*, 182 N.C. App. 334, 336–37, 641 S.E.2d 721, 724 (2007). The pinnacle question is " 'whether the contracting parties intended that a third party should receive a benefit which might be enforced in the courts.' " *Raritan River Steel Co.*, 329 N.C. at 651, 407 S.E.2d at 181 (citation omitted). "It is not sufficient that the contract does benefit [the third party] if in fact it was not intended for his direct benefit." *Vogel v. Reed Supply Co.*, 277 N.C. 119, 128–29, 177 S.E.2d 273, 279 (1970) (citation omitted).

Plaintiff argues the existence of two contracts to which they were third-party beneficiaries. First, Westwood is party to lease agreements

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3. Plaintiff presents a claim for common law nuisance. We are cognizant of North Carolina's statute granting a statutory private right of action for public nuisance. Section 19-2.1 of the North Carolina General Statutes creates a right of action to sue for abatement of the nuisance. *See* N.C. Gen. Stat. § 19-2.1 (2023) (allowing "any private citizen of the county [to] maintain a civil action in the name of the State of North Carolina to abate a [public] nuisance . . . , perpetually to enjoin all persons from maintaining the same").

with the commercial tenants in Cornerstone Village, which bestow on Westwood the responsibility for "providing security and on-and-off site traffic control" on the premises. Second, the services agreement between Centrex and Westwood states that Centrex would "perform and observe [Westwood's] obligations under the lease agreements." Neither party disputes the existence and validity of these agreements.

Plaintiff argues each of these contracts "explicitly contemplate[s] the existence of Plaintiff as a member of the general public and contain[s] provisions which are intended for the public's direct, and not merely incidental, benefit." In support, Plaintiff points to language in Westwood's lease agreements which require its commercial tenants to "provide and keep in force, *for the protection of the general public* and [Westwood], liability insurance against all claims, for bodily injuries or death upon or near" Cornerstone Village. (Emphasis added). Plaintiff interprets this provision to mean that "members of the general public, including individuals located not directly on but near the premises, were specifically considered within and intended to benefit from the parties' agreement."

We disagree with Plaintiff's interpretation. Beyond recitations of black-letter law setting out North Carolina's observation of breach of contract claims by third-party beneficiaries, Plaintiff presents no law which specifically bolsters her interpretation of the contracts. Likewise, this Court can ascertain no North Carolina precedent which supports the notion that the terms within a lease agreement between two private entities specifically intended to bestow rights upon third-parties the lessee may serve.[4] Lease agreements, by their nature, are ordinarily drafted to make explicit the rights and duties of the parties in the lessor-lessee relationship, and are not created for the benefit of a third-party.

In this case, the language "for the protection of the general public and [Westwood]" describes the liability insurance that Westwood's commercial tenants must provide as a duty of its relationship with

4. Other jurisdictions have, however, held that a lease agreement naturally intends to benefit only the parties to the lease and serves to establish their contractual duties to one another. *See Brunsell v. City of Zeeland*, 651 N.W.2d 388, 391 (Mich. 2002) (holding the plaintiff was not an intended third-party beneficiary of a lease agreement which required maintenance "as may be necessary for the public safety," because the "public as a whole is too expansive a group to be considered 'directly' benefitted by a contractual promise"); *Wood v. Centermark Props., Inc.*, 984 S.W.2d 517, 527 (Mo. Ct. App. 1998) (holding that term in lease agreement between a commercial tenant and a landlord which required the landlord to provide security services did not intend to benefit the tenant's employee).

Westwood, to safeguard Westwood against liabilities that may arise throughout the commercial tenant's use of the leased property. This term intended to set out only Westwood and the commercial tenant's duties and rights with respect to each other. *See Town of Belhaven, N.C. v. Pantego Creek, LLC*, 250 N.C. App. 459, 472, 793 S.E.2d 711, 720 (2016) (holding that a contract giving the defendant the right to manage and operate a hospital was for the exclusive benefit of the parties to the contract); *Brunsell*, 651 N.W.2d at 391 ("[A]n objective analysis of the contract at issue indicates that the contractual provision at issue was intended to delineate the obligations of the [contractual parties] with regard to the premises, not to directly benefit third parties."). The trial court did not err in dismissing Plaintiff's claim because neither Plaintiff nor her husband were intended third-party beneficiaries of the contracts existing between Centrex and Westwood.

III. Conclusion

The trial court did not err by granting summary judgment in favor of Defendants Centrex and Westwood, and dismissing each of Plaintiff's claims against them, because Plaintiff failed to forecast genuine issues of fact regarding each claim.

AFFIRMED.

Judges TYSON and HAMPSON concur.

HATCHER v. RODRIGUEZ

[299 N.C. App. 351 (2025)]

JAMES HATCHER, PLAINTIFF
v.
JEREMY R. RODRIGUEZ, INDIVIDUALLY, AND JEREMY R. RODRIGUEZ, IN HIS CAPACITY AS A MEMBER OF LAURINBURG POLICE DEPARTMENT, AND CITY OF LAURINBURG, DEFENDANTS

No. COA23-1108

Filed 18 June 2025

1. Negligence—gross negligence—car accident—officer speeding in response to nonemergency—reckless disregard for safety of others

In a tort action arising from a car crash involving plaintiff and a police officer, the trial court did not err by denying summary judgment to defendants (the officer and the city he worked for) on plaintiff's gross negligence claim, where the evidence showed that the officer: responded to a shoplifting incident despite no request for assistance from the officer at the scene; initiated an emergency response, which was against department policy for a property crime; turned on his lights but failed to activate his siren; by his own admission, did not know how to operate the siren following recent repairs to his vehicle; drove at 52 mph in a 35-mph speed zone; and looked away from the road to adjust the siren controls, all while driving into an oncoming traffic lane on a two-lane road with double lines, after which he crashed into plaintiff's vehicle. Based on these facts, a jury could find that the officer's actions showed a high probability of injury to the public despite the absence of significant countervailing law enforcement benefits, thereby creating a genuine issue of material fact on the issue of gross negligence.

2. Immunity—public official immunity—police officer—summary judgment—genuine issue as to gross negligence—immunity pierced

In a tort action arising from a car crash involving plaintiff and a police officer responding to a shoplifting incident, the trial court did not err at the summary judgment phase in finding that the officer was not immune from suit through public official immunity, since the court also found that a genuine issue of material fact existed as to whether the officer's conduct during the incident rose to the level of gross negligence, which in turn pierced the shield of absolute immunity the officer would have enjoyed under the public official immunity doctrine.

3. Negligence—gross negligence—respondeat superior—applicability conceded by defendants—claims of inadequate training and negligent supervision still allowed to proceed

In a tort action arising from a car crash involving plaintiff and a police officer responding to a shoplifting incident, where the trial court denied summary judgment to defendants (the officer and the city he worked for) on plaintiff's gross negligence claim, the trial court did not err by declining to dismiss plaintiff's additional claims of inadequate training and negligent supervision where, although the city conceded that the officer acted within the course and scope of employment at the time of the collision, thereby enabling plaintiff to argue the city's liability under the doctrine of respondeat superior, plaintiff also sought punitive damages, which could only be pursued through the inadequate training and negligent supervision claims.

Appeal by defendants from interlocutory order entered 5 September 2023 by Judge Dawn M. Layton in Scotland County Superior Court. Heard in the Court of Appeals 17 April 2024.

Law Offices of James Scott Farrin, by Coleman M. Cowan, Donald C. Clack, and Hannah L. Lavender, for plaintiff-appellee.

Hall Booth Smith, P.C., by Christian J. Ferlan and Scott D. MacLatchie, for defendants-appellants.

GORE, Judge.

Defendants, Jeremy Rodriguez ("defendant Rodriguez") and the City of Laurinburg (the "City"), appeal the order denying their motion for summary judgment ("MSJ"). The MSJ order is interlocutory but includes a denial of defendant Rodriguez's public official immunity claim. Defendants properly demonstrate that the interlocutory order affects a substantial right, therefore, we have jurisdiction to consider this appeal. *See Bartley v. City of High Point*, 381 N.C. 287, 293 (2022). Having reviewed the briefs, the record, and recent precedent, we affirm.

I.

On 19 November 2021, Defendant Rodriguez was in his patrol vehicle at a church parking lot on Old Lumberton Road while on duty for the Laurinburg Police Department ("LPD"). Defendant Rodriguez began working with LPD in 2017 and was assigned a marked patrol vehicle. The interior of the vehicle included a switch that would activate both

the siren and the lights when slid to a certain position. A couple months before the incident in November, defendant's vehicle went to the shop for repairs after his "light bar" sustained considerable wiring damage. After the repairs to the vehicle, the mechanic explained a separate siren knob must be turned on to activate both the siren and the lights when he moved the normal switch. Defendant Rodriguez testified he did not attempt to activate his siren and lights between the repair and the November incident, and that he did not know how to activate the siren the day of the incident.

Around 3:50 p.m. on 19 November 2021, defendant Rodriguez heard Corporal Teasley over the radio stating he was at the nearby Walmart to respond to a reported shoplifting incident. Corporal Teasley did not request backup and he did not communicate any concerns with the shoplifter other than to state the female shoplifter might attempt to run on foot. Although Corporal Teasley did not request assistance, defendant Rodriguez decided to respond and assist Corporal Teasley in case the shoplifter was dangerous, based upon his previous experiences. A sergeant and lieutenant who were near the Walmart, communicated over the radio that they would respond as backup and to follow "routine traffic"; however, defendant Rodriguez stated he did not hear the others' responses at the time. When the sergeant and lieutenant arrived at the Walmart, Corporal Teasley had already apprehended and released the shoplifter with a citation.

Defendant Rodriguez pulled out onto Old Lumberton Road, a two-lane road in a residential area with a school bus route and many side roads, and drove westbound. There were three vehicles driving in front of defendant Rodriguez and double lines on the road such that he could not pass the vehicles. Defendant Rodriguez decided to initiate an emergency response; he drove into the oncoming traffic lane and moved the switch to initiate both the lights and siren, while the lights turned on the siren did not, because the separate siren knob was turned off. Defendant Rodriguez looked down at the controls as he continued in the oncoming traffic lane, driving about 52-mph in the 35-mph speed limit zone. When defendant Rodriguez looked up, he saw that the vehicle two cars in front of him was turning onto a side street. Although he stated he hit his brakes, the crash was instantaneous. Plaintiff was driving the vehicle and sustained serious life-altering injuries.

The LPD assigned an officer to investigate the collision; at the conclusion of the investigation, the officer submitted a report that stated defendant Rodriguez violated multiple standard procedures. The report included a recommendation to issue a reprimand and suspend defendant

Rodriguez from police duty. Defendant Rodriguez resigned from the LPD prior to the issuance and suspension.

Plaintiff filed a complaint and an amended complaint against defendant Rodriguez in his individual and official capacities, and against the City of Laurinburg. Plaintiff brought claims for negligence, gross negligence, and wanton negligence; imputed liability of the City for negligence, gross negligence, recklessness, and willful and wanton conduct by its police officer; negligent supervision and inadequate training by the City; a claim for section 20-145 against defendant Rodriguez; and sought punitive damages against both defendants in addition to the compensatory damages. Plaintiff specified, and the City conceded, that the City waived its governmental immunity through its liability insurance under the doctrine of *respondeat superior*.

Defendants filed a motion for summary judgment after discovery. Defendants asserted defendant Rodriguez was entitled to public official immunity and that both the City and defendant Rodriguez were "entitled to judgment as a matter of law." Plaintiff filed multiple affidavits, photographs, a police report, the LPD internal investigation report, the LPD Standard Operation Procedures, defendant Rodriguez's responses to the interrogatories, transcripts of multiple depositions, the radio call, and other forms of exhibits in support of his motion in opposition to summary judgment. On 14 August 2023, the trial court heard arguments from both parties on the motion for summary judgment. After reviewing the submitted materials and hearing arguments, the trial court determined there were genuine issues of material fact on plaintiff's claims against defendants and entered an order on 5 September 2023 denying defendants' motion for summary judgment. Defendants filed an interlocutory notice of appeal seeking review of the order denying the motion for summary judgment. Defendants seek interlocutory appeal by arguing that public official immunity affects a substantial right.

II.

Both parties agree that an interlocutory order denying summary judgment is immediately appealable when governmental immunity and public official immunity are involved. *See Thompson v. Town of Dallas*, 142 N.C. App. 651, 653 (2001) ("Orders denying dispositive motions based on the defenses of governmental and public official's immunity affect a substantial right and are immediately appealable.").

Defendants seek de novo review of the order denying their motion for summary judgment. Defendants seek review of the following three issues: (1) whether the trial court erred by determining the claim for

gross negligence against Officer Rodriguez involved a genuine dispute of material facts; (2) whether the trial court erred by denying Officer Rodriguez's claim for public official immunity; and (3) whether the trial court erred by not dismissing the claims against the City of imputed liability for inadequate training and supervision. We review a denial of a motion for summary judgment de novo. *Bartley*, 381 N.C. at 293.

> Summary 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. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. Nevertheless, if there is any question as to the weight of evidence summary judgment should be denied.

In re Will of Jones, 362 N.C. 569, 573–74 (2008) (cleaned up). Accordingly, we consider defendants' arguments through this standard of review.

A.

[1] Defendants argue the trial court erred by denying summary judgment because defendant Rodriguez's conduct "did not rise to the level of gross negligence." Plaintiff seeks damages pursuant to section 20-145, which establishes the standard of care for officers and exempts them from speeding laws when engaged in high-speed chases or emergency responses but does not exempt officers who display a "reckless disregard [for] the safety of others." N.C.G.S. § 20-145 (2023). Our Supreme Court previously established that civil suits against law enforcement for injuries resulting during emergency responses and high-speed chases are based upon a gross negligence standard of care. *Parish v. Hill*, 350 N.C. 231, 238 (1999). Gross negligence is "defined as wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Id.* at 239.

As plaintiff states, "issues of negligence are generally not appropriately decided by way of summary judgment," because the question of whether Officer Rodriguez's conduct "was grossly negligent or showed reckless disregard for the safety of others are legal conclusions to be drawn from the evidence." *Norris v. Zambito*, 135 N.C. App. 288, 292–93 (1999) (cleaned up). Negligence is only properly decided through

summary judgment when "there are no genuine issues of material fact, and an essential element of a negligence claim cannot be established." *Id.* at 293. Our Supreme Court explained that when deciding whether a police officer's actions were grossly negligent, we should consider that:

> an officer must conduct a balancing test, weighing the interests of justice in apprehending the fleeing suspect with the interests of the public in not being subjected to unreasonable risks of injury. Gross negligence occurs when an officer consciously or recklessly disregards an unreasonably high probability of injury to the public despite the absence of significant countervailing law enforcement benefits.

Jones v. City of Durham, 168 N.C. App. 433, 444 (2005) (Levinson, J., dissenting in part and concurring in part), *aff'd*, 360 N.C. 81 (2005), *opinion withdrawn and superseded on reh'g*, 361 N.C. 144 (2006) (Supreme Court reversing for the reasons stated in the dissent of Judge Levinson).

Defendants direct us to consider twelve cases with similar outcomes that each determined the officers in high-speed chases or emergency response calls did not act grossly negligent. *See Parish*, 350 N.C. at 246; *Young v. Woodall*, 343 N.C. 459 (1996); *Estate of Graham v. Lambert*, 282 N.C. App. 269 (2022), *rev'd and remanded by* 898 S.E.2d 888 (N.C. 2024); *Greene v. City of Greenville*, 225 N.C. App. 24 (2013); *Lunsford v. Renn*, 207 N.C. App. 298 (2010); *Holloway v. N.C. Dep't of Crime Control & Pub. Safety*, 197 N.C. App. 165 (2009); *Villepigue v. City of Danville, Va.*, 190 N.C. App. 359 (2008); *Bray v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 281 (2002); *Norris*, 135 N.C. App. at 295; and *Fowler v. N.C. Dep't of Crime Control & Pub. Safety*, 92 N.C. App. 733 (1989). Having considered each case, the similar features throughout are the direct pursuit or emergency response by each officer and the primary role each officer had during the emergency responses. As defendants accurately state, the appellate Courts ultimately determined in each case a lack of gross negligence on the officer's part. But the present case does not involve the necessity of a direct pursuit or an emergency response with defendant Rodriguez taking the primary response role.

Plaintiff relies upon *Jones v. City of Durham* and *Truhan v. Walston* as analogous cases to the present case. In *Jones*, our Supreme Court ultimately reversed this Court's determination because the officer was acting in a backup response role, and the facts in totality were more appropriate for jury determination rather than summary judgment adjudication. 361 N.C. 144, 146 (2006) (adopting dissent of Judge Levinson).

Similarly in *Truhan*, the officer was responding in a backup role to provide traffic control assistance for a minor accident. 235 N.C. App. 406, 413 (2014). The officer testified a concern that there was a "violent situation" having believed he heard radio communications state, "a woman was arguing with a man and had pushed him." *Id.* at 413–14. However, the audio recording lacked proof of the evidence, and this Court additionally added that even if the officer "was aware of the disturbance, there [was] no evidence that the disturbance was serious." *Id.* at 414. Further, the officer was acting against department policy by "initiating emergency response driving without any justifiable reason, and without notifying his department." *Id.* at 420. This Court listed additional evidence viewed in the light most favorable to the nonmoving party and held that the facts were similarly persuasive to *Jones*. *Id.* at 420–21. The *Truhan* Court reversed the trial court's summary judgment and remanded for further proceedings on the claims against the officer. *Id.* at 421.

Every case involving section 20-145 and the gross negligence of a police officer considers and applies three components to determine whether their actions "constituted gross negligence." *Greene*, 225 N.C. App. at 27. These components are: "(1) the reason for the pursuit; (2) the probability of injury to the public due to the officer's decision to begin and maintain pursuit, and (3) the officer's conduct during the pursuit." *Id.*

When reviewing the reason of the pursuit under the first component, we consider: "whether the officer was attempting to apprehend someone suspected of violating the law and whether the suspect could be apprehended by means other than [a] high-speed chase." *Id.* In the present case, viewing the facts in the light most favorable to plaintiff, defendant Rodriguez heard an officer's communication over the radio for a shoplifter at a Walmart and responded, although the officer did not request assistance. The officer who was at the Walmart did not suggest an emergency response was necessary to apprehend the suspect and was able to apprehend the suspect without an emergency response.

We consider these additional factors under our review of the second component: "(1) time and location of the pursuit, (2) the population of the area, (3) the terrain for the chase, (4) traffic conditions, (5) the speed limit, (6) weather conditions, and (7) the length and duration of the pursuit." *Id.* Viewing the evidence in the light most favorable to plaintiff, defendant Rodriguez initiated an emergency response on a road that is a mix between residential and commercial/urban, and along a school bus route between 3:50 p.m. and 4:00 p.m. in the afternoon; defendant Rodriguez admitted he saw school buses driving along

this road prior to his emergency response. There were three vehicles in the lane in front of defendant Rodriguez when he decided to initiate an emergency response, the road was a two lane road with two lines in the center indicating a no pass zone; the speed limit was 35-mph; the weather conditions were uneventful and the road was relatively flat; Officer Rodriguez's emergency response lasted only seconds after driving into the oncoming traffic lane and looking away from the road to initiate his siren before a vehicle (not directly) ahead of him turned left.

Under the third component, we consider the following: "(1) whether an officer made use of the lights or siren, (2) whether the pursuit resulted in a collision, (3) whether an officer maintained control of the cruiser, (4) whether an officer followed department policies for pursuits, and (5) the speed of the pursuit." *Id.* at 27–28. Viewing the evidence in the light most favorable to plaintiff, defendant Rodriguez turned on his lights but not his siren; the siren knob was turned off in defendant Rodriguez's vehicle, despite his informed knowledge that the knob be turned on for siren activation; within seconds of initiating an emergency response and driving into the oncoming traffic lane, defendant Rodriguez collided with plaintiff as plaintiff made a left-hand turn onto an adjoining road; defendant Rodriguez lost control of his cruiser; the affidavits, interviews, and policy handbook entered into evidence prove defendant Rodriguez did not follow department policies for pursuits; and the evidence reveals defendant Rodriguez drove up to 52-mph within the 35-mph speed zone.

Viewing the evidence produced at summary judgment in the light most favorable to plaintiff a jury could find: defendant Rodriguez responded to a Walmart shoplifting incident although there was no request for assistance; defendant Rodriguez drove on a school bus route around 3:50 p.m. that was partially residential and partially commercial; defendant Rodriguez initiated an emergency response although this was against the department's policy for a property crime; defendant Rodriguez initiated his lights but failed to initiate his siren, and this was also against the department policy; defendant Rodriguez did not know how to operate his siren, despite the informed knowledge, and had not attempted to operate it after repairs were made to the vehicle; defendant Rodriguez drove into the oncoming traffic lane and was going up to 52-mph; defendant Rodriguez looked away from the road and down at his controls when the siren did not turn on; defendant Rodriguez collided with plaintiff's vehicle at about 52-mph as plaintiff turned left onto an adjoining street; the speed limit was 35-mph; defendant Rodriguez accelerated until he saw and collided with plaintiff; this collision occurred because defendant Rodriguez initiated an emergency response when only a "traffic control" response was proper, which requires officers to

follow traffic regulations and drive on a direct route at a normal speed; other officers had responded on the radio that they would back up the officer at the Walmart; and defendant Rodriguez was familiar with the road and had seen school buses driving on that route.

This evidence is analogous to both *Jones* and *Truhan*. Given the affidavits, depositions, interrogatories, and cumulative evidence, a jury could find that defendant Rodriguez's actions "tended to show a high probability of injury to the public despite the absence of significant countervailing law enforcement benefits, and thus raises a genuine issue of material fact on the question of gross negligence." *Truhan*, 235 N.C. App. at 420 (citation omitted). Therefore, the trial court did not err by denying defendants' motion for summary judgment on the gross negligence claim under section 20-145.

B.

[2] Defendants argue the trial court erred by determining defendant Rodriguez was not immune from suit through public official immunity. We disagree.

We first address the confusion surrounding governmental immunity for officers in their official capacity as opposed to immunity for officers in their individual capacity. Both parties refer to the protection of governmental immunity under section 20-145, however, our Supreme Court just recently opined that there is no waiver of governmental immunity under section 20-145. *Estate of Graham*, 898 S.E.2d at 900 (internal quotation marks and citation omitted) ("Because section 20-145 is not a direct, positive, or clear waiver by the lawmaking body, it does not expose municipalities to liability when their agents breach its terms.").[1] However, "[s]ection 20-145 fastens responsibility to individual drivers for their individual acts and therefore applies to individual capacity suits. For those claims, gross negligence is the standard." *Id.*

While plaintiff may not seek liability against the City through the vehicle of section 20-145, it may seek liability through waiver of governmental liability "by the purchase of liability insurance," under section 160A-485. *Id.* at 898, 900; *see* N.C.G.S. § 160-485 (2023) ("Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance."). Further, our Supreme Court clarified that a suit against an officer "in his official capacity" is "merely another

1. We recognize the parties did not have access to this recent opinion by our Supreme Court at the time of filing.

way of bringing suit against the City, both claims entail the same analysis and the same result." *Estate of Graham*, 898 S.E.2d at 900 (citation omitted).[2] Plaintiff specified a waiver of governmental immunity by the City through liability insurance, and plaintiff sought relief through the doctrine of *respondeat superior*. Defendants do not appear to challenge the waiver of governmental immunity, but instead argue the trial court erred by not granting the motion for summary judgment because of defendant Rodriguez's public official immunity defense.

Public official immunity is a complete defense for "discretionary acts" public officials commit, in their individual capacity, while in the course and scope of government employment. *Schlossberg v. Goins*, 141 N.C. App. 436, 445 (2000) ("[P]olice officers enjoy absolute immunity from personal liability for their discretionary acts done without corruption or malice."). This complete defense is not a "shield[ ] from liability if his alleged actions were corrupt or malicious or if he acted outside and beyond the scope of his duties." *Id.* "A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *Bartley*, 381 N.C. at 296 (citation omitted). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Yancey v. Lea*, 354 N.C. 48, 52 (2001), *superseded on other grounds by* N.C. R. Civ. P. 51. "Gross violations of generally accepted police practice and custom contributes to the finding that officers acted contrary to their duty." *Bartley*, 381 N.C. at 296 (internal quotation marks and citation omitted). Therefore, our determination there is a genuine issue of material fact as to the gross negligence of defendant Rodriguez pierces defendant Rodriguez's shield of absolute immunity under the public official immunity doctrine. The trial court did not err by denying the motion for summary judgment despite the defense of public official immunity.

C.

[3] Defendants also argue the trial court erred by not dismissing plaintiff's additional claims of inadequate training and negligent supervision because of the concession of defendant Rodriguez's employment status at the time of the incident. In support of this argument, defendants cite

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2. We take time to clarify this area of law because both parties although including the necessary claims to preserve both individual capacity and official capacity claims, make statements that have the appearance of conflating these important distinctions. Such conflation of these claims could have legal consequences for the parties as it did for the plaintiff in the *Estate of Graham*.

to a case from the United States District Court for the Eastern District of North Carolina and one case from our Supreme Court. *See Johnson v. Lamb*, 273 N.C. 701, 706–07 (1968); *Justice v. Greyhound Lines, Inc.*, 2019 WL 267910 *1, *2 (E.D.N.C. 2019).

Having reviewed these cases, we determine the trial court did not err by allowing these claims to proceed, because although the City concedes defendant Rodriguez was within the course and scope of employment, thus triggering the doctrine of *respondeat superior*, plaintiff also seeks punitive damages. Based upon the case law defendants cite to in support of this argument, punitive damages are not available through the doctrine of *respondeat superior*, but rather through these additional claims. *See Plummer v. Henry*, 7 N.C. App. 84, 90–91 (1969). Because defendants limit their argument to whether these claims should have been dismissed pursuant to the City's concession under the doctrine of *respondeat superior*, we do not consider the additional question of whether denial of summary judgment was proper for these claims.

III.

For the foregoing reasons, we determine the trial court did not err by denying defendants' motion for summary judgment.

AFFIRMED.

Judges CARPENTER and WOOD concur.

HOLLAND v. HOLLAND

[299 N.C. App. 362 (2025)]

JULIA A. HOLLAND, PLAINTIFF
v.
JONATHAN R. HOLLAND, DEFENDANT

No. COA24-791

Filed 18 June 2025

1. Divorce—subject matter jurisdiction—military pension division—dismissal of procedural motion—no effect

In an action between former spouses in which plaintiff ex-wife filed a motion seeking division of defendant ex-husband's military pension, the trial court properly denied defendant's motion to dismiss for lack of subject matter jurisdiction. At the time plaintiff filed her motion, her sole remaining claim was for equitable distribution (ED). Contrary to defendant's assertion, plaintiff's voluntary dismissal of her initial motion—she refiled a new one several months later—did not effectuate a dismissal of the ED claim in its entirety, but was instead a procedural withdrawal of her motion (done erroneously with a pre-printed AOC form for voluntary dismissals) that did not cause prejudice to defendant.

2. Laches—equitable distribution—motion for division of military pension—delay not unreasonable—pension issue reserved until vesting

In an action between former spouses in which plaintiff ex-wife filed a motion seeking division of defendant ex-husband's military pension, the trial court properly denied and dismissed defendant's laches defense—whereby defendant asserted that plaintiff's fifteen-year delay in seeking to resolve her equitable distribution claim was unreasonable and should be barred. First, the parties' prior consent judgment explicitly reserved the pension issue for further consideration; therefore, defendant was on notice of the grounds for the issue he sought to bar. Second, since defendant was not vested in his military pension until his retirement, it was not unreasonable for plaintiff to wait until then to file her motion, which she did within two months of defendant's retirement. Finally, defendant's assertion that he would have sought other employment had he known that his military pension would be divided did not serve to support his laches defense.

3. Divorce—equitable distribution—military pension—calculation and award—statutory default equation properly applied

In an action between former spouses in which plaintiff ex-wife filed a motion seeking division of defendant ex-husband's military pension, the trial court's award of 24.7720% of defendant's military pension to plaintiff and its order requiring defendant to remit $50,111.73 of back payments to plaintiff were supported by its findings of fact, which in turn were supported by competent evidence. The parties' prior consent judgment had reserved the pension issue for further consideration without specifying an equal division; therefore, the statutory default method applied and, here, the trial court properly applied the statutory default coverture fraction in its calculation and award.

Appeal by defendant from judgment entered 18 January 2024 by Judge Bryan A. Corbett in Iredell County District Court. Heard in the Court of Appeals 10 April 2025.

Poyner & Spruill, LLP, by Steven B. Epstein, for the plaintiff-appellee.

Sullivan & Hilscher Family Law, by Kristopher J. Hilscher, for the plaintiff-appellee.

Pope McMillan, P.A., by Clark D. Tew, and Christian Kiechel, for the defendant-appellant.

TYSON, Judge.

Jonathan R. Holland ("Defendant") appeals from the trial court's denial of his motion to dismiss for lack of subject matter jurisdiction, disposal of his laches defense, and entry of a military pension division order awarding 24.7720% of his military pension and $50,111.73 in back payments to his ex-wife, Julia Holland ("Plaintiff"). We affirm.

I. Background

Plaintiff and Defendant were married 31 March 1991 and separated 5 October 2004. Plaintiff and Defendant had two children during the marriage. An absolute divorce judgment was entered 24 September 2007. Plaintiff filed a complaint for child custody, equitable distribution, post-separation support, and alimony on 7 June 2005. She subsequently filed a supplemental pleading for absolute divorce on 24 October 2005. Defendant filed a counterclaim for child custody, child support, and raised the affirmative defense of laches.

The parties entered into a consent judgment on 9 November 2005. Section 4(d) of the parties' judgment stated, "The nonvested military retirement account is reserved for further consideration." The judgment also provided all other issues remain open for further consideration, including alimony, child support, and post-separation support. Plaintiff voluntarily dismissed her claims for alimony, post-separation support, and attorney's fees on 4 January 2006.

The absolute divorce judgment expressly provided and reserved all pending claims between the parties would survive entry of judgment. The parties' youngest child turned eighteen on 26 February 2019 and child support was terminated. Defendant's pension vested upon his retirement from the United States Army and achieving the rank of Lieutenant Colonel (O-5) on 30 June 2021.

Plaintiff filed a motion for entry of the military pension division order on 25 August 2021. She voluntarily dismissed the motion, without prejudice, on 25 February 2022. She re-filed the motion on 20 December 2022. The trial court denied Defendant's motion to dismiss Plaintiff's motion pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and (6). The trial court ordered division of Defendant's military pension, awarding Plaintiff 24.7720% of the pension and for him to remit $50,111.73 in back payments. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Issues

Defendant argues the district court lacked subject matter jurisdiction to consider Plaintiff's motion for entry of a military pension division order, erred by rejecting his laches defense, and erred by entering a military pension division order.

IV. Subject Matter Jurisdiction

A. Standard of Review

[1] This Court "reviews Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction *de novo* and may consider matters outside the pleadings." *Nation Ford Baptist Church Incorporated v. Davis*, 382 N.C. 115, 121, 876 S.E.2d 742, 750 (2022) (citation omitted). On *de novo* review, this Court "considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Appeal of the Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576, S.E.2d 316, 319 (2003).

B. Analysis

North Carolina Rule of Civil Procedure 41(a)(1) states, in relevant part:

> Subject to the provisions of Rule 23(c) and of any statute of this State, *an action or any claim therein* may be dismissed by the plaintiff without order of court [] by filing a notice of dismissal at any time before the plaintiff rests his case[.] Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal[.]

N.C. Gen. Stat. § 1A-1, Rule 41(a) (2023) (emphasis supplied).

"An 'action' is defined as 'a formal complaint within the jurisdiction of a court of law.' A 'claim' is a 'demand for money or property' or a 'cause of action.' " *Bradford v. Bradford*, 279 N.C. App. 109, 114, 864 S.E.2d 783, 788 (2021) (quoting *Massey v. Massey*, 121 N.C. App. 263, 267, 465 S.E.2d 313, 315 (1996) (citation omitted)).

A motion is "a written or oral application requesting a court to make a specified ruling or order." *Motion*, Black's Law Dictionary (12th ed. 2024). A claim asserts a party's substantive right to relief, while a motion seeks procedural action in relation to that right. A motion exists to facilitate how and when a claim is addressed. *Id.*

"Generally, trial court judges enjoy broad discretion in the efficient administration of justice and in the application of procedural rules toward that goal." *M.E. v. T.J.*, 380 N.C. 539, 555, 869 S.E.2d 624, 634 (2022). "[R]ather than erecting hurdles to the administration of justice, '[t]he Rules of Civil Procedure [reflect] a policy to resolve controversies on the merits rather than on technicalities of pleadings.' " *Id.* at 556, 869 S.E.2d at 635 (citation omitted). "Equity regards substance, not form," and it "will not allow technicalities of procedure [to] defeat that which is eminently right and just." *Lankford v. Wright*, 347 N.C. 115, 118, 489 S.E.2d 604, 606 (1997) (citation omitted).

Plaintiff initiated this action asserting claims for equitable distribution, child support, child custody, alimony, post-separation support, and attorney's fees on 7 June 2005. The parties' entered into a consent judgment expressly preserving all claims for future consideration on 9 November 2005. Plaintiff voluntarily dismissed the latter three claims on 4 January 2006. The parties' youngest child reached the age of majority in 2017, and child support terminated in 2019. As of 2021, Plaintiff's sole remaining and pending claim was for equitable distribution.

Plaintiff filed a motion for entry of the military pension division order on 25 August 2021, voluntarily dismissed that motion on 25 February 2022, then refiled it 20 December 2022. Defendant argues the voluntary dismissal of the motion should be construed as dismissal of Plaintiff's sole pending claim, terminating the civil action and requiring her to commence a new action by filing a summons and complaint. *Bradford*, 279 N.C. App. at 116, 864 S.E.2d at 789.

The record shows Plaintiff intended only to withdraw her motion, not her underlying equitable distribution claim. She used a pre-printed AOC form specific to voluntary dismissal of actions and claims under Rule 41(a). Rather than checking the box to dismiss her complaint or a counterclaim, she marked the "other" box and specified "Motion (See Below)," attaching only her military pension motion. Plaintiff did not reference the greater equitable distribution claim within which the motion was asserted. If she had intended to dismiss the claim in its entirety, she would have identified it explicitly.

This filing error does not cause prejudice to the opposing party. A party cannot unilaterally alter a court-ordered and entered consent judgment by withdrawing a motion. As a result, Plaintiff's equitable distribution claim remained pending despite her voluntary dismissal of the motion, which amounted to a harmless procedural error. She refiled the motion within one year of dismissal, and Defendant has not shown he suffered prejudice from her action.

The civil action remained pending despite dismissal of Plaintiff's procedural motion. The court retained subject matter jurisdiction to resolve the equitable distribution claim. We affirm the trial court's order denying Defendant's motion to dismiss for lack of subject matter jurisdiction. N.C. Gen. Stat. § 1A-1, Rule 41(a) (2023).

V. Laches Defense

[2] Defendant argues the district court's Military Pension Division Order is barred under the doctrine of laches. The trial court found Plaintiff did not unreasonably delay filing this suit to foreclose Defendant's laches

defense. Defendant challenges this finding and conclusion and argues Plaintiff's fifteen-year delay in seeking to resolve her equitable distribution claim was barred by laches.

A. Standard of Review

"[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). "If supported by competent evidence, the trial court's findings of fact are conclusive on appeal." *Gannett Pac. Corp. v. City of Asheville*, 178 N.C. App. 711, 713, 632 S.E.2d 586, 588 (2006) (quoting *Finch v. Wachovia Bank & Tr. Co.*, 156 N.C. App. 343, 347, 577 S.E.2d 306, 308-09 (2003)). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Gannett*, at 713, 632 S.E.2d at 588 (quoting *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 26, 265 S.E.2d 123, 127 (1980)).

B. Analysis

Defendant appeals the trial court's denial and dismissal of his laches defense at the hearing. He challenges the court's finding Plaintiff did not act in a manner which unreasonably delayed this suit.

> A party seeking to invoke the affirmative defense of laches must show: (1) a delay of time resulting in some change in the condition of the property or in the relations of the parties; (2) the delay was unreasonable and worked to the disadvantage, injury, or prejudice of the party seeking to invoke the doctrine of laches; and, (3) the party against whom laches is sought to be invoked knew of the existence of the grounds for the claim sought to be barred.

U.S. Bank Nat'l Ass'n v. Estate of Wood, 268 N.C. App. 311, 320, 836 S.E.2d 270, 276 (2019) (citing *MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209–10, 558 S.E.2d 197, 198 (2001)).

The assertion of laches is "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 88-89, 712 S.E.2d 221, 230 (2011) (citation omitted). Laches does not arise from the mere passage of time; it must be demonstrated the delay was unreasonable under the circumstances. *Myers v. Myers*, 213 N.C. App. 171, 179, 714 S.E.2d 194, 200 (2011).

The trial court's 29 March 2023 Order Denying Defendant's Motion to Dismiss included the following finding:

> 17. The Court does not find that Plaintiff acted in a manner which deliberately or unreasonably delayed the matter. Furthermore, the Uniform Services Former Spouse Protection Act contains no deadline for the entry of a Military Pension Division Order. Although [Plaintiff] filed her motion nearly sixteen (16) years after the entry of the divorce judgment, [Defendant's] pension did not vest until he retired on July 1, 2021. Even if the Court had determined the percentage of the pension that Plaintiff would be entitled to in 2007, the actual amount that [Plaintiff] is to receive cannot be determined until now.

Defendant sufficiently challenged this finding and preserved this issue for our review. We review whether competent evidence supports the findings and whether the court's conclusion to deny Defendant's motion to dismiss was proper. *Shear*, 107 N.C. App. at 160, 418 S.E.2d at 845.

Defendant asserted prejudice and testified he would have pursued alternate employment had he known his pension would be divided. This Court has found prejudice to exist where a defendant entered into real estate contracts and incurred financial obligations while a plaintiff, having knowledge of these facts, delayed filing suit. *Save our Schs. of Bladen County, Inc. v. Bladen County Bd. of Educ.*, 140 N.C. App. 233, 237, 535 S.E.2d 906, 909-10 (2000).

Defendant undertook no such action or change of position. He did not incur legal or financial obligations, nor did he change his position in reliance upon Plaintiff's delay during the period between the time of 2005 consent judgment and Plaintiff's motion for division of the pension. His asserting he may have sought other financially-fulfilling employment is too speculative to support a laches defense.

In *Seifert v. Seifert*, the Supreme Court of North Carolina calculated the percentage of Defendant's pension the plaintiff was entitled to and ordered a deferred award of such benefits "payable when defendant-husband actually begins to receive them." This holding tends to show the trial court's ruling is not unreasonable. *Seifert v. Seifert*, 319 N.C. 367, 372, 354 S.E.2d 506, 510 (1987). "[A]bsent agreement, a court cannot order the immediate or periodic payment of a distributive award of vested pension . . . prior to the employee-spouse's actual receipt thereof." *Id.* at 369, 354 S.E.2d at 508; N.C. Gen. Stat. § 50-20.1(b).

"Under 10 U.S.C. § 3914 (1983), an enlisted member of the United States Army's right to retirement benefits vests when he/she has completed twenty years of service." *George v. George*, 115 N.C. App. 387, 389, 444 S.E.2d 449, 450 (1994); 10 U.S.C. § 3914 (1983). Here, Defendant's military pension vested 30 June 2021. Plaintiff filed her motion to divide the pension on 25 August 2021, less than two months after it vested. Until vesting, Defendant remained at risk of ineligibility. *Id.* As the pension's value and status could not be ascertained before mid-2021, Plaintiff's timing in filing less than two months after the pension vested was reasonable. *Seifert*, 319 N.C. at 372, 354 S.E.2d at 510.

The consent judgment and record shows Defendant was aware of the grounds for the claim he sought to bar. He agreed and had received clear notice the issue of the military pension remained unresolved, because the 2005 Consent Judgment explicitly reserved the matter for further consideration. Plaintiff also filed an equitable distribution status report in 2007 confirming her claim remained pending.

Competent evidence supports the trial court's finding and conclusion Plaintiff did not act in a manner to unreasonably delay asserting her claim. We affirm the district court's denial and dismissal of Defendant's laches defense. *Id.*

VI. Award of Military Pension

[3] Defendant contends the district court failed to make sufficient findings to support its award of 24.7720% of his pension and to remit $50,111.73 of back payments to Plaintiff.

A. Standard of Review

Our Supreme Court has held:

> Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted). The trial court's findings of fact are conclusive on appeal, if they are supported by competent evidence. *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 776 (1984).

B. Analysis

The trial court's Military Pension Order distributed Defendant's pension in accordance with § 50-20.1(a)(3)(ii), which states, *inter alia*:

> (a) The distribution of vested marital pension, retirement, or deferred compensation benefits may be made payable by any of the following means:
>
> …
>
> (3) As a prorated portion of the benefits made to the designated recipient, if permitted by the plan, program, system, or fund . . . (ii) at the time the participant-spouse actually began to receive the benefits[.]

N.C. Gen. Stat. § 50-20.1(a) (2023).

The court found Plaintiff was eligible to receive a portion of Defendant's retirement under the Uniform Services Former Spouses' Protection Act, which permits classification of military retirement pay as either marital or separate property and authorizes direct payments to a former spouse, when the marriage overlapped with at least ten years of the service member's military service. 10 U.S.C. § 1408(c)(1) (2018). Defendant contends such marital property must be equally divided under N.C. Gen. Stat. § 50-20(c) (2023).

This argument overlooks the parties' 2005 consent judgment which reserved the military pension "for further consideration," without prescribing an equal division method. Such judgments are governed by § 50-20(d), which states parties may "in a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property. . . in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties." N.C. Gen. Stat. § 50-20(d) (2023).

Where a consent judgment reserves a pension determination for future consideration but provides no specific terms, the default method in § 50-20.1(d) applies. N.C. Gen. Stat. § 50-20.1(d) (2023); *Gilmore v. Garner*, 157 N.C. App. 664, 670, 580 S.E.2d 15, 20 (2003). Section 50-20.1(d) prescribes a valuation method that:

> [C]an be expressed as a fraction, the numerator of which "is the total period of time the marriage existed (up to the date of separation) simultaneously with the employment which earned the vested pension or retirement rights[,]" with the denominator being "the total amount of time the

> employee spouse is employed in the job which earned the vested pension or retirement rights."

Gagnon v. Gagnon, 149 N.C. App. 194, 198, 560 S.E.2d 229, 231 (2022) (quoting *Lewis v. Lewis*, 83 N.C. App. 438, 442-43, 350 S.E.2d 587, 589 (1986); *see also Seifert*, 82 N.C. App. at 337, 346 S.E.2d at 508 (approving use of § 50-20(d) for distribution of military retirement benefits).

The court determined and awarded Plaintiff's share of the pension in accordance with the statutory default equation by concluding: "Plaintiff is entitled to receive one-half of the marital share of the divisible retirement benefits, computed as follows: 163 months of marital pension service, divided by 329 of total pension service which is equal to Plaintiff receiving 24.7720% of Defendant's military retired pay." *Id.*

Competent evidence exists to support the trial court's calculation and award of 24.7720% of Defendant's pension to Plaintiff. We affirm the trial court's order dividing Defendant's military pension and the award of back pay as shown above.

VII. Conclusion

The trial court properly denied Defendant's motion to dismiss for lack of subject matter jurisdiction to consider Plaintiff's motion for military pension division order. Plaintiff's voluntary dismissal of her motion did not extinguish her equitable distribution claim, which remained pending under the parties' prior 2005 consent judgment.

The court's award of 24.7220% of Defendant's military pension was supported by competent evidence. In the absence of an agreement to the contrary, the trial court correctly applied the statutory default coverture fraction, where the consent judgment failed to specify a different division method of the pension. The trial court's disposal of Defendant's laches defense was proper because competent evidence supports the court's finding and conclusion Plaintiff did not unreasonably delay asserting her preserved claim. *It is so ordered.*

AFFIRMED.

Chief Judge DILLON and Judge GORE concur.

MH MISSION HOSPITAL, LLLP, PETITIONER
v.
NC DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED, RESPONDENT

No. COA24-726

Filed 18 June 2025

1. Hospitals and Other Medical Facilities—certificate of need—conformance with statutory criteria—need determination—"surgical services"

The administrative law judge properly affirmed the decision of the Department of Health and Human Services to award a certificate of need (CON) to one of three applicants that had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina. The selected applicant complied with Criteria 1 (requiring a proposed project to be consistent with applicable policies and need determinations in the SMFP) where, although its project did not include a general purpose operating room (OR) (contained in both of the other applicants' plans), the plain and unambiguous language of the SMFP did not require a general purpose OR; moreover, the selected plan included a new c-section operating room, which qualified under the broad category of "medical or surgical services" contained in the SMFP.

2. Hospitals and Other Medical Facilities—certificate of need—conformance with statutory criteria—cost, design, and means of construction—designated Brownfield site

The administrative law judge (ALJ) properly affirmed the decision of the Department of Health and Human Services to award a certificate of need (CON) to one of three applicants that had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina. The selected applicant complied with Criteria 12 (regarding the reasonableness of the cost, design, and means of construction) where, although its proposed development of a new hospital was on a designated EPA Brownfield Site, there was no evidence of a legal or practical bar to the site being developed, and the ALJ's further determination that the property could be safely remediated was not contradicted by any evidence that remediation would exceed projected development costs.

3. Hospitals and Other Medical Facilities—certificate of need—public hearing—limits placed on applicant employees from speaking—no substantial prejudice

In a certificate of need (CON) matter, in which three applicants had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina, the administrative law judge properly determined that the decision of the Department of Health and Human Services to prohibit eight employees of one of the applicants from speaking during a portion of the agency's public hearing—a part of the hearing process distinct from the Proponent Time Period, during which applicants' employees were allowed to speak—did not constitute prejudicial error. Even if the restriction placed on the employees was in error or not in keeping with the agency's past practice, there was no substantial prejudice as a matter of law, since the limitation was in accord with a permissible interpretation of the public hearing statute.

4. Hospitals and Other Medical Facilities—certificate of need—competing applications—award to one applicant insufficient to show prejudice to another

In a certificate of need (CON) matter, in which three applicants had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina, where the administrative law judge properly upheld the decision of the Department of Health and Human Services to award the CON to one applicant, since the agency did not commit any error in making its determination, the mere denial of another applicant's submission did not automatically establish substantial prejudice to that unsuccessful applicant.

Appeal by Petitioner and cross-appeal by Respondent from a final decision entered 10 May 2024 by Administrative Law Judge Michael C. Byrne in Office of Administrative Hearings. Heard in the Court of Appeals 25 February 2025.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, by William F. Maddrey, Kenneth L. Burgess, Matthew A. Fisher, and Iain M. Stauffer, for the petitioner-appellant.

Attorney General Jeff Jackson, by Assistant Attorney General, Derek L. Hunter, for the respondent-appellee.

Wyrick Robbins Yates & Ponton LLP, by Frank Kirschbaum, Charles George, and Trevor P. Presler, for the respondent-intervenor-appellant.

TYSON, Judge.

MH Mission Memorial Hospital, LLLP ("Petitioner" or "Mission Memorial") appeals from a Final Decision by an Administrative Law Judge ("ALJ") affirming the decision of the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section ("DHHS"). DHHS approved AdventHealth Asheville, Inc.'s and Adventist Health System Sunbelt Healthcare Corporation's (collectively "Respondent-Intervenor" or "Advent") application for a certificate of need ("CON") for a new hospital with sixty-seven acute beds, one obstetrical c-section delivery operating room, and five procedure rooms.

Petitioner appealed DHHS' decision to the Office of Administrative Hearings ("OAH"). The ALJ affirmed DHHS' decision and entered a Final Decision for Advent on 10 May 2024. Mission Memorial appeals. Advent cross-appeals.

I. Background

The 2022 State Medical Facilities Plan ("2022 SMFP") identified a need for an additional sixty-seven acute care beds in the service area of Buncombe, Graham, Madison, and Yancey counties. Advent is a not-for-profit acute healthcare system operating in Western North Carolina. Mission Memorial operates an 815 bed, tertiary-quaternary acute care hospital facility located in Asheville. Mission Memorial is a subsidiary of HCA Healthcare, Inc.

Mission Memorial submitted a CON application to develop sixty-seven additional acute care beds at its existing hospital in Buncombe County on 15 June 2022. Advent filed a CON application to develop a new hospital with sixty-seven acute care beds, one obstetrical c-section operating delivery room, and five procedure rooms at a new location in Buncombe County the same day.

Novant Health Asheville Medical Center ("Novant") also filed a CON application to develop a new hospital with sixty-seven acute care beds, one relocated operating room from the Outpatient Surgery Center of Asheville, one obstetrical c-section operating delivery room, and three procedure rooms at a new location in Buncombe County.

DHHS determined the three applications were submitted by qualified applicants and complete and began its review on 1 July 2022. DHHS determined the approval of one application under the 2022 SMFP would result in the denial of the other applications. *See* N.C. Gen. Stat. § 131E-183(a)(1) (2023) ("The proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved.").

Mission Memorial submitted written comments addressing both Advent's and Novant's applications. Advent submitted written comments to DHHS addressing the proposals included in both Mission Memorial's and Novant's applications. Novant also submitted written comments to DHHS addressing the proposals included in both Advent's and Mission Memorial's applications.

DHHS conducted a public hearing in Buncombe County on 12 August 2022. DHHS did not allow eight attendees to speak at a certain time at the public hearing because they were purported employees of Mission Memorial or employees of one its affiliated hospitals or entities. DHHS hearing administrators decided these speakers should have presented during the "Proponent Time Period" of the hearing, rather than during the "Public Time Period."

DHHS issued its decision approving Advent's application and disapproving Mission Memorial's and Novant's application on 22 November 2022. Mission Memorial filed a Petition for Contested Case Hearing in the OAH to seek administrative review of the 22 November 2022 decision on 21 December 2022. Novant also filed a Petition for Contested Case Hearing in the OAH on the same day.

By order entered 20 January 2023, the OAH consolidated the cases and allowed Mission Memorial and Novant to intervene in both parties' actions. Novant voluntarily dismissed its petition for a contested case hearing with prejudice on 21 March 2023. Mission Memorial voluntarily dismissed its petition for a contested case on 14 August 2023, but it refiled a Petition for Contested Case Hearing the same day.

The ALJ entered a Final Decision to uphold DHHS' decision to award Advent the CON to develop its proposed project. Mission Memorial appeals. Advent cross-appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 131E-188(b) and 7A-29(a) (2023).

III. Standard of Review

This Court applies a *de novo* standard of review if a party argues DHHS' "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 DHHS' 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). A petitioner's status as a denied applicant does not alone constitute substantial prejudice. *CaroMont Health, Inc. v. N.C. HHS Div. of Health Serv. Regulation*, 231 N.C. App. 1, 5, 751 S.E.2d 244, 248 (2013) (citation omitted); *Parkway Urology, P.A. v. N.C. HHS*, 205 N.C. App. 529, 536-37, 696 S.E.2d 187, 193 (2010).

A non-applicant's witness's attempt to quantify the projected harm that will allegedly result from grant of the application is insufficient. *Id.* The evidence must be persuasive and demonstrate the harm caused by the CON approval to successfully challenge DHHS' grant of a CON application. *Id.* at 17, 751 S.E.2d at 255.

"The cardinal principle of statutory construction is that the intent of the legislature is controlling. In ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute, and what it seeks to accomplish." *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 443-44 (1983) (citations omitted).

A statute "should always be interpreted in a way which avoids an absurd consequence." *Wake Med v. N.C. Dep't of Health and Human Servs.*, 225 N.C. App. 253, 258, 737 S.E.2d 754, 757 (2013) (quoting *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 423, 276 S.E.2d 422, 435 (1981)). "Where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Wake Med*, 225 N.C. at 258, 737 S.E.2d at 757-58 (quoting *Frye Reg'l Med. Ctr. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999)).

Our Supreme Court has held:

> When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. "The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

N.C. Sav. & Loan League v. N.C. Credit Union Comm'n, 302 N.C. 458, 465-66, 276 S.E.2d 404, 410 (1981) (citations omitted) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 89 L. Ed. 124, 129 (1944)).

IV. Issues

Mission Memorial contends the ALJ erred in finding and concluding Advent's CON application met the "qualified applicant" standard and complied with Criteria 1 and 12 of N.C. Gen. Stat. § 131E-183(a)(1), (12) (2023) to meet the need outlined in the 2022 SMFP. Mission Memorial further asserts DHHS violated N.C. Gen. Stat. § 131E-185 (2023) by refusing to allow eight individuals to speak at the public hearing, resulting in substantial prejudice to Mission Memorial from the approval of Advent's application.

Advent argues Mission Memorial's application failed to comply with Criteria 1, 4, and 18a, under N.C. Gen. Stat. § 131E-183(a)(1), (4), (18a) (2023), and was not eligible for CON approval.

V. Advent's CON Application Compliance with Criterion 1 and 12 of N.C. Gen. Stat. § 131E-183 (2023)

DHHS determined and concluded Advent was a qualified CON applicant in compliance with § 131E-183(a) criteria. N.C. Gen. Stat. § 131E-183(a) (2023). Mission Memorial argues the ALJ erroneously found Advent to be a qualified applicant because it had failed to comply with Criteria 1 and 12. *Id.* We disagree.

A. Analysis

The 2022 SMFP defines a "qualified applicant" applying "for a CON to acquire the needed acute care beds" as a person or entity "who proposes

to operate the additional acute care beds in a hospital," to provide: (1) "a 24-hour emergency services department;" (2) "inpatient medical services to both surgical and non-surgical patients; and" (3) "if proposing a new licensed hospital, medical and surgical services on a daily basis within at least five of the following major diagnostic categories (MDC) recognized by the Centers for Medicare & Medicaid Services (CMS)." N.C. Dep't Health & Hum. Servs. ("NC DHHS"), State Medical Facilities Plan 37 (2022).

1. General OR Requirement (Criterion 1)

[1] Statutory Review Criterion 1 of N.C. Gen. Stat. § 131E-183(a)(1) ("Criterion 1") requires proposed projects to be consistent with needs of qualified applicants as set forth by the SMFP. N.C. Gen. Stat. § 131E-183(a)(1) (2023) (providing the applicant's proposal must be "consistent with applicable policies and need determinations in the State Medical Facilities Plan"). The 2022 SMFP provided an applicant proposing to develop and construct a new hospital must also provide medical and surgical services on a daily basis within at least five of the twenty-five MDCs listed in the 2022 SMFP and recognized by CMS. NC DHHS, State Medical Facilities Plan 37.

Mission Memorial argues, while Advent's application includes a proposal to develop a new c-section operating room ("OR"), the application did not propose to develop a new general purpose OR to be used for any type of surgical procedure, which would not support the conclusion Advent would be providing surgeries on a daily basis.

No statute or regulation requires a new hospital to include a general-purpose OR to qualify for the CON under the SMFP, as Mission Memorial suggests. The purported requirement to provide a general purpose OR is not mentioned in the SMFP definition of a "qualified applicant." The SMFP simply requires the applicant to offer "medical and surgical services" within the five of the twenty-five MDCs. NC DHHS, State Medical Facilities Plan 37. The language of the SMFP is unambiguous and incorporated into a statute. *See* N.C. Gen. Stat. § 131E-183(a)(1) (2023). The language should be interpreted using the plain meaning of its words, applying "surgical services" broadly rather than to limit the terms of the 2022 SMFP to mandate a general purpose OR. *Lemons v. Boy Scouts of America, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988) ("When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.").

Additionally, Advent's application proposed to develop five procedure rooms and one c-section OR, which is recognized as an OR by DHHS. *See* 10A N.C. Admin. Code 14C.2101 (2021); NC DHHS, State Medical Facilities Plan 49, 54. The ALJ found Advent would provide "medical and surgical services on a daily basis within eight (8) MDCs in Project Year 1, ten (10) MDCs in Project Year 2, and twelve (12) MDCs in Project Year 3." DHHS concluded Advent was a Qualified Applicant, and the "surgical services" required by the 2022 SMFP could be provided in either a procedure room or in a c-section OR.

Although DHHS may have initially advised Advent a CON application for a new hospital had to include at least one general OR, the statement was without legal justification, and the plain statutory interpretation rule from *Lemons* governs. 322 N.C.at 276, 367 S.E.2d at 688. While no other approved applicant proposed to develop a new hospital without at least one general OR, DHHS found and concluded a general OR is not a qualification for the CON award. The ALJ concluded the absence of something does not mean it is either required or prohibited.

Mission Memorial's own witness testified no current law specifies what specific types of procedures can be performed in a procedure room. One of Mission Memorial's witnesses testified surgeries may be performed in a procedure room, provided the licensed clinicians and governing body of the specific facility agree the space is safe and equipped to perform such procedure. The ALJ's Final Decision acknowledges this fact and used this as part of his conclusion Advent was a qualified applicant and DHHS' grant of the CON to Advent should be affirmed.

Mission Memorial also argues the Facility Guidelines Institute ("FGI") guidelines state specific differences between procedure rooms and operating rooms and invasive procedures should not be performed in procedure rooms. At the hearing, it was acknowledged this notion is contained in an FGI Guidelines appendix item, which is not an enforceable part of the guidelines. *See* 10A N.C. Admin. Code 13B.6105(b) (2019).

Mission Memorial's arguments challenging Advent's omission of a general operating room fails to recognize the General Assembly is presumed to be aware of the CON application statutes and decided to maintain *status quo*. Hospitals in North Carolina are required to report each year the numbers and types of procedures performed in general ORs. The General Assembly has not found this as a concern by specifying procedural practices by statute. The ALJ's decision complies with the current statutory scheme.

2. Brownfield Site (Criterion 12)

[2] Statutory Review Criterion 12 ("Criterion 12") requires an applicant to "demonstrate that the cost, design, and means of construction proposed represent the most reasonable alternative, and that the construction of the project will not unduly increase the cost of health services." N.C. Gen. Stat. § 131E-183(a)(12) (2023). DHHS and the ALJ's Final Decision determined Advent's proposed development of a hospital on an EPA Brownfield Site was not strictly barred by a Brownfield Site agreement, and the ALJ concluded the site could be safely remediated for construction if needed. *See* N.C. Gen. Stat. § 130A-310.31 (2023) (explaining a "brownfields site" is "abandoned, idled, or underused property at which expansion or redevelopment is hindered by actual environmental contamination or the possibility of environmental contamination and that is or may be subject to remediation").

Mission Memorial argues it was error for the ALJ to conclude Advent complied with Criterion 12 because Respondent's CON application for the proposed hospital site was a designated Brownfield site. Advent was not aware the location was designated a Brownfield at the time Advent filed its application. Mission Memorial asserts Advent failed to include reasonable and adequate information demonstrating the proposed project is cost-effective and would not incur unreasonable costs in developing its proposed project and to include reasonable and adequate information to demonstrate the project can be developed at its proposed site. Mission Memorial argues the cost of the Advent project failed to factor in the potential remedial costs of the site, considering its Brownfield site designation, and these costs may affect consumers pursuant to N.C. Gen. Stat. § 131E-181(b) (2023).

While Advent did not initially disclose the site's Brownfield designation in its application, DHHS found and the ALJ concluded no legal or practical bar exists to the hospital's development on that site. *Britthaven v. North Carolina Dept. of Human Resources, Div. of Facility Services*, 118 N.C. App. 379, 389, 455 S.E.2d 455, 463 (1995) asserts an ALJ reviewing a CON case is limited to evidence, which either was or could have been before the Agency at the time of its original decision.

In *Duke Univ. Health Sys. Inc. v. N.C. Dep't of Health & Hum. Servs.*, 295 N.C. App. 25, 905 S.E.2d 729 (2024) ("*Duke I*"), DHHS found the applications of both UNC and Duke to develop forty acute care beds and four operating rooms in the Durham/Caswell County service area to be conforming with all statutory criteria under N.C. Gen. Stat. § 131E-183(a). *Id.* at 77, 905 S.E.2d. at 761. DHHS conditionally approved the UNC application, and the ALJ affirmed DHHS' decision after being

presented with a "proposed alternative location" after learning "the primary location is currently subject to zoning requirements and restrictive covenants that would, as they stand currently, prevent the construction of the proposed facility." *Id.* This Court remanded the matter "given the possibility that the ALJ would not have awarded UNC the CON without the additional consideration of the proposed alternative site and a future material compliance request, we have no way of knowing whether the ALJ's conclusion would have followed from only the allowable considerations." *Id.* Duke had argued UNC's proposal was nonconforming with Criterion 12 because the hospital's primary proposed location in Research Triangle Park was subject to restrictive covenants not accounted for in the application, which purportedly prohibited the development of a hospital, while the alternate proposed site posed hazards that would require extra costs to remediate. *Id.* at 295 N.C. App. 58, 905 S.E.2d 751. This Court overturned the ALJ's determination on this basis.

In contrast to the facts in *Duke I*, no definitive evidence was offered tending to show a hospital could not be built on Advent's proposed site. The ALJ found "as of the time of the hearing, it has not been established that [Advent] cannot use the . . . site to construct a hospital," and "[t]here is no evidence before the Agency or this Tribunal that the site selected by [Advent] could not be used by [Advent] for its proposed project . . . ."

No evidence before DHHS showed the Brownfield site was not suitable for development as a hospital, and nothing in the Brownfield agreement strictly prohibited the construction of the hospital. The ALJ further concluded the Brownfield site had potential for remediation, and no evidence was offered such remediation would exceed projected project costs.

Unlike in *Duke I*, where this Court questioned whether the ALJ would have reached the same decision if an alternate site was not considered and the ability to use a different site pursuant to a material compliance request, here, the availability of the material compliance request was, at most, an alternate basis for his finding of conformity with Criterion 12. *Id.* at 77, 905 S.E.2d. at 761. There is no doubt whether the ALJ would have found conformity with Criterion 12 even without considering the availability of a material compliance request. *Id.*

The DHHS project analyst testified "[n]othing about [the Brownfield designation] automatically makes it a site that cannot be developed." She added: "[i]n situations where I have found that there are land restrictions that would prevent . . . a CON facility from being developed, I have denied an applicant because of that, but nothing in the

Brownfield's agreement by itself said it couldn't be developed." While the EPA Brownfield designation clearly prohibits numerous activities, as was found by the ALJ, none prohibits building a hospital on the site.

The ALJ correctly found:

> It is simply not the Tribunal's function under the CON law to supersede the Agency's judgement and declare that a given site is "inappropriate" for the proposed new hospital. Either the proposed hospital site property is legally barred from use as a hospital, or it is not. It is not, and accordingly, the Tribunal will not replace the Agency's judgment on this issue with its own.

As the ALJ properly noted, it is not the function on appellate review under the CON law to supersede DHHS' judgment and to declare a site is "inappropriate" for a proposed project. "Either the proposed hospital site is legally barred from use as a hospital, or it is not." The Final Decision also evidences how the ALJ would have decided on Criterion 12 if he had not considered the possibility of Adent later filing a material compliance request for a different property be used. No evidence tends to show required remediation would cause undue cost increases.

The ALJ found and concluded no evidence showed the hospital could not be safely built on the property selected. *Id.* Because no evidence tends to show Advent was not compliant with Criteria 1 or 12 of the relevant statute, the ALJ's decision on this issue is affirmed.

VI. Public Hearing

[3] DHHS prohibited eight Mission Memorial employees from speaking during a portion of the public hearing. DHHS determined whether the individual worked for Mission Memorial by examining their email addresses. Mission Memorial argues its employees should have been allowed to speak as members of the public pursuant to N.C. Gen. Stat. § 131E-185 (2023), as long as the employee was not a "proponent" of the CON being awarded to them. We disagree.

A. Analysis

DHHS is required to conduct a public hearing if: (1) "the review to be conducted is competitive;" (2) "the proponent proposes to spend five million dollars ($5,000,000) or more;" (3) "a written request for a public hearing is received before the end of the written comment period from an affected party as defined in G.S. 131E-188(c);" or, (4) "the agency determines that a hearing is in the public interest." N.C. Gen. Stat. § 131E-185(2) (2023).

> If a public hearing is held, the public hearing "shall" include:
>
> a. An opportunity for the proponent of each application under review to respond to the written comments submitted to the Department about its application.
>
> b. An opportunity for any person, except one of the proponents, to comment on the applications under review.
>
> c. An opportunity for a representative of the Department, or such other person or persons who are designated by the Department to conduct the hearing, to question each proponent of applications under review with regard to the contents of the application.

N.C. Gen. Stat. § 131E-185(2)(a)-(c) (2023).

In *Fletcher I*, this Court held the failure to hold a public hearing was error under N.C. Gen. Stat. § 131E-185. *Fletcher Hosp. Inc. v. N. Carolina Dep't of Health & Hum. Servs., Div. of Health Serv. Regul., Health Care Plan. & Certificate of Need Section*, 293 N.C. App. 41, 47, 902 S.E.2d 1, 5 (2024) ("*Fletcher I*"). The Court in *Fletcher I* held the requirements in N.C. Gen. Stat. § 131E-185(2) are clear, and "this Court has 'no power to add to or subtract from the language of the statute.' " *Id.* (quoting *Ferguson v. Riddle*, 233 N.C. 54, 57, 62 S.E.2d 525 (1950)).

Here, and unlike in *Fletcher I*, DHHS conducted a hearing as required by statute. Mission Memorial asserts the project exceeded the five-million-dollar cap, and a public hearing was required. N.C. Gen. Stat. § 131E-185(2) (2023). Mission Memorial's argument relies upon cases where no public hearing occurred at all, despite also acknowledging a public hearing was held in this case. Our General Statutes delineate the time during which the general public is scheduled to speak, the "Public Time Period," from the time during which a proponent of the application is permitted to speak, the "Proponent Time Period." *Compare* N.C. Gen. Stat. § 131E-185(a1)(2)(a.) and (b.) (2023). DHHS' hearing included both a Proponent Time Period and a Public Time Period.

Mission Memorial contends the DHHS Coordinator wrongfully restricted certain people from speaking during the Public Time Period based upon her classification of them as employees of Mission Memorial or its affiliates and as proponents. She made this decision by reviewing the email addresses these individuals used to sign in at the hearing, and she barred all individuals with a Mission Memorial email address from speaking as a member of the public. All of those prohibited from speaking during the Public Time Period were either employees of Mission

Memorial or one of its affiliate organizations, and they were presumed to be speaking in favor of Mission Memorial's application and against Advent's and Novant's applications. Mission Memorial argues this restriction of an applicant's employees from speaking during the Public Time Period violated the statute requiring a public hearing.

Mission Memorial contends DHHS' action undermined the clear intent of the statute. By its terms, during the Proponent Time Period, the application proponents are limited to "respond[ing] to the written comments submitted to the Department about its application," and under subsection (a1)(2)(a.), cannot attack another applicant. N.C. Gen. Stat. § 131E-185(a1)(2)(a.) (2023). No such limitation exists with respect to the Public Time Period, where the opportunity existed to "comment on the applications under review," which allow a member of the public, but not proponents, to make positive or negative comments on any of the applications at issue. N.C. Gen. Stat. § 131E-185(a1)(2)(b.) (2023).

Reviewing N.C. Gen. Stat. § 131E-185(a1)(2) and the facts of this case, the record shows DHHS' project analyst's decision to limit an applicant's employees to speaking only during the Proponent Time Period was consistent with the statutes. The DHHS' project analyst determined to allow applicant employees to speak as public commenters would collapse this distinction between the Proponent Time Period and the Public Time Period outlined in the statute. *Id.* The ALJ found DHHS' interoperation of the statute was reasonable and consistent.

Even if this Court determined a reasonable interpretation of the public hearing statute allowed an applicant to self-select who among its officers were to speak as a proponent and who was to speak as a member of the public, the DHHS Project Analyst's decision to prevent Mission Memorial's employees from doing so was reasonable and based on a permissible construction of the statute. *Carpenter v. N.C. Dep't of Human Res.*, 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992), *disc. rev. improvidently allowed*, 333 N.C. 533, 427 S.E.2d 874 (1993) (explaining "the court should defer to the agency's interpretation of the statute . . . so long as the agency's interpretation is reasonable and based on a permissible construction of the statute"). While Mission Memorial relies on communications from the day of the hearing and past practices to argue a different historical interpretation by DHHS, which may have allowed Mission Memorial/HCA employees to speak as members of the public, the agency's interpretation is reasonable and a permissible construction of the statute. *Id. See* N.C. Gen. Stat. § 131E-185(a1)(2) (2023).

Even if the decision to limit those individuals to speak only during the Proponent Time Period was erroneous, there is no prejudice shown for

overturning the ALJ's decision. A decision limiting when persons were allowed to speak during certain times during an actual public hearing does not establish substantial prejudice as a matter of law. *See Fletcher I*, 293 N.C. App. at 47-50, 902 S.E.2d at 5-7 (determining "the Agency was required to hold a public hearing under the facts in this case, and its failure to do so was error" and remanding the case to the trial court for petitioner to establish substantial prejudice); *Fletcher Hospital Inc. v. N.C. Dep't of Health & Human Servs.*, 295 N.C. App. 82, 90, 906 S.E.2d 19, 26 (2024) ("*Fletcher II*") (remanding "to the ALJ for further consideration of whether substantial prejudice existed on a basis other than per se substantial prejudice due to the hearing's absence"); *Duke Univ. Health Sys., Inc. v. N.C. Dep't of Health & Hum. Servs., Div. of Health Serv. Regul., Healthcare Plan. & Certificate of Need Section*, 295 N.C. App. 589, 593, 906 S.E.2d 535, 537-38 (2024) ("*Duke II*") ("Failure to conduct a public hearing as required by N.C.G.S. § 131E-185(a1)(2), despite constituting improper procedure for purposes of N.C.G.S. § 150B-23(a)(3), does not automatically result in substantial prejudice to a petitioner before the Office of Administrative Hearings.").

The ALJ properly concluded DHHS' reasonable interpretation of an applicant's employees being proponents is not shown to be prejudicial error. *Id.* Substantial prejudice against Mission Memorial was not established in the limitation of its employees or affiliated employees being permitted to speak during the Public Time Period, because the limitation was in accord with the public hearing statute. The ALJ's finding of no prejudice is affirmed.

VII. Mission Memorial's Rights Substantially Prejudiced by the Approval of the Advent CON Application

[4] Mission Memorial argues their rights were substantially prejudiced by the approval of Advent's CON Application because, absent the ALJ's approval of the Advent Application and the award of the CON to Advent, Mission Memorial would have been awarded the CON.

A. Analysis

Mission Memorial made several arguments at the hearing it failed to advance in its brief regarding why its rights had been substantially prejudiced by DHHS' decision. Any arguments not advanced on appeal are deemed abandoned. N.C. R. App. P. 28(a) provides, "Issues not presented and discussed in a party's brief are deemed abandoned." Any other evidence or contention not brought forward from Mission Memorial purporting to show it was substantially prejudiced by DHHS' Decision or the ALJ's Final Decision is deemed abandoned. *Id.*

Mission Memorial argues it was substantially prejudiced due to the alleged error with respect to Criterion 1 because: it was an approvable applicant and Advent was not. It asserts DHHS interpreted the definition of "qualified applicant" differently from how Mission Memorial contends it had been interpreted previously. This Court has affirmed Advent complied with DHHS' interpretation of a "qualified applicant." In *Fletcher I*, DHHS interpreted a CON statute in a manner differently than previously, but to prove this action warranted reversal, the Court required a separate and distinct showing of substantial prejudice separate from DHHS' purported error. *Fletcher I*, 293 N.C. App. at 45-50, 902 S.E.2d at 4-7. Because both of Mission Memorial's prejudice arguments hinge upon this Court holding DHHS erred, which we have held otherwise, Mission Memorial's arguments fail. Mere denial of Mission Memorial's application alone cannot *ipso facto* support substantial prejudice.

Mission Memorial's reliance on *AH N.C. Owner LLC v. N.C. Dep't of Health & Human Servs.*, 240 N.C. App. 92, 109, 771 S.E.2d 537, 547 (2015) requires the court to find DHHS erred in granting Advent's application by finding them compliant with all criterions of N.C. Gen. Stat. § 131E-185.

In *AH N.C. Owner LLC*, this Court directly linked the determination of agency error in the application of the statutory review criterion with the substantial prejudice to the petitioner. *Id.* Without that initial showing and conclusion of error by DHHS, this Court cannot find Mission Memorial was substantially prejudiced. The ALJ's final decision on this issue is affirmed.

VIII. Advent's Cross Appeal

Advent cross appeals and argues Mission Memorial's application was not in compliance with Criterion 18a of N.C. Gen. Stat. § 131E-183 (2023) because Mission Memorial did not prove their services were ones for which competition would not have a favorable impact, or does enhance competition, because it enhances competition "in the proposed service area." *Id.* Advent also argues Mission Memorial's application was not compliant with Criteria 1 and 4. In light of our holding above to affirm the final decision of the ALJ, we need not reach Advent's cross appeal. We dismiss Advent's cross appeal as moot.

IX. Conclusion

The ALJ reviewed DHHS' evidence and findings and heard arguments from Advent, Mission Memorial, and DHHS. Substantial evidence supported DHHS' finding Advent had complied with Criterion 1 and

Criterion 12. Mission Memorial has not demonstrated reversible error in the public hearing.

Mission Memorial has not demonstrated the ALJ's decision is affected by error or how it was substantially prejudiced. The ALJ's final decision to affirm DHHS' decision to award the CON to Respondent is affirmed. Advent's cross appeal is dismissed as moot. *It is so ordered.*

AFFIRMED.

Judges WOOD and MURRY concur.

NORTH STATE ENVIRONMENTAL, INC., PLAINTIFF
v.
TOWN OF MOORESVILLE, DEFENDANT

No. COA24-765

Filed 18 June 2025

Contracts—breach—town's nonpayment under road improvement contract—unresolved utility conflicts—impossibility of performance

In a breach of contract action brought against a town by plaintiff, a company that had been awarded a contract to install a storm water drainage system underneath roads as part of a broader roadway improvement plan, the trial court's judgment awarding plaintiff $132,657.40 was affirmed where the court's unchallenged findings of fact amply supported its conclusions, including that: the town had breached the contract by failing to identify and arrange for the resolution of potential utility impacts—including underground gas lines—prior to the start of plaintiff's work and by failing to pay plaintiff for work satisfactorily completed under the contract; the town's refusal to terminate the contract as requested by plaintiff was unreasonable; the town's breach excused further performance by plaintiff; and the town was not justified in defaulting plaintiff. Further, the trial court's decision did not overlook the contract's Authority of Engineer term, since the project engineer's limited authority under the contract did not extend to determining whether the town had met its contractual obligations or owed damages.

Appeal by defendant from judgment entered 10 July 2023 by Judge William Long in Iredell County Superior Court. Heard in the Court of Appeals 8 April 2025.

Craige Jenkins Liipfert & Walker LLP, by William W. Walker and Lori B. Edwards, for plaintiff-appellee.

Cranfill Sumner LLP, by Steven A. Bader and Mica N. Worthy, for defendant-appellant.

ZACHARY, Judge.

Defendant Town of Mooresville ("the Town") appeals from the trial court's judgment awarding Plaintiff North State Environmental, Inc., ("North State") the sum of $132,657.40 plus interest on its claim for breach of contract. After careful review, we affirm.

I. Background

We recite only the facts necessary for our analysis. These include the relevant findings of fact made by the trial court, none of which are disputed on appeal.

In 2013, the Town contracted with the North Carolina Department of Transportation ("NCDOT") to administer a roadway improvement project ("the Project") at an intersection on State Highway 115. "The Project had two principal goals: to realign the intersection; and to install a storm water drainage system under the roads. Installation of the drainage system was the Project's 'controlling operation.' " The contract between the Town and NCDOT provided, *inter alia*, that the Town "and/or its agent, at no liability to [NCDOT], shall relocate, adjust, relay, change or repair all utilities in conflict with the Project, regardless of ownership."

The Town hired the engineering firm Ramey Kemp ("Kemp") to design plans for the Project in 2015. In its contract with the Town, Kemp agreed to "[c]oordinate existing private utility conflicts and relocations required for the proposed improvements with the appropriate utility company" and to "[i]dentify all potential utility impacts caused by the [P]roject and show [the potential utility impacts] on plans prepared for coordination with utility owners."

As the trial court described in its findings of fact, Kemp failed to identify several potential utility impacts:

> 7. Kemp's scope of work included a requirement that it produce information and diagrams in "Utilities By Others Plans" (UBO Plans).
>
> 8. In 2016, Public Service Company of North Carolina/ Dominion Energy (Dominion) gave Kemp drawings of its underground gas lines and other facilities in the Project area.
>
> 9. Kemp's "Utility Analysis and Routing Report" dated June 6, 2016, said Dominion's underground gas lines would not conflict with the Project's drainage system.
>
> 10. Kemp failed to identify several Dominion gas lines in conflict with the planned drainage system. In turn, Kemp failed to show all of the Dominion gas lines on the Project plans. And Kemp never produced UBO Plans.
>
> 11. Kemp finalized the Project plans on March 12, 2018.

(Internal citations omitted).

On 5 February 2019, the Town awarded the contract for the Project ("the Contract") to North State. The Town subcontracted the construction engineering and inspection work to Stewart Engineering ("Stewart"), which subsequently subcontracted these portions of the Project to A. Morton Thomas and Associates, Inc. ("AMT"). AMT, in turn, named Brenna Stephenson the Project Engineer under the Contract. The Contract included a term ("the Authority of Engineer Term") giving Stephenson, as Project Engineer, the final authority to resolve certain disputes.

The Contract also incorporated, *inter alia*, NCDOT Standard Specification § 105-8, which provided that before beginning construction, the Town was required to "notify all utility owners known to have facilities affected by the construction of the [P]roject and . . . make arrangements for the necessary adjustments of all affected public or private utility facilities." This Standard Specification further provided that "[t]he utility adjustments may be made either before or after the beginning of construction of the [P]roject. The adjustments will be made by the utility owner or his representative or by [North State] when such adjustments are part of the work covered by [the C]ontract."

Additionally, the Contract incorporated NCDOT Standard Specification § 108-13, which, in pertinent part, authorized the Town to terminate the Contract if it was impossible for North State to complete its contracted work:

> The [Town] may terminate the [C]ontract in accordance with the following provisions:
>
> (A) The [Town] will consider termination of the [C]ontract upon written notification by [North State] that any of the following circumstances exist. [North State] shall include adequate documentation of these circumstances along with such notification:
>
> . . . .
>
> (2) If it is impossible for [North State] to complete the work in accordance with the [C]ontract by reason of unanticipated conditions at the site, including slides and unstable subsoil, without a major change in the design of the [P]roject and [North State] will be unduly delayed in completing the [P]roject by reason of such unanticipated conditions and changes in design . . . .

Before North State began work on the Project, it was informed that there were no anticipated utility conflicts. However, as North State commenced its work, the first utility conflicts were discovered and the first conflicts regarding payment for work on the Project arose between North State and the Town:

> 19. In June 2019, North State's surveyor discovered a sewer line manhole in conflict with the Project fill elevation in the southeast quadrant. The Town installed the new sewer line in the Project area unbeknownst to North State and after North State was awarded the Contract.
>
> 20. The first progress meeting was held on site on June 25, 2019. The AMT and North State representatives discussed the poor condition of the road pavement in the Project area, and North State's representative asked for a GIS layout (i.e., a map) of the utilities in the Project area. AMT never supplied North State with a GIS layout of the utilities.
>
> 21. In June and July 2019, utility poles prevented North State from bringing fill to the southeast quadrant of the Project. Duke was in the process of moving the poles at that time.
>
> 22. North State sent AMT an updated progress narrative on October 3, 2019, and started work on the Project on October 25, 2019.

23. North State installed a construction entrance and temporary traffic control, cleared part of the Project area, and brought in fill materials for the southeast quadrant of the Project.

24. In early December 2019, North State began a planned "jack-and-bore" across and under NC 115. (Jack-and-bore is a procedure used to install pipe under a road without cutting open the road surface.) The plans called for the drainage pipe to run 80 feet and to end in Box 403 at the west side of NC 115 in the Project's southwest quadrant. (A box is a concrete structure, about five feet tall, laid underground to serve as a connection and pivot point for the pipes. The Project plans had four boxes in the drainage system.)

25. The jack and bore could not be completed. AMT realized that the plans showed a gas line running through the 80-foot point – the area in which Box 403 was to be installed – and told North State to stop the bore tunnel at 75 feet. But Box 403 could not [be] installed at the 75-foot point because it would have conflicted with a second gas line – an 8-inch high pressure line that fed Dominion's regulator station in the northwest quadrant.

26. North State submitted its first two pay applications on January 23, 2020. The Town paid North State $74,254.70 for pay application one and $49,577.50 for pay application two.

27. On January 27, 2020, North State asked AMT to hold bi-weekly meetings with all utility owners to review potential utility conflicts.

28. On February 4, 2020, North State and AMT representatives met on site to discuss the utility conflicts on the Project, which included gas lines, signal poles, power poles, and phone lines that prevented installation of the planned drainage system.

29. On February 17, 2020, North State submitted a third pay application for $61,801.40. The Town did not pay the third pay application.

(Internal citations omitted).

As a result of the utility conflicts, work on the Project was paused, while the impasse between North State and the Town and its subcontractors continued:

> 30. At a March 3, 2020, progress meeting, North State and AMT agreed that, because of the underground gas line conflicts, North State would demobilize and leave the site and return when the conflicts were resolved. (A supplemental agreement for demobilization and remobilization was discussed but never implemented.)
>
> 31. After ensuring erosion control measures were in place, North State demobilized and left the site on March 6, 2020.
>
> 32. On March 9, 2020, Kemp sent AMT a revised plan that purported to resolve the Project's gas line conflicts by adding a curb and gutter in the northwest quadrant. North State's supervisor told the [Project E]ngineer the revised plan would not resolve the conflicts. He pointed out that the gas lines in the northwest quadrant still blocked the Project's drainage system — the controlling operation.
>
> 33. On March 20, 2020, North State submitted its fourth pay application, requesting $70,856.00.
>
> 34. The Town did not pay the fourth pay application.
>
> 35. AMT relayed North State's concerns and a drawing to Kemp on April 24, 2020. Kemp's engineer/designer acknowledged that the proposed field adjustment moved boxes in the northwest quadrant to a point where drainage had to flow uphill, but he did not address North State's concerns about the gas line conflicts.
>
> 36. The [Project E]ngineer sent North State a concern for progress letter on May 22, 2020, which said in pertinent part "We are currently not aware of any conflicts or issues delaying your work."
>
> 37. None of the utility conflicts known to the Town in February 2020 had been resolved by May 22, 2020.
>
> 38. The North State supervisor repeatedly expressed concerns to the [Project E]ngineer that Kemp's redesign did not correct the utility conflicts. He repeatedly asked that Kemp and the Town's engineer meet with North State,

> AMT, and the utility companies to discuss the redesign of the Project and the utility conflicts.

(Internal citations omitted).

The parties reconciled their concerns enough to recommence work on the Project in August 2020, whereupon the utility conflicts immediately resumed:

> 41. Assured by the [Project E]ngineer that Kemp's redesign would avoid the gas line conflicts, North State remobilized and returned to the Project site on August 20, 2020.
>
> 42. As a first step, North State "potholed" in the northwest quadrant, looking for potential gas line conflicts. North State sent photos to AMT along with gas line locations and depths.
>
> 43. On August 24, 2020, the [Project E]ngineer told the North State supervisor that North State could file a claim for more time because of the utility conflicts.
>
> 44. On August 28, 2020, North State began trying to implement Kemp's redesign by making an open cut on Campus Lane to install part of the drainage system.
>
> 45. The AMT inspector on site stopped the operation when he determined that the Dominion 8" high pressure gas main was still in direct conflict with the projected location of Box 403 in the southwest quadrant.

(Internal citations omitted).

The resurfaced utility dispute brought the Project to another standstill, and the parties' conflict escalated to the point that North State once again demobilized, and the Town considered default:

> 46. On September 1, 2020, representatives of North State, AMT, Dominion, and NCDOT met on site to discuss the gas line conflicts. Everyone agreed the Dominion gas lines were in conflict with the planned drainage system in the northwest and southwest quadrants of the intersection. Some of the gas lines blocked the drainage system as designed; and, if the intersection was realigned as designed, some of the gas lines would lie dangerously close to the road surface.

> 47. The Dominion representative told the Town it had two options if it wanted to continue the Project: completely redesign the plans or have Dominion relocate the gas lines in conflict with the planned drainage system. (The Dominion representative said there had been a meeting between the Town and Dominion on site two years earlier, and the Town's representative had told Dominion there were no conflicts between Dominion's lines and the planned drainage system.)
>
> 48. North State cleaned up the erosion control on site, demobilized, and left the site on September 4, 2020.
>
> 49. On September 11, 2020, the North State supervisor sent the [Project E]ngineer a lengthy and detailed email explaining why North State was prevented from progressing on the Project and requesting a suspension of the Project retroactive to February 2020.
>
> 50. The [Project E]ngineer replied "Thanks Chris. Yes this is what I was looking for- laying everything out from the contractor's perspective so we can address each issue point by point and figure out together how to go about getting the work completed."
>
> 51. On September 11, 2020, the Town sent North State a letter stating the Town was contemplating default.

(Internal citations omitted).

By this point, as the trial court adroitly summarized, there were utility conflicts preventing North State from working in all four quadrants of the Project work site:

> 52. North State could not work in the *northeast quadrant* of the Project because an underground AT&T line conflicted with driveway pipes in the plans. Any other work in that quadrant would have been out of the plans' sequence and would have sent storm water toward the basement of a nearby residence.
>
> 53. North State was prevented from performing the planned work in the *northwest quadrant* because multiple gas lines blocked installation of the pipes and boxes in the drainage system as designed.

> 54. North State could not work in the *southeast quadrant* because the existing drainage system sent storm water through the quadrant, and, if North State brought in more fill as suggested by AMT, it would cause the intersection to flood.
>
> 55. North State could not work in the *southwest quadrant* because gas lines and signal poles blocked installation of the pipes and boxes of the planned drainage system.

(Emphases added) (internal citations omitted).

Nevertheless, the Town proposed additional work for the Project that North State could perform, although beyond the scope of the Contract:

> 56. The Town and AMT believed in September 2020 that Kemp could re-design its plans to avoid the gas line conflicts. To that end, they suggested North State do exploratory digging in the intersection.
>
> 57. Exploratory digging was outside North State's scope of work in the Contract. And North State had already potholed in the areas where AMT and the Town wanted the exploratory digging to be done.

(Internal citations omitted).

The parties were at a deadlock, with the Town ultimately refusing to terminate the Contract and defaulting North State:

> 60. The Town's principal engineer never went to the site while North State was working on the Project.
>
> 61. North State's attorney asked the Town to meet on site with AMT, Kemp, and the utility companies to find solutions to the utility conflicts. Alternatively, the attorney asked that the Contract be terminated pursuant to Standard Specification § 108-13.
>
> 62. The Town refused to meet and rejected North State's request to terminate the Contract.
>
> 63. On October 5, 2020, North State's supervisor sent the [Project E]ngineer an email requesting updates on the relocation of the gas line, AT&T line, and overhead utility lines. [The Project E]ngineer never responded.

64. The Town defaulted North State on October 21, 2020.

(Internal citations omitted).

North State filed a complaint against the Town on 27 April 2021, which it amended on 3 November 2021. North State alleged that the Town breached the Contract and sought damages as well as a declaration that the Contract had been terminated. Meanwhile, the Town maintained its interest in completing the Project; yet, it was ultimately forced to ask Dominion to relocate its gas lines:

> 66. After it had defaulted North State, and North State had left the site, the Town, including its principal engineer, met with AMT, NCDOT, Dominion, and other utilities and discussed how to complete the Project.
>
> 67. After it defaulted North State, the Town did not immediately attempt to relet the Project.
>
> 68. The Town did not order further surveying of the Project area until March 3, 2021.
>
> 69. Ultimately, NCDOT rejected the Town's new plan to work around the gas line conflicts in the intersection. For instance, the planned drainage pipe under Campus Lane still could not be installed due to a gas line conflict that prevented the pipe from being placed in that location.
>
> 70. In 2022, the Town asked Dominion to relocate its gas lines.
>
> 71. In May 2022, Dominion relocated the gas lines in the intersection. The gas lines and new regulator station were moved completely out of the Project area.
>
> 72. Kemp completed its new plans in March 2022.
>
> 73. The new drainage summary (used to order precast pipes and boxes) in Kemp's plans was materially different from the drainage summary in the original plans dated March 12, 2018.
>
> 74. The new plans incorporated the work completed by North State.

(Internal citations omitted).

On 13 December 2021, the Town filed its answer and counterclaims, in which it alleged that North State breached the Contract and sought

damages as well as liquidated damages. Both parties moved for summary judgment on 5 May 2023; the trial court denied the parties' motions on 30 May 2023.

This matter came on for bench trial in Iredell County Superior Court on 13 June 2023. On 10 July 2023, the trial court entered its judgment, which included the above-quoted findings of fact and the following conclusions of law:

> 2. The Town materially breached the parties' contract.
>
> a. The Town failed to identify and "make arrangements for the necessary adjustments of all affected public or private utility facilities," as required by . . . Standard Specification §[ ]105-8.
>
> b. The Dominion gas lines in conflict with the planned drainage system were affected public utilities.
>
> c. The Town is responsible for the mistakes and omissions of Kemp, Stewart, and AMT, each of which was an agent of the Town, acting in the normal course of its employment.
>
> d. The Town consciously and repeatedly refused to acknowledge and deal with the substantial conflicts posed by the Dominion gas lines. NCDOT rejected the Town's redesigned plans because they would not resolve the gas line conflicts. In essence, NCDOT had to force the Town to ask Dominion to relocate its gas lines.
>
> e. The Town failed to pay North State sums owed under the Contract for work satisfactorily completed.
>
> 3. The Town's breach of contract caused North State to suffer actual damages totaling $132,657.40.
>
> a. North State is entitled to be paid for the work it satisfactorily completed on the Project.
>
> b. The Town breached the Contract by not paying North State for pay applications 3 and 4.
>
> 4. The Town should have terminated the Contract pursuant to Standard Specification §[ ]108-13(A)(2) . . . .
>
> b. North State could not complete the work in accord with the Contract because of unanticipated conditions at the site.

c. The Project could not be completed without a major relocation of the Dominion gas lines.

d. North State would have been unduly delayed in completing the [P]roject by reason of the unanticipated conditions and the necessary changes in the plans' design.

e. The Town's refusal to terminate the Contract was unreasonable and amounts to an abuse of its discretion.

5. North State did not breach the parties' contract.

a. The Town's failure to meet the requirements of §[ ]105-8 was a material breach of the parties' contract. The Town's breach excused further performance by North State and prevented North State from performing its obligations under the Contract.

b. The Town was not justified in defaulting North State.

6. The Town is not entitled to recover compensatory damages from North State.

7. The Town is not entitled to recover liquidated damages from North State. The Town and its agents caused the delays in the completion of the Project by their actions, omissions, negligence, and delays. Standard Specification §[ ]108-11.

The court entered judgment against the Town "in the principal amount of $132,657.40 plus interest at the judicial rate from October 21st, 2020." As of the entry of the judgment, the Project was "not yet completed."

The Town timely filed notice of appeal.

II. Discussion

The Town primarily argues on appeal that the trial court "erred when it declined to give effect to the Authority of Engineer term" in the Contract. (Internal quotation marks omitted). It further argues that the court erred by finding that the Town breached the Contract and that North State did not. We disagree.

A. Standard of Review

"When reviewing a judgment from a bench trial, our standard of review is whether there is competent evidence to support the trial

court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Carolina Marlin Club Marina Ass'n v. Preddy*, 238 N.C. App. 215, 220, 767 S.E.2d 604, 608 (2014) (cleaned up), *disc. review denied*, 368 N.C. 279, 776 S.E.2d 193 (2015). "The trial court's findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *Id.* (cleaned up). Unchallenged findings of fact are binding on appeal. *Id.* at 221, 767 S.E.2d at 608.

"An issue of contract interpretation is a question of law" that this Court reviews de novo. *D.W.H. Painting Co. v. D.W. Ward Constr. Co.*, 174 N.C. App. 327, 330, 620 S.E.2d 887, 890 (2005).

B. Analysis

The Town argues that the trial court erred "because its contract interpretation overlooked the Authority of Engineer term altogether. The court made no findings about the term, nor did it make any findings about Stephenson's vital role as the project engineer." (Internal quotation marks omitted).

As our Supreme Court has explained, disputes in construction cases—such as the case at bar—may initially be referred to a project architect or engineer:

> In building and construction contracts the parties frequently provide that the completion, sufficiency, classification, or amount of the work done by the contractor shall be determined by a third person, usually an architect or engineer. Such stipulations which, in their origin, were designed to avoid harassing litigation over questions that can be determined honestly only by those possessed of scientific knowledge, have generally been held valid. This is true even though the architect or engineer is employed by the owner . . . .

Welborn Plumbing & Heating Co. v. Randolph Cty. Bd. of Educ., 268 N.C. 85, 89–90, 150 S.E.2d 65, 68 (1966) (citation omitted). "[W]here the parties stipulate . . . that the determination of the architect or engineer shall be final and conclusive," it is well settled that "both parties are bound by his determination of those matters which he is authorized to determine, except in case of fraud or . . . gross mistake." *Id.* at 90, 150 S.E.2d at 68 (citation omitted).

Here, the Authority of Engineer Term vested the Project Engineer with the final authority to resolve certain disputes:

> The [Project] Engineer will decide all questions which may arise as to the quality and acceptability of work performed and as to the rate of progress of the work; all questions which may arise as to the interpretation of the contract; and all questions as to the acceptable fulfillment of the contract on the part of [North State]. H[er] decision shall be final and [s]he shall have executive authority to enforce and make effective such decisions and orders as [North State] fails to carry out promptly.

But rather than overlooking the Authority of Engineer Term, as the Town asserts, the trial court properly recognized that the term is inapplicable to the dispositive issues in this case: whether the Town breached the Contract, and if so, whether such breach excused any responsive breach by North State. *See McClure Lumber Co. v. Helmsman Constr., Inc.*, 160 N.C. App. 190, 198, 585 S.E.2d 234, 239 (2003) ("As a general rule, if either party to a bilateral contract commits a material breach of the contract, the non-breaching party is excused from the obligation to perform further.").

Recognizing this flaw in its argument, the Town argues in its reply brief that it did not breach Standard Specification § 105-8's "plain terms," which it maintains did "not impose a non-delegable duty on [the Town] to locate every utility or forbid assignment." The Town asserts that it did " 'notify' known affected utilities and adjust[ed] work as needed before or during construction"—an assertion flatly contradicted by the trial court's unchallenged findings (1) that "[n]one of the utility conflicts known to the Town in February 2020 had been resolved by May 22, 2020," and (2) that the Town consistently ignored or rejected North State's concerns about the numerous utility conflicts until—and even after—North State requested that the Contract be terminated for impossibility and the Town defaulted North State.

The Town further contends that the Project Engineer told North State that she interpreted Standard Specification § 105-8 as requiring "North State to perform certain exploratory digging" and that "[s]he also told North State, on multiple occasions, that it could work in the area while the engineers resolved the utility conflicts." However, this appeal to the Project Engineer's opinions is unavailing.

First, as quoted above, the Authority of Engineer Term covers a limited set of issues. North State aptly notes that the Project Engineer "is not given authority to determine whether the Town, as opposed to North State, has fulfilled its obligations under the Contract." That determination is therefore within the ambit of the trial court, not the Project

Engineer—and the Town's breach "relieved [North State] from the obligation to perform." *Ball v. Maynard*, 184 N.C. App. 99, 108, 645 S.E.2d 890, 897, *disc. review denied*, 362 N.C. 86, 656 S.E.2d 591 (2007).

Moreover, the Project Engineer's own testimony belies the Town's confidence that her opinion favors it. At trial, the Project Engineer testified that she was "not sure whether or not it was impossible" for North State "to work around" the utility conflicts; that "North State complied with [§] 105-8 as far as potholing the utilities"; that the exploratory digging that the Town suggested North State perform was "outside of the scope of" the Contract and would have required a supplemental agreement; and that it was not "possible" for her to judge whether either party had breached the Contract and owed damages to the other. Thus, insofar as the Town leans on the Project Engineer's favorable opinion for support in this matter, such reliance is misplaced.

Notably, the Town has not challenged any of the trial court's thorough and detailed findings of fact, many of which are quoted above, which are thus binding on appeal. *See Carolina Marlin Club*, 238 N.C. App. at 221, 767 S.E.2d at 608. Instead, the Town challenges the trial court's conclusions that the Town (1) "consciously and repeatedly refused to acknowledge and deal with the substantial conflicts posed by the Dominion gas lines," and (2) "should have terminated the Contract pursuant to Standard Specification §[ ]108-13(A)(2)." However, as these arguments are also based on the trial court's supposed overlooking of the Authority of Engineer Term, they lack merit for the reasons explained above.

The Town also challenges the trial court's conclusion that the Town was "responsible for the mistakes and omissions of Kemp, Stewart, and AMT, each of which was an agent of the Town, acting in the normal course of its employment." The Town undergirds this challenge with the assertion that "[i]n general, a municipality is not liable for actions taken by its independent contractors." To support this proposition, the Town cites a series of cases. *See Drake v. City of Asheville*, 194 N.C. 6, 138 S.E. 343 (1927) (personal injury); *City of Winston-Salem v. Ferrell*, 79 N.C. App. 103, 338 S.E.2d 794 (1986) (inverse condemnation); *Horne v. City of Charlotte*, 41 N.C. App. 491, 255 S.E.2d 290 (1979) (property damage). In so doing, the Town misapprehends the import of the challenged conclusion. The Town was not being held liable under any of these theories for the actions taken by its independent contractors; rather, this conclusion—and the unchallenged findings of fact upon which it is based—supports the trial court's determination that the Town breached the Contract.

"Municipal contracts are measured by the same tests and are subject to the same rights and liabilities as are other contracts. It follows that a city may be sued on its valid contracts . . . ." 10A Eugene McQuillin, *The Law of Municipal Corporations* § 29:134 (3d ed., rev. vol. 2018) (footnote omitted). "Thus, it is established that, if a contract has been violated by the municipality, the other party may at once sue to recover damages for its breach . . . in the same manner as though the contract had been made with an individual, firm or private corporation." *Id.* (footnote omitted); *see also Knotville Vol. Fire Dep't v. Wilkes County*, 94 N.C. App. 377, 379, 380 S.E.2d 422, 423 (recognizing that local governments, "no less than others, are legally bound by their valid contracts"), *disc. review denied*, 325 N.C. 432, 384 S.E.2d 538 (1989).

In that a municipality's alleged breach of a valid contract may be determined using ordinary contract principles, North State directs us to *Brown v. Bowers Construction Co.*, in which our Supreme Court recognized that a contractor could not "escape by assignment" of its contractually obligated duties to a subcontractor. 236 N.C. 462, 469, 73 S.E.2d 147, 152 (1952). "The assumption of the assignor's duty by the assignee merely gives to the other party a new and added security." *Id.* at 470, 73 S.E.2d at 152. We agree with North State that the Town can no more "escape by assignment" its contractually obligated duties than can any other contracting party. *Id.* at 469, 73 S.E.2d at 152. The Town's argument concerning purported liability for its agents accordingly misses the mark.

Further, even if we assume, *arguendo*, that the trial court erred by concluding that the Town was "responsible for the mistakes and omissions of Kemp, Stewart, and AMT," the court's remaining conclusions of law amply support its determination that the Town breached the Contract, thereby excusing North State from its contractual obligations. Ultimately, "there is competent evidence to support the trial court's findings of fact and . . . the findings support the conclusions of law and ensuing judgment." *Carolina Marlin Club*, 238 N.C. App. at 220, 767 S.E.2d at 608 (citation omitted). The Town's various arguments to the contrary are meritless.

III. Conclusion

For the foregoing reasons, the trial court's judgment is affirmed.

AFFIRMED.

Judges GRIFFIN and FLOOD concur.

NORTH CAROLINA DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF ENERGY, MINERAL, AND LAND RESOURCES, PETITIONER
v.
WAKE STONE CORPORATION, RESPONDENT

No. COA24-914

Filed 18 June 2025

1. Parties—challenge to mining permit—intervention of right—permissive intervention—conditions not met

Where appellants (a nonprofit entity dedicated to preserving William B. Umstead State Park and a couple who owned a home adjacent to the Park) sought to intervene in a contested case between the North Carolina Department of Environmental Quality (NCDEQ) and respondent (a company operating a quarry near the Park and seeking to modify a mining permit to expand its operations), the superior court properly affirmed the denial of appellants' motions by the administrative law judge (ALJ). The individual appellants failed to show a direct and immediate interest in the matter—as required to intervene of right pursuant to Civil Procedure Rule 24(a)(2)—because their basis for challenging the mining permit (a direct and substantial physical hazard to their home) differed from that of NCDEQ (significant adverse effects on the Park); further, they were not entitled to permissive intervention pursuant to Rule 24(b)(2) because there was no common question of law or fact between their asserted interest and the contested case. In addition, the interests of the nonprofit, which sought only permissive intervention, were adequately represented by NCDEQ such that the superior court was correct to determine that the ALJ did not abuse his discretion in denying the nonprofit's motion to intervene.

2. Appeal and Error—mootness—intervention in contested case—settlement of controversy

Where appellants (a nonprofit entity dedicated to preserving William B. Umstead State Park and a couple who owned a home adjacent to the Park) sought to intervene in a contested case between the North Carolina Department of Environmental Quality (NCDEQ) and respondent (a company operating a quarry near the Park and seeking to modify a mining permit to expand its operations), the superior court properly affirmed the denial of appellants' motions to intervene by the administrative law judge. Even if appellants arguably should have been permitted to intervene in

the contested case, appellants' claims were moot by the time of the superior court's order because the relief appellants sought was no longer available. By settling the dispute with respondent and voluntarily issuing the requested permit, NCDEQ ended the controversy from which appellants would have appealed to the superior court (had they been allowed to intervene in the matter).

Appeal by third-party petitioners from order entered 19 February 2024 by Judge Gale M. Adams in Wake County Superior Court. Heard in the Court of Appeals 18 March 2025.

Calhoun, Bhella & Sechrest, LLP, by James L. Conner, II and Shannon M. Arata, for petitioners-appellants The Umstead Coalition, Randal Dunn, and Tamara Dunn.

Ward & Smith, P.A., by A. Charles Ellis and Hayley R. Wells, for respondent-appellee Wake Stone Corporation.

Attorney General Jeff Jackson, by Assistant Attorney General Carolyn McLain and Assistant Attorney General Kyle Peterson, for petitioner-appellee North Carolina Department of Environmental Quality.

DILLON, Chief Judge.

Appellants The Umstead Coalition and Randal and Tamara Dunn wish to challenge the issuance of a mining permit to Wake Stone Corporation ("Wake Stone"). To accomplish this, they moved to intervene in a contested case hearing between Wake Stone and the North Carolina Department of Environmental Quality, Division of Energy, Mineral, and Land Resources (the "Division"). Appellants' motions were denied in the administrative proceeding, and their appeal of that denial was affirmed by the Wake County Superior Court.

Appellants appeal the superior court's order in its entirety, arguing that they should have been allowed to intervene, that the case is not moot, and that the Administrative Law Judge ("ALJ") erred in reversing the Division's denial of the permit. For the reasoning below, we affirm the order of the superior court.

I. Background

Wake Stone operates Triangle Quarry, a mining operation located adjacent to William B. Umstead State Park and the Raleigh-Durham

Airport in Wake County. In April 2020, Wake Stone applied to the Division to modify its mining permit under The Mining Act of 1971, N.C.G.S. § 74-46 *et seq.*, to expand its operations onto a parcel of land called the Odd Fellows Tract.

In February 2022, the Division issued its decision denying Wake Stone's application.

In March 2022, Wake Stone timely petitioned for a contested case hearing before an ALJ pursuant to N.C.G.S. § 150B-23(a) (2023). At this stage, The Umstead Coalition (a nonprofit organization dedicated to preserving Umstead Park) and the Dunns (Coalition members who own a home adjacent to the Odd Fellows Tract) (collectively, "Appellants") filed motions to intervene as parties pursuant to Rule 24 of our Rules of Civil Procedure. The ALJ denied each motion, but did allow The Umstead Coalition to file an *amicus curiae* brief before the hearing.

In August 2023, the ALJ issued his decision, reversing the Division's denial of the permit on four independent grounds. The next month, in September 2023, the Division filed a petition for judicial review of the ALJ's decision but subsequently settled with Wake Stone and withdrew its petition with prejudice in November 2023.

In the meantime, on 11 September 2023, Appellants filed petitions for judicial review contesting both the ALJ's denial of their motions to intervene and the ALJ's reversal of the Division's denial of the permit application. In February 2024, in a forty-six-page order, the trial court determined Appellants' petitions were mooted in their entirety by the settlement of the underlying controversy between Wake Stone and the Division and the issuance of Wake Stone's permit. The trial court further reasoned in its order that, even if Appellants' petitions were not moot, the ALJ did not err either in denying the motions to intervene or in reversing the Division's denial of the permit. Appellants appealed.

II. Analysis

On appeal, Appellants argue they should have been allowed to intervene as parties, that their petitions for judicial review were not moot, and that the ALJ's reversal of the Division's denial of Wake Stone's permit application was erroneous. We address each argument in turn.

A. Intervention of Right and Permissive Intervention

[1] Rule 24 of our Rules of Civil Procedure governs intervention of parties. N.C.G.S. § 1A-1, Rule 24 (2023). Rule 24(a)(2) provides that an applicant shall be permitted to intervene if he

> claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Id. § 1A-1, Rule 24(a)(2).

Our Supreme Court interprets Rule 24 to require a putative intervenor to "show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties." *Virmani v. Presbyterian Health*, 350 N.C. 449, 459 (1999). To show a "direct and immediate interest," the putative intervenor must prove "he will either gain or lose by the direct operation and effect of the judgment[.]" *Strickland v. Hughes*, 273 N.C. 481, 485 (1968). "[A]n indirect, inconsequential, or a contingent" interest is not sufficient. *Id.*

Rule 24(b)(2) provides for permissive intervention "[w]hen an applicant's claim or defense and the main action have a question of law or fact in common." N.C.G.S. § 1A-1, Rule 24(b)(2). Permissive intervention is a matter of the court's discretion, considering "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* A discretionary ruling under Rule 24(b)(2) "is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777 (1985).

1. The Dunns

The Dunns moved to intervene under both Rules 24(a)(2) and 24(b)(2). As to Rule 24(a)(2), the superior court found that the Dunns failed to show a "direct and immediate interest" because the Dunns' basis for challenging the mining permit was not the same as that of the Division. The Division denied Wake Stone's permit application under N.C.G.S. § 74-51(d)(5), which allows denial based on "a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area." As this was the sole basis for the Division's denial, Wake Stone's effect on the purposes of Umstead Park—namely, conservation, recreation, and education—was the only interest at issue in the contested case hearing. The Dunns, however, applied to intervene to challenge the permit application pursuant to N.C.G.S. § 74-51(d)(4), which allows denial based on "a direct and substantial physical hazard to . . . a neighboring dwelling

house." Therefore, the ALJ found, and the superior court affirmed, that the Dunns were not entitled to intervene because they did not allege a direct and immediate interest.

We conclude the trial court did not err. While Appellants are correct that intervenors are free to introduce new issues beyond the scope of the original case once they become a party, *see Leonard E. Warner, Inc. v. Nissan Motor Corporation in U.S.A.*, 66 N.C. App. 73, 79 (1984), this rule does not extend to *putative* intervenors. As the Dunns were not yet parties to the contested case hearing, any interest warranting intervention under Rule 24(a)(2) must have been at issue at the time of their motion to intervene. The Dunns' interest in the case—the potential physical hazard posed to their home—was properly identified as an indirect interest in the dispute between Wake Stone and the Division because it did not relate to the mining operation's effect on Umstead Park. *See Holly Ridge Assocs. v. N.C. Dep't of Env't & Nat. Res.*, 361 N.C. 531, 538 (2007) (finding that a direct interest must be one that relates to the matter at issue in the contested case and not merely an "underlying issue" affected by the ruling).

As to Rule 24(b)(2), the ALJ determined, and the superior court affirmed, the Dunns were not entitled to permissive intervention because there was no common question of law or fact between the contested case and the Dunns' asserted interest. We agree. The denial criteria raised by the Division and the Dunns—adverse effect on the purposes of Umstead Park and physical hazard to the Dunns' house—are distinct legal questions involving substantially different factual inquiries. The Dunns' characterization of the question of law here as "whether the denial of [Wake Stone]'s application was proper pursuant to the provisions of [N.C.G.S. § 74-51]" erroneously conflates the two distinct legal and factual inquiries raised. We conclude that there is no basis for finding that the ALJ reached his decision arbitrarily.

2. The Umstead Coalition

As an initial matter, we agree with the superior court that The Umstead Coalition moved to intervene solely pursuant to Rule 24(b) (permissive intervention). As such, The Umstead Coalition cannot now raise Rule 24(a) as a ground for intervention. *See Plemmer v. Matthewson*, 281 N.C. 722, 725 (1972). Regardless, there was certainly sufficient evidence to find that The Umstead Coalition's interest was adequately represented by the Division. The Umstead Coalition asserts that the Division is "not well-equipped to assess the specific impact of proposed mining operations on the Park and its environs." However, the

Division is explicitly tasked by statute to do just that. *See* N.C.G.S. §§ 74-48, -50, -51(d)(5) (2023). And in doing so, the Division consulted the North Carolina Division of Parks and Recreation—the agency that has the primary responsibility of preserving and protecting Umstead Park—extensively. Therefore, the evidence shows that the Division adequately represented the interest of protecting and preserving Umstead Park, so The Umstead Coalition would not be entitled to intervene pursuant to Rule 24(a).

We agree that the ALJ did not abuse his discretion by denying The Umstead Coalition's motion for permissive intervention and instead granting leave to file an *amicus curiae* brief. The ALJ denied The Umstead Coalition's motion for permissive intervention because it would cause the parties undue delay or prejudice. Specifically, the ALJ believed that adding The Umstead Coalition as a party after the scheduling order was issued would require deadlines to be extended, that it would burden Wake Stone with additional discovery demands, and that it would hinder mediation or settlement negotiations. The superior court determined that each of these concerns was reasonable based on the administrative record. We agree and accordingly conclude that the ALJ's decision to deny intervention was not so arbitrary that it could not have been the result of a reasoned decision. Moreover, we find that the ALJ's decision to allow The Umstead Coalition to submit an *amicus curiae* brief further substantiates that his decision was reasoned, because it allowed The Umstead Coalition to present any arguments or expertise not captured by the Division's case that might have been relevant to the ALJ's final decision without risking undue delay or prejudice to the parties or the proceeding. Therefore, we affirm the superior court's finding that the ALJ did not abuse his discretion in denying The Umstead Coalition's motion to intervene pursuant to Rule 24(b)(2).

B. Mootness

[2] Assuming *arguendo* that Appellants should have been permitted to intervene as parties to the contested case, we nevertheless agree with the judgment of the superior court that Appellants' claims are moot because the relief sought is no longer available.

Our Supreme Court has stated that our courts "will not hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist." *In re Swindell*, 326 N.C. 473, 474–75 (1990) (quotation omitted). This is so because "the existence of an actual controversy is necessary to the court's subject matter jurisdiction." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585

(1986). "If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action." *In re Peoples*, 296 N.C. 109, 148 (1978).

A case or controversy is 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 (2003) (quotation omitted). Our Court has previously determined that mootness occurs where, during an appeal of a decision denying a permit, the permit in question is voluntarily issued. In *Carolina Marina v. New Hanover County Board of Commissioners*, 207 N.C. App. 250 (2010), the superior court reversed a Board of Commissioner's decision to deny the plaintiff a special use permit. *Id.* at 251. A neighbor of the plaintiff, whom the superior court allowed to intervene in the case, appealed from the superior court's order. *Id.* While that appeal was pending, the Board voluntarily granted the permit to the plaintiff pursuant to the superior court's order. *Id.* at 252. This Court dismissed the intervenor's appeal, concluding that the Board's subsequent decision to grant the permit mooted the issues presented on appeal. *Id.* at 254–55.

Here, Appellants sought to intervene in order to defend the Division's denial of Wake Stone's mining permit. As in *Carolina Marina*, by settling its dispute with Wake Stone and voluntarily issuing the permit, the Division ended the controversy from which Appellants would have appealed had they been parties in the case. In other words, once the Division decided to grant the permit, a decision from this Court finding that the Division's original denial was lawful would have no legal effect—the permit would still be granted. To wit, the settlement mooted the case in its entirety, and Appellants no longer have a live controversy in which to intervene.

As we have determined that the Division's decision to issue Wake Stone's permit has mooted any issues pertaining to the Division's original denial, we decline to address Appellants' remaining arguments.

AFFIRMED.

Judges CARPENTER and GRIFFIN concur.

THE NORTH CAROLINA STATE BAR, PLAINTIFF
v.
MARTIN MUSINGUZI, ATTORNEY, DEFENDANT

No. COA24-661

Filed 18 June 2025

1. Appeal and Error—appellate jurisdiction—order from State Bar Disciplinary Hearing Commission—timely notice of appeal

The Court of Appeals had jurisdiction to review an attorney's appeal from an order of discipline entered against him by the State Bar Disciplinary Commission, where the attorney timely filed his notice of appeal within thirty days of the order's entry in compliance with N.C.G.S. § 7A-29(a) (allowing appeals from any final order of the State Bar) and Rule 18(b)(2) of the Rules of Appellate Procedure (governing the timing for appeals from administrative tribunal decisions).

2. Jurisdiction—disciplinary—attorney licensed out of state—statutory basis for jurisdiction—limited to attorneys admitted to practice in North Carolina

An order of discipline from the North Carolina State Bar Disciplinary Hearing Commission (DHC) was reversed where the DHC lacked subject matter jurisdiction over defendant, since N.C.G.S. § 84-28 limits the DHC's disciplinary jurisdiction to any attorney "admitted to practice law in [North Carolina]," and defendant—though he lived in North Carolina and maintained a law office there—was licensed in New York and limited his practice to federal immigration court. Importantly, the more specific language in section 84-28 controlled over the more general language in section 84-23 granting the State Bar disciplinary authority over any "licensed lawyer," which, when read in conjunction with section 84-28, necessarily referred to any lawyer licensed to practice in North Carolina.

3. Jurisdiction—disciplinary—attorney licensed out of state—Rule 8.5 of the Rules of Professional Conduct

In an action before the North Carolina State Bar Disciplinary Hearing Commission (DHC) involving an attorney (defendant) who lived in North Carolina and maintained an office there but was licensed in New York and limited his practice to federal immigration court, a disciplinary order disbarring defendant was reversed where the DHC lacked subject matter jurisdiction over defendant under Rule 8.5 of the Rules of Professional Conduct, which authorized the State Bar to discipline attorneys not licensed in North Carolina but

who "render any legal services in North Carolina." Rule 8.5 could not confer jurisdiction over defendant beyond the jurisdiction granted under N.C.G.S. § 84-28, which limited the DHC's disciplinary jurisdiction to attorneys "admitted to practice law in [North Carolina]." Furthermore, Chapter 84 defined the "practice [of] law" in terms of the specific legal services performed, not the physical location where an attorney works or meets with clients.

Appeal by defendant from orders entered 11 January 2024 and 10 June 2024 by the North Carolina State Bar Disciplinary Hearing Commission. Heard in the Court of Appeals 29 January 2025.

The North Carolina State Bar, by Deputy Counsel Robert W. Weston and Counsel Carmen H. Bannon, for plaintiff-appellee.

Dowling PLLC, by Troy D. Shelton, for defendant-appellant.

STROUD, Judge.

Defendant appeals from an Order of Discipline and an Order on Motion for Relief from Judgment and Lifting Stay from the North Carolina State Bar Disciplinary Hearing Commission. Defendant is an attorney licensed by the State of New York who practices in the federal immigration court in North Carolina, but he is not and has never been admitted to practice in the North Carolina courts. Based on the plain language of North Carolina General Statute Section 84-28, which grants "disciplinary jurisdiction" to the Disciplinary Hearing Commission over "[a]ny attorney admitted to practice law in this State[,]" the Disciplinary Hearing Commission did not have subject matter jurisdiction to issue an Order of Discipline of Defendant, so we reverse the Order of Discipline and the Order on Motion for Relief from Judgment and Lifting Stay. N.C. Gen. Stat. § 84-28 (2023).

I. Background

The facts in this case are not in dispute. Defendant is a licensed attorney who is a member of the New York Bar. He is not and has never been a member of the North Carolina State Bar ("State Bar"). He lives in North Carolina, maintains a law office in Charlotte, North Carolina, and represents clients in the federal immigration court in Charlotte. His practice is limited to federal immigration law and Defendant does not appear in North Carolina state courts, although his clientele in the immigration court "regularly included North Carolina clients." Defendant's

law practice maintained a trust account in North Carolina with Bank of America and as required by North Carolina Rule of Professional Conduct 1.15-2, this trust account was registered with the North Carolina Interest on Lawyer's Trust Account ("IOLTA") program.[1] In North Carolina, all trust accounts used by attorneys must be registered with IOLTA. *See* 27 N.C. Admin. Code 1D.1316. If a lawyer's trust account has insufficient funds, the bank at which the account is maintained is required by law to report the insufficient funds to the State Bar. *See* N.C. R. Pro. Conduct 1.15-2(f).

In 2017, Bank of America sent the State Bar notices of insufficient funds in Defendant's trust account. The notices of insufficient funds resulted from Defendant's misappropriation of funds during his representation of clients A.B. and P.M., both North Carolina residents.[2] Ultimately, the State Bar "opened grievance file number 17G0374 against [Defendant] after receiving" the notice of insufficient funds. On 27 June 2017, the State Bar served Defendant with a "Letter of Notice in 17G0374" and he responded to the Letter of Notice. The Disciplinary Hearing Commission ("DHC") found that as the investigation progressed, Defendant

> continued to acknowledge both the State Bar's disciplinary jurisdiction over him and his obligation to comply with the North Carolina Rules of Professional Conduct, including a Consent Order of Preliminary Injunction he executed in an action the State Bar brought against him in Wake County Superior Court, bearing the caption *The North Carolina State Bar v. [Defendant]*, File No. 17-CVS-15617.

The "consent injunction enjoined [Defendant] from handling entrusted funds." The State Bar also reported Defendant's trust account issue to New York's First Judicial Department Attorney Grievance Committee ("Attorney Grievance Committee"). On 26 September 2019, the Attorney Grievance Committee sent a letter to the State Bar stating it had "completed its investigation" and "issued a Letter of Admonition" to

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1. IOLTA was created by order of the Supreme Court of North Carolina on 23 June 1983 and was implemented by the North Carolina Bar Association in January 1984. *See* Amendments to the Code of Professional Responsibility, 307 N.C. 707, 716-20. It is currently administered by the Board of Trustees of the North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts, which is a standing committee of the North Carolina State Bar Council. *See* 27 N.C. Admin. Code 1D.1302.

2. The State Bar does not contend that it has disciplinary jurisdiction over Defendant based on his maintenance of an IOLTA account.

Defendant. Later, Defendant "stopped participating in the . . . State Bar disciplinary process at all."

On 19 July 2022, the State Bar filed a complaint against Defendant with the Disciplinary Hearing Commission ("DHC"). The State Bar alleged Defendant failed to respond to its grievance and requested Defendant be disciplined by the DHC under North Carolina General Statute Section 84-28. Defendant did not respond to the complaint and the State Bar eventually "moved for entry of default against [Defendant], which [the DHC] entered" on 9 May 2023. The State Bar filed an amended motion for entry of default on 22 August 2023 and an amended entry of default was entered 23 August 2023. On 11 January 2024, the DHC entered an Order of Discipline ordering that "Defendant, Martin Musinguzi, is hereby DISBARRED from the practice of law." The Order of Discipline also required Defendant to "comply with all provisions of 27 N.C. Admin. Code 1B.0128" and to take other actions to terminate his law practice.

On 2 February 2024, Defendant filed a Motion for Relief from Judgment under Rules 55(d) and 60(b)(4) of the North Carolina Rules of Civil Procedure alleging that the State Bar and the DHC "lack jurisdiction and authority to discipline someone who is not a member of the . . . State Bar." On 5 February 2024, Defendant filed a notice of appeal from the Order of Discipline to this Court. On 12 February 2024, the parties filed a Joint Motion to Stay the Order of Discipline pending consideration of Defendant's Motion for Relief from Judgment. On the same date, this Court entered an order holding the appeal in abeyance and remanding the matter to the DHC to consider the Motion for Relief from Judgment and certify its order to the Court of Appeals.[3]

After hearing on the Motion for Relief from Judgment, the DHC entered an Order on Motion for Relief from Judgment and Lifting Stay ("Order on Motion for Relief") on 10 June 2024. The DHC concluded that "[a]s a licensed lawyer practicing in North Carolina, [Defendant] is subject to the disciplinary jurisdiction of the . . . State Bar under N.C. Gen. Stat. § 84-23(a) and Rule 8.5(a) of the Rules of Professional Conduct, and this Hearing Panel has subject matter jurisdiction over this matter."

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3. This Court's order required DHC to consider the motion under the procedure established in *Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980), which states "[t]his procedure allows the trial court to rule in the first instance on the Rule 60(b) motion and permits the appellate court to review the trial court's decision on such motion at the same time it considers other assignments of error."

The Order on Motion for Relief did *not* amend the Order of Discipline, but stated in the findings of fact that Defendant was

> incorrect to interpret the directions in paragraphs 3 through 7 of the decretal section of the Order of Discipline as requiring him to wind down any portion of his presentation and practice in North Carolina that is permitted by federal law before federal courts. Paragraphs 3 through 7 of the decretal section of the Order of Discipline only apply to any portion of his presentation and practice in North Carolina not permitted by federal law before federal courts.

Defendant filed written notice of appeal of the DHC's Order on Motion for Relief that same day.

II. Jurisdiction

[1] The Order of Discipline was entered on 11 January 2024 and Defendant filed written notice of appeal on 5 February 2024. The Order on Motion for Relief was entered on 10 November 2024 and Defendant filed written notice of appeal that same day.

Under North Carolina General Statute Section 7A-29(a), governing "[a]ppeals of right from certain administrative agencies[,]" a defendant may appeal "any final order or decision of . . . the North Carolina State Bar under G.S. 84-28 . . . appeal as of right lies directly to the Court of Appeals." N.C. Gen. Stat. § 7A-29(a) (2023). Under Rule 18(b)(2) of our Rules of Appellate Procedure,

> [a]ny party to the proceeding may appeal from a final decision of an administrative tribunal to the appropriate court of the appellate division for alleged errors of law by filing and serving a notice of appeal within thirty days after receipt of a copy of the final decision of the administrative tribunal.

N.C. R. App. P. 18(b)(2). Thus, Defendant properly filed his notice of appeal of the Order of Discipline within 30 days of its entry in compliance with North Carolina General Statute Section 7A-29(a) and North Carolina Rule of Appellate Procedure 18(b)(2). Defendant then filed a Joint Motion to Stay the Order of Discipline on 12 February 2024 pursuant to this Court's decision in *Bell v. Martin*, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980).

As Defendant filed timely written notice of appeal of the Order of Discipline and of the Order on Motion for Relief, this Court has jurisdiction to hear Defendant's appeal of each order.

III. Analysis

Defendant contends that the State Bar does not have disciplinary jurisdiction over him because he is not a member of the State Bar and has not been "otherwise admitted to practice in North Carolina." Defendant argues the DHC does not have subject matter jurisdiction over him for three reasons: (1) "jurisdiction is barred by the disciplinary jurisdiction statute[,]" North Carolina General Statute Section 84-28; (2) "jurisdiction is barred by the Supreme Court's decision in" *Disciplinary Hearing Commission v. Frazier*, 354 N.C. 555, 556 S.E.2d 262 (2001); and (3) "jurisdiction is barred by the [State] Bar's own rules." (Capitalization altered.) Because North Carolina General Statute Section 84-28 limits the DHC's disciplinary jurisdiction to attorneys admitted to practice in this State, we reverse the DHC's Order of Discipline and Order on Motion for Relief.

A. Standard of Review

"[W]hen the pertinent inquiry on appeal is based on a question of law—such as whether the trial court properly interpreted and applied the language of a statute—we conduct de novo review." *Da Silva v. WakeMed*, 375 N.C. 1, 5, 846 S.E.2d 634, 638 (2020) (footnote omitted). Further, "[w]hether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *Hillard v. Hillard*, 223 N.C. App. 20, 22, 733 S.E.2d 176, 179 (2012) (citation and quotation marks omitted). "When conducting de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Bracey v. Murdock*, 286 N.C. App. 191, 193, 880 S.E.2d 707, 709 (2022) (citation and quotation marks omitted).

To resolve the question of the State Bar's subject matter jurisdiction over Defendant, we must consider several statutes:

> Under our canons of statutory interpretation, where the language of a statute is clear, the courts must give the statute its plain meaning. However, where a statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. Additionally, although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those

> interpretations are not binding. Our Supreme Court has also stated that
>
> > it is ultimately the duty of the courts to construe administrative statutes and they may not defer that responsibility to the agency charged with administering those statutes. While the interpretation of the agency responsible for their administration may be helpful and entitled to great consideration when the Court is called upon to construe the statutes, that interpretation is not controlling. It is the Court and not the agency that is the final interpreter of legislation.

N.C. State Bar v. Brewer, 183 N.C. App. 229, 236, 644 S.E.2d 573, 577 (2007) (citations, quotation marks, and brackets omitted). If two or more statutes apply to the same "matter or subject," we must also construe the statutes together: "It is, of course, a fundamental canon of statutory construction that statutes which are *in pari materia*, *i.e.*, which relate or are applicable to the same matter or subject, must be construed together in order to ascertain legislative intent." *Morris v. Rodeberg*, 385 N.C. 405, 409, 895 S.E.2d 328, 331 (2023) (citation, quotation marks, and ellipses omitted).

B. Statutory Basis for Disciplinary Jurisdiction of the State Bar

[2] Defendant first argues "jurisdiction is barred by the disciplinary jurisdiction statute[,]" North Carolina General Statute Section 84-28. (Capitalization altered.) Specifically, Defendant contends North Carolina General Statute Section 84-28 grants the State Bar "disciplinary jurisdiction" only as to "attorneys admitted to practice in North Carolina," and since he has not been admitted to practice in North Carolina, the State Bar has no jurisdiction to disbar him. The State Bar argues the General Assembly has granted it disciplinary jurisdiction over all "licensed lawyers" who practice in North Carolina, including Defendant, who is licensed as a lawyer by the State of New York, under North Carolina General Statute Section 84-23(a) and Rule 8.5 of the Rules of Professional Conduct. Specifically, the State Bar contends that North Carolina General Statute Section 84-23(a) grants it the authority to "regulate the professional conduct of licensed lawyers," and under Rule 8.5(a), even a lawyer not admitted in North Carolina "is also subject to the disciplinary authority of North Carolina if the lawyer renders or offers to render any legal services in North Carolina."

1. Jurisdiction Cannot be Conferred by Consent

We first note that the State Bar states in its brief that Defendant "*acknowledged the State Bar's disciplinary jurisdiction and his obligation to comply with the rules*." (Emphasis in original.) The State Bar also concedes "a litigant cannot consent to subject matter jurisdiction" but then contends Defendant's "extensive history of recognizing the State Bar's jurisdiction over his practice . . . is a significant data point demonstrating the correct, most reasonable interpretation of Chapter 84." But Defendant's initial belief about subject matter jurisdiction is simply not a relevant "data point." It is well-established that "[p]arties cannot stipulate to give a court subject matter jurisdiction where no such jurisdiction exists. A lack of jurisdiction of the subject matter may always be raised by a party, or the court may raise such defect on its own initiative." *Conner Bros. Mach. Co., Inc. v. Rogers*, 177 N.C. App. 560, 561, 629 S.E.2d 344, 345 (2006) (citations and quotation marks omitted). Thus, even if Defendant first believed the DHC had subject matter jurisdiction over this matter, his belief is immaterial and we will not consider it in this analysis. Likewise, the State Bar's interpretation of North Carolina General Statute Sections 84-23 and 84-28 and its determination that Section 84-23 grants it subject matter jurisdiction is also of limited relevance. "While the interpretation of the agency responsible for [the administration of a statute] may be helpful and entitled to great consideration when the Court is called upon to construe the statutes, that interpretation is not controlling. It is the Court and not the agency that is the final interpreter of legislation." *Brewer*, 183 N.C. App. at 236, 644 S.E.2d at 577 (citation omitted).

2. North Carolina General Statute Sections 84-23 and 84-28

Because we must construe statutes *in pari materia*, we consider North Carolina General Statute Sections 84-23 and 84-28 in the context of Chapter 84 of the North Carolina General Statutes, which is entitled "Attorneys-at-Law." N.C. Gen. Stat. Ch. 84 (2023). Article 4, entitled "North Carolina State Bar," establishes the State Bar as "an Agency of the State" in Section 84-15 and the rest of the Article sets out provisions addressing the membership in the State Bar and the organization, governance, structure, powers, and duties of the State Bar. N.C. Gen. Stat. § 84-15 (2023); *see generally* N.C. Gen. Stat. Ch. 84, art. 4.

North Carolina General Statute Section 84-16, entitled "[m]embership and privileges[,]" defines the "membership" of the State Bar. N.C. Gen. Stat. § 84-16 (2023). There are two classes of members, active and inactive:

> The active members shall be all persons who have obtained a license or certificate, entitling them to practice law in the State of North Carolina, who have paid the membership dues specified, and who have satisfied all other obligations of membership. No person other than a member of the North Carolina State Bar shall practice in any court of the State except foreign attorneys as provided by statute and natural persons representing themselves.

Id.

The governing body of the State Bar is the Council, which is created by North Carolina General Statute Section 84-17:

> The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar referred to in this Chapter as the "Council." . . . . The Council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article, the borrowing of money, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments to this Chapter, and all other matters.

N.C. Gen. Stat. § 84-17 (2023).

The powers of the Council are established by North Carolina General Statute Section 84-23:

> (a) The Council is vested, as an agency of the State, *with the authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals*. Among other powers, the Council shall administer this Article; take actions that are necessary to ensure the competence of lawyers and State Bar certified paralegals; formulate and adopt rules of professional ethics and conduct; investigate and prosecute matters of professional misconduct; expunge disciplinary actions; grant or deny petitions for reinstatement; resolve questions pertaining to membership status; arbitrate disputes concerning legal fees; certify legal specialists and paralegals and charge fees to applicants and participants necessary to administer these certification programs; determine whether a member is disabled; maintain an annual registry of interstate and international law firms doing business in this State;

> and formulate and adopt procedures for accomplishing these purposes. The Council may do all things necessary in the furtherance of the purposes of this Article that are not otherwise prohibited by law.

N.C. Gen. Stat. § 84-23(a) (2024) (emphasis added).

North Carolina General Statute Section 84-28, entitled "[d]iscipline and [d]isbarment" sets out the disciplinary jurisdiction of the Council and procedures for disciplinary actions against "respondent attorney[s.]" N.C. Gen. Stat. § 84-28. Subsection (a) provides that "[a]*ny attorney admitted to practice law in this State* is subject to the disciplinary jurisdiction of the Council *under such rules and procedures as the Council shall adopt as provided in G.S. 84-23*." N.C. Gen. Stat. § 84-28(a) (emphasis added). Therefore, Section 84-23 grants the Council "the authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals," including the authority to "adopt rules of professional ethics and conduct" and to "investigate and prosecute matters of professional misconduct," while Section 84-28 grants the Council "disciplinary jurisdiction" over "[a]ny attorney admitted to practice law in this State" to enforce the rules the Council is empowered to adopt under Section 84-23. N.C. Gen. Stat. § 84-23(a); N.C. Gen. Stat. § 84-28(a). Thus, State Bar has "disciplinary jurisdiction" over "[a]ny attorney admitted to practice law in this State" to enforce the rules adopted in accord with Section 84-23.

Subsection 84-28(b) confirms that the disciplinary jurisdiction is limited to "[a]ny attorney admitted to practice law in this State" by identifying the specific "acts or omissions *by a member of the North Carolina State Bar* or any attorney admitted for limited practice under G.S. 84-4.1[4]" that "shall constitute misconduct and shall be grounds for discipline[.]" N.C. Gen. Stat. § 84-28(a), (b) (emphasis added). Thus, the plain language of North Carolina General Statute Section 84-28(b) limits the "grounds for discipline" to "acts of omissions by a member of the North Carolina State Bar or any attorney admitted for limited practice under G.S. 84-4.1." N.C. Gen. Stat. § 84-28(b). Subsection 84-28(c) then outlines the types of discipline available, ranging from the least severe discipline, admonition, to the most severe, disbarment. N.C. Gen. Stat. § 84-28(c).

In interpreting statutory language, "[w]e begin with the text of the statute and, if that text is clear and unambiguous, we conclude that

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4. North Carolina General Statute Section 84-4.1 authorizes *pro hac vice* limited practice and does not apply to this case. *See* N.C. Gen. Stat. § 84-4.1 (2023).

the legislature intended the statute to be implemented according to the plain meaning of its terms." *Arter v. Orange Cnty.*, 386 N.C. 352, 354, 904 S.E.2d 715, 717 (2024) (citation and quotation marks omitted). If two statutes "apparently overlap," the more particular statute controls over the more general statute, unless it is clear that the General Assembly intended for the more general statute to be controlling:

> The rules of statutory construction require that a more specific statute controls over a statute of general applicability. When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control.

Technocom Bus. Sys. Inc., v. N.C. Dep't of Revenue, 219 N.C. App. 207, 212, 723 S.E.2d 151, 155 (2012) (citations, quotation marks, and brackets omitted).

In comparing North Carolina General Statute Sections 84-23 and 84-28, the State Bar contends that Section 84-23 addresses its "authority to regulate the professional conduct of licensed lawyers and State Bar certified paralegals" while Section 84-28 specifically addresses the "disciplinary jurisdiction of the Council" over "[a]ny attorney admitted to practice law in this State[.]" N.C. Gen. Stat. § 84-23(a); N.C. Gen. Stat. § 84-28(a). The State Bar contends that Section 84-23 differs from Section 84-28 since Section 84-23 is broader in scope because it applies to "licensed lawyers" while Section 84-28 is more limited and applies to "[a]ny attorney admitted to practice law in this State[.]" N.C. Gen. Stat. § 84-23(a); N.C. Gen. Stat. § 84-28(a). The Order on Motion for Relief concluded that the State Bar has subject matter jurisdiction over Defendant based on North Carolina General Statute Section 84-23(a) and Rule 8.5(a) of the Rules of Professional Conduct because Defendant is a "licensed lawyer" who has an office in Charlotte and represents clients who live in North Carolina, although his practice is limited to federal immigration court. But the plain language of the more specific statute, Section 84-28, read in conjunction with Section 84-23, grants the State Bar disciplinary jurisdiction only over "attorney[s] admitted to practice law in this State[.]" N.C. Gen. Stat. § 84-28.

The plain language of Section 84-23 is a general grant of authority for the Council to perform many duties. *See* N.C. Gen. Stat. § 84-23. The plain language of Section 84-28 is a specific grant of "disciplinary jurisdiction" which only applies to "[a]ny attorney admitted to practice

law in this State[.]" N.C. Gen. Stat. § 84-28. And if we read the statutes *in pari materia*, Section 84-23 is consistent with Section 84-28. Both statutes must be read in the context of Article 4, which deals with the State Bar of North Carolina and regulation of lawyers *licensed* by North Carolina. N.C. Gen. Stat. Ch. 84, art. 4. For example, it would be absurd to interpret Section 84-23 as requiring the State Bar to "take actions that are necessary to ensure the competence of lawyers" who do not practice in North Carolina or who are licensed only in another State. N.C. Gen. Stat. § 84-23. And lawyers licensed by another state, such as Defendant, are not required to obtain continuing legal education, which is required for lawyers licensed in North Carolina.[5] 27 N.C. Admin. Code 1D.1501 ("Except as provided herein, these rules shall apply to every active member licensed by the North Carolina State Bar."). Nor does the State Bar purport to "certify legal specialists and paralegals" who practice in the courts of another state or exclusively in the federal courts; to reinstate lawyers disbarred in another jurisdiction; to "expunge disciplinary actions" against a lawyer in another jurisdiction; or to "resolve questions pertaining to membership status" of a lawyer who is a member of the bar of another state. N.C. Gen. Stat. § 84-23. All these situations may involve a "licensed lawyer," if we define this as a lawyer licensed to practice law in any jurisdiction, but Section 84-23 and Section 84-28 together grant the State Bar regulatory powers only over "licensed lawyers" who are licensed in North Carolina. Under the State Bar's interpretation of Section 84-23 as granting disciplinary jurisdiction applicable to "licensed lawyers" in general, the State Bar would theoretically have the authority to discipline or disbar any "licensed lawyer" admitted to the bar in any state or jurisdiction, not just North Carolina, but its other powers and duties granted by Section 84-23 would be limited to lawyers (and paralegals) who are licensed in North Carolina. So although the phrases "licensed lawyer" and "attorney admitted to practice law in this State" are different, the meaning is the same in the context of these two statutes. N.C. Gen. Stat. § 84-23(a); N.C. Gen. Stat. § 84-28(a). Thus, in determining disciplinary jurisdiction, Section 84-28 controls over Section 84-23 since Section 84-28 is the more specific statute. *See Technocom Bus. Sys. Inc.*, 219 N.C. App. at 212, 723 S.E.2d at 155.

The State Bar does not seriously dispute its lack of authority over lawyers who practice only in the federal courts, as is indicated by its

5. The Rules of Professional Conduct require only "active member[s]" who are "licensed by the North Carolina State Bar" to obtain Continuing Legal Education hours. 27 N.C. Admin. Code 1D.1501.

"clarification" in the Order on Motion for Relief. In its brief to the DHC regarding the Motion for Relief from Judgment, the State Bar noted that it

> does not construe the Order of Discipline's reference to § .0128 to require [Defendant to shut down his law practice]. Rather, the State Bar construes this reference as a requirement that [Defendant] comply with § .0128 as to any portion of his North Carolina practice not confined to the practice of law before federal immigration courts, as the State Bar cannot prohibit the federal immigration courts from permitting a lawyer (or non-lawyer, such as an accredited representative) from appearing before them. To the extent the Panel feels this is not clearly expressed in the Order of Discipline, the State Bar asks for an appropriate conclusion of law or amendment clarifying the same.

The original Order of Discipline ordered that Defendant "is hereby DISBARRED from the practice of law." Despite the State Bar's request, the DHC's Order on Motion for Relief did not amend the original Order of Disbarment, nor did it include a conclusion of law or decree provision limiting the effect of the Order of Discipline. Instead, the Order on Motion for Relief includes a *finding of fact* addressing Defendant's erroneous "interpretation" of the Order of Discipline. It states that Defendant

> is incorrect to interpret the directions in paragraphs 3 through 7 of the decretal section of the order of discipline as requiring him to wind down any portion of his presentation and practice in North Carolina that is permitted by federal law before federal courts. Paragraphs 3 through 7 of the decretal section of the Order of Discipline only apply to any portion of his presentation and practice in North Carolina not permitted by federal law before federal courts.

Defendant's brief also notes the DHC's agreement regarding its lack of authority over lawyers engaged only in practice in federal courts:

> The State Bar recognizes attorneys can appear before federal immigration tribunals in North Carolina without a North Carolina law license. N.C. State Bar, *Reporting and Preventing the Unauthorized Practice of Law*, https://dub.sh/xyWv0MO. Federal law confirms that an attorney licensed to practice law in any state may appear before these federal agencies and practice federal immigration law. See 8 C.F.R. § 1001.1(f); *id.* § 1292.1(a)(1).

But according to the findings in the Orders on appeal, Defendant does not practice in North Carolina courts. In addition, while the Order of Discipline disbars Defendant, the Order on Motion for Relief specifically denied Defendant's Motion for Relief from Judgment and did not change the requirements of the Order of Discipline. The finding of fact regarding Defendant's "interpretation" of the Order of Discipline leaves us wondering exactly what it would mean for Defendant to shut down his "presentation and practice" in North Carolina while still being allowed to practice in the federal immigration court in Charlotte when – according to the findings of fact – he practices *only* in the federal immigration court in Charlotte.

The State Bar argues interpreting Section 84-28 to mean the State Bar only has disciplinary jurisdiction over attorneys admitted to practice in North Carolina would "render[ ] Section 84-23 surplusage."

> It is well established that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.

Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) (citation omitted). But our interpretation would not render Section 84-23 surplusage since the general grant of authority would remain unaffected. The Council would still have general authority to "administer this Article," and one of the provisions of "this Article" is Section 84-28, so the State Bar has the authority to "administer" Section 84-28 by exercising its "disciplinary jurisdiction" under Section 84-28. *See* N.C. Gen. Stat. § 84-28. The State Bar has the general authority to "take actions that are necessary to ensure the competence of lawyers and State Bar certified paralegals; formulate and adopt rules of professional ethics and conduct; [and] investigate and prosecute matters of professional misconduct[.]" N.C. Gen. Stat. § 84-23(a). As Defendant notes in his reply brief, Section 84-23 does not use the word "jurisdiction." We disagree with the State Bar that interpreting the statutes in this way would render Section 84-23 surplusage. *See Porsh Builders, Inc.*, 302 N.C. at 556, 276 S.E.2d at 447.

The State Bar also contends that if we interpret North Carolina General Statute Sections 84-23 and 84-28 to limit its disciplinary jurisdiction only to "attorney[s] admitted to practice law in this State[,]" this will create absurd and terrible consequences. One of these absurdities is that lawyers admitted *pro hac vice* would be "subject to the Rules

but not to the State Bar's investigatory powers or the DHC's jurisdiction[.]" (Emphasis in original.) But *pro hac vice* admission is not the issue in this case, and the State Bar's argument is also simply not correct: Attorneys from other states who practice in North Carolina courts must be admitted *pro hac vice* under North Carolina General Statute Section 84-4.1, and an attorney who is admitted *pro hac vice* has subjected himself to the disciplinary jurisdiction of the State Bar. *See Couch v. Priv. Diagnostic Clinic*, 146 N.C. App. 658, 670, 554 S.E.2d 356, 365 (2001) ("Under N.C. Gen.Stat. § 84-28, attorneys admitted to practice *pro hac vice* are subject to the same disciplinary jurisdiction of this State as are attorneys licensed to practice here. That statute provides that a violation of the Rules of Professional Conduct of this State 'shall be grounds for discipline,' including disbarment or 'suspension for a period up to but not exceeding five years.' " (citations and brackets omitted)).

We also briefly note that this opinion does not address the statutory provisions addressing unauthorized practice of law in North Carolina, whether by a layperson or by an attorney licensed by another jurisdiction.[6] Under North Carolina General Statute Section 84-37, the State Bar is authorized to "inquire into and investigate any charges or complaints of (i) unauthorized or unlawful practice of law . . . by individuals who have not been certified in accordance with the rules adopted by the North Carolina State Bar." N.C. Gen. Stat. § 84-37 (2023). The unauthorized practice of law is forbidden by statute. *See* N.C. Gen. Stat. § 84-4 ("Persons other than members of State Bar prohibited from practicing law."); *see also* N.C. Gen. Stat. § 84-7 (2023) ("District attorneys, upon application, to bring injunction or criminal proceedings."). Any person "who is damaged by" the unauthorized practice of law is also "entitled to maintain a private cause of action to recover damages and reasonable attorneys' fees and other injunctive relief as ordered by court." N.C. Gen. Stat. § 84-10.1 (2023) ("Private cause of action for the unauthorized practice of law."). This opinion does not affect the protections available to citizens of this State who may be harmed by the unauthorized practice of law, but Defendant was not accused of unauthorized practice of law. He was certified to practice in the federal immigration court and limited his practice to that court.

The State Bar also contends that it would be absurd to interpret North Carolina General Statute Section 84-23 and 84-28 as limiting its

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6. The State Bar also presents an argument regarding North Carolina Rule of Professional Conduct 5.5, which deals with unauthorized practice of law. We will not address Rule 5.5 since there is no issue of unauthorized practice of law in this case.

disciplinary jurisdiction to "attorney[s] admitted to practice law in this State" because this would leave "a pocket of lawyers practicing law in North Carolina and representing North Carolinians" without being subject to disciplinary jurisdiction of the State Bar. This is correct, but that is what the plain language of Section 84-28 requires. *See* N.C. Gen. Stat. § 84-28. Defendant does not fall within the categories of professionals over which the State Bar has disciplinary jurisdiction under Section 84-28. He is a licensed attorney, but he is not licensed in North Carolina. He is not "admitted to practice law in this State." *Id*. He practices only in a federal court located in North Carolina. There are many federal courts in North Carolina, including the immigration court where Defendant practices. All federal courts, including the immigration court, have their own requirements for attorneys to be admitted to practice before the court. As the Order on Motion for Relief acknowledges in its finding regarding Defendant's "interpretation" of the Order of Discipline, the procedures and practices of the federal courts are not subject to control by the State of North Carolina. Federal courts, and the admission of attorneys who practice in federal courts, are controlled by federal law.

To obtain jurisdiction over this "pocket of lawyers," the State Bar asks us to rewrite North Carolina General Statute Section 84-28 to apply to "any attorney admitted to practice law" *in any state* if the attorney practices in a federal court physically located in North Carolina or has an office in North Carolina for a federal practice. But this Court does not have the authority to rewrite the statute to cover this group of attorneys who practice only in federal court and are licensed by another state. Defendant is a member of and subject to discipline by the New York Bar. As an attorney practicing before the federal immigration court, Defendant is also subject to discipline by the Executive Office for Immigration Review. *See* 8 C.F.R. § 1003.1(d)(5) ("Discipline of practitioners and recognized organizations. The Board shall have the authority pursuant to § 1003.101 *et seq*. to impose sanctions upon practitioners who appear in a representative capacity before the Board, the Immigration Courts, or DHS, and upon recognized organizations.").

The State Bar notes that "[n]umerous courts have held that a state's disciplinary authority has jurisdiction to discipline—and even disbar—a lawyer who is not licensed in the state but is practicing in a federal tribunal or agency within the state." The State Bar argues that

> the federal immigration courts afford great significance to predicate discipline, reflecting the immigration courts' expectation that a state should be able to investigate and impose appropriate discipline upon an attorney practicing

> within its borders. The Board of Immigration Appeals (the "BIA") may impose sanctions on practitioners appearing before it (or before the immigration courts or Department of Homeland Security) for professional misconduct. 8 C.F.R. § 1003.1(d)(5) (2024). The BIA routinely looks to state disciplinary actions as a predicate for reciprocal discipline against its practitioners. 8 C.F.R. § 1003.103(a)(1). This is true *even when the practitioner is not licensed by the state imposing the predicate suspension or disbarment against him.*

(Emphasis in original). The State Bar notes as examples cases in which the BIA considered disciplinary actions against immigration attorneys by Colorado and Maryland, although the attorneys in those cases were not licensed in those states. *See People v. Hooker*, 318 P.3d 77 (Colo. 2013); *Att'y Grievance Comm'n of Md. v. Ndi*, 184 A.3d 25 (Md. 2018). It is true that the BIA may consider discipline imposed by a state as a factor in the federal disciplinary process, but the question before us is whether North Carolina's State Bar has jurisdiction to impose discipline on an attorney not licensed in this State who is practicing only in the federal court. The other states noted by the State Bar have different regulatory schemes for attorneys; for example, in Colorado and Maryland, and many other states, the state's appellate court has exclusive authority to regulate the practice of law. *See In re Wimmershoff*, 3 P.3d 417, 420 (Colo. 2000) ("The regulation of the practice of law, including the determination of a lawyer's compliance or noncompliance with the Code of Professional Responsibility (such as Colo. RPC 1.5(a)), resides exclusively with this court."); *see In re Application of Kimmer*, 896 A.2d 1006, 1017 (Md. 2006) ("Therefore, it has been clear, since 1898, that the Court of Appeals has had exclusive jurisdiction over the regulation of, and admission to, the practice of law." (citations omitted)). In other states, statutes or caselaw may support subject matter jurisdiction for disciplinary action as to attorneys not licensed in those states, but we are bound by North Carolina's statutes.

The State Bar also contends Defendant's "assumption that he cannot be disbarred because he was not admitted to practice in North Carolina misapprehends the broad public-protection function of attorney discipline." We appreciate the "public-protection function of attorney discipline," but the extent of the disciplinary power granted to the State Bar by the General Assembly is a public policy matter. "Absent [a] constitutional restraint, questions as to public policy are for legislative determination." *Home Sec. Life Ins. Co. v. McDonald*, 277 N.C. 275, 285, 177 S.E.2d 291, 298 (1970) (citation omitted). This

Court's role is to interpret and apply the law as it is written. If the General Assembly would like to expand the disciplinary jurisdiction of the State Bar to cover attorneys who are not admitted to practice in North Carolina, it may do so by statutory amendment, but this Court may not re-write the statutes.

C. Jurisdiction Based on the Rules of Professional Conduct

[3] The Order on Motion for Relief also concluded that the State Bar had subject matter jurisdiction to discipline Defendant under Rule 8.5 of the Rules of Professional Conduct. Rule 8.5 addresses "disciplinary authority [and] choice of law" and provides:

> (a) Disciplinary Authority. A lawyer admitted to practice in North Carolina is subject to the disciplinary authority of North Carolina, regardless of where the lawyer's conduct occurs. *A lawyer not admitted in North Carolina is also subject to the disciplinary authority of North Carolina if the lawyer renders or offers to render any legal services in North Carolina*. A lawyer may be subject to the disciplinary authority of both North Carolina and another jurisdiction for the same conduct.

N.C. R. Pro. Conduct 8.5(a) (emphasis added). Defendant contends "Rule 8.5 doesn't create disciplinary jurisdiction" over Defendant. Specifically, Defendant contends "the [State] Bar argued, and DHC agreed, that the [State] Bar had lawfully expanded its jurisdiction beyond the disciplinary jurisdiction statute through administrative rulemaking" and "[t]hat argument, however, runs counter to basic principles of administrative law." The State Bar argues it has jurisdiction over Defendant under Rule 8.5, and this rule is consistent with Chapter 84 since our Supreme Court "approved and caused [Rule 8.5] to go into effect after finding it consistent with Chapter 84." The State Bar's argument that our Supreme Court has already decided Rule 8.5 is consistent with Chapter 84 is based on North Carolina General Statute Section 84-21, which states

> The rules and regulations adopted by the Council under this Article may be amended by the Council from time to time in any manner not inconsistent with this Article. Copies of all rules and regulations and of all amendments adopted by the Council shall be certified to the Chief Justice of the Supreme Court of North Carolina, entered by the North Carolina Supreme Court upon its minutes, and published in the next ensuing number of the North Carolina Reports and in the North Carolina Administrative Code: Provided,

> that the court shall decline to have so entered upon its minutes any rules, regulations and amendments which in the opinion of the Chief Justice are inconsistent with this Article.

N.C. Gen. Stat. § 84-21(b) (2023).

The State Bar's argument turns on the meaning of rendering or offering to render "legal services in North Carolina." The State Bar's argument is based on the physical location of Defendant's practice in North Carolina, even if he only practices in federal court. The State Bar argues that based on Rule 8.5(b), by having an office in this State and representing clients who live in North Carolina, even if his practice was limited to federal immigration court, Defendant was "render[ing] or offer[ing] to render any legal services *in North Carolina*." (Emphasis added.) In other words, the State Bar argues that Defendant may appear in federal immigration court and represent clients there, but if he "establish[es] an office or other systematic and continuous presence in this jurisdiction for the practice of law" even in federal court only, he is "rendering legal services" *in North Carolina* and is subject to the disciplinary jurisdiction of the State Bar. *See* N.C. R. Pro. Conduct 5.5(b)(1); N.C. R. Pro. Conduct 8.5.

The State Bar's claim regarding its definition of the practice of law focuses on the *physical location* where Defendant, as an attorney, consults with clients, prepares documents, or appears in a court, and not the subject matter or purpose of his work or the court he appears in. Yet the definition of the practice of law in North Carolina General Statute 84-2.1(a) does not mention the physical location where an attorney may meet with a client or do his work; it addresses the specific legal services performed for the purpose of advising a client or preparing documents or representing a client before a particular tribunal:

> The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or

> quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition.

N.C. Gen. Stat. § 84-2.1(a) (2023).

Here, the DHC found that Defendant "*practices law* in North Carolina, where he maintains a law office in Charlotte, North Carolina, and appears in federal immigration courts in Charlotte on behalf of his clients." (Emphasis added.) But Defendant was *practicing* only in federal immigration court, although that court is in North Carolina and he maintained an office in Charlotte. To the extent that Rule 8.5 may purport to extend the disciplinary jurisdiction of the State Bar beyond "attorney[s] admitted to practice law in this State" to attorneys not admitted in North Carolina practicing only in a federal court simply because the attorney has a home or office in North Carolina, this Rule is not in accord with North Carolina General Statute Section 84-28. *See* N.C. R. Pro. Conduct 8.5(a); N.C. Gen. Stat. § 84-28. The State Bar has "disciplinary jurisdiction" over "attorney[s] admitted to practice law in this State" no matter where they live or where their offices are located or where they do their work. It does not have disciplinary jurisdiction over attorneys who are not admitted to practice in North Carolina and who practice *only* in federal court just because they may live in North Carolina or have an office in North Carolina.

Rule 8.5 does not change our analysis because the Rules of Professional Conduct cannot grant or expand the subject matter jurisdiction of the State Bar beyond the boundaries set by North Carolina General Statute Section 84-28. As we concluded above, North Carolina General Statute Section 84-28 only gives the DHC disciplinary jurisdiction over those attorneys admitted to practice in this State. *See* N.C. Gen. Stat. § 84-28.

We next address the State Bar's argument that since our Supreme Court allowed the rules to be "entered . . . upon its minutes," the rules have been found to be consistent with Chapter 84. N.C. Gen. Stat. § 84-21(b). Under Section 84-21, the rules must be approved only by the Chief Justice. *See* N.C. Gen. Stat. § 84-21. And even if we assumed that

the Chief Justice's decision to allow a rule to be "entered . . . upon [the Court's] minutes" could be considered as a form of approval of the rule, this approval is not a decision of the Supreme Court. The Chief Justice's action is part of the rule-making authority of the Supreme Court, which is distinct from the Supreme Court's authority to adjudicate disputed cases brought before the Supreme Court on appeal or petition for review from a lower court. A binding decision of the Supreme Court requires a vote of at least four of the seven justices. *See* N.C. Gen. Stat. § 7A-10 (2023) ("Four justices shall constitute a quorum for the transaction of the business of the court."). While we are bound by the *decisions* of our Supreme Court, *see Snipes v. TitleMax of Va., Inc.*, 285 N.C. App. 176, 184, 876 S.E.2d 864, 870 (2022) ("Of course, we are also bound by *decisions* of our Supreme Court and by prior panels of this Court" (emphasis added) (citations omitted)), the Chief Justice's approval of a rule is not a decision of the Supreme Court. Neither the Chief Justice nor the Supreme Court ruled on the disputed issue raised in this case of the State Bar's disciplinary jurisdiction over attorneys who are not admitted to practice in North Carolina and the interpretation of Sections 84-23 and 84-28 simply by the Chief Justice's approval of Rule 8.5.

More fundamentally, this Court and our Supreme Court have long concluded an administrative agency only has those powers given to it by statute. *See Rouse v. Forsyth Cnty. Dep't of Soc. Servs.*, 373 N.C. 400, 407, 838 S.E.2d 390, 395 (2020) ("[A]n administrative agency has no power to promulgate rules and regulations which alter or add to the law it was set up to administer or which have the effect of substantive law." (citation and quotation marks omitted)); *see also Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 89, 92 S.E.2d 673, 677 (1956) ("The jurisdiction of the Industrial Commission in relation to the subject matter over which it may exercise authority is limited by the North Carolina Workmen's Compensation Act, and this jurisdiction can be enlarged or extended only by the General Assembly its creator."). While Defendant cites both *Rouse* and *Hart*, the State Bar does not address these cases and instead relies on its argument that Section 84-28 does not limit the DHC's jurisdiction and Rule 8.5 is valid since it was approved by the Chief Justice. But as both of those arguments fail, we agree with Defendant that since the General Assembly limited the DHC's disciplinary jurisdiction to "[a]ny attorney admitted to practice law in this State[,]" the State Bar cannot enlarge the DHC's jurisdiction via rulemaking. N.C. Gen. Stat. § 84-28. Based on this interpretation of the disciplinary jurisdiction of the State Bar under Section 84-28, we need not address Defendant's remaining arguments on appeal.

IV. Conclusion

The DHC did not have subject matter jurisdiction over Defendant since North Carolina General Statute Section 84-28 limits its disciplinary jurisdiction to "[a]ny attorney *admitted to practice law in this State*" and Defendant is licensed in New York, not North Carolina, and limits his practice to federal immigration court. N.C. Gen. Stat. § 84-28 (emphasis added). The more specific language in Section 84-28 controls over the more general grant of authority in Section 84-23. Further, Rule 8.5 of the Rules of Professional Conduct cannot confer subject matter jurisdiction over Defendant beyond the plain language of North Carolina General Statute Section 84-28. The DHC's Order of Discipline and Order on Motion for Relief are both reversed.

REVERSED.

Chief Judge DILLON and Judge CARPENTER concur.

LAWANDA T. SESSOMS, PLAINTIFF
v.
JOHN M. RAY, DEFENDANT

No. COA23-919

Filed 18 June 2025

Civil Procedure—alimony and postseparation support—involuntary dismissal—with prejudice absent specific language to contrary—no jurisdiction over refiled claims

In a divorce matter relating to plaintiff ex-wife's claims for alimony and postseparation support, where the trial court's order dismissing plaintiff's alimony claim for failure to prosecute did not explicitly state that the dismissal was without prejudice, the order constituted an involuntary dismissal with prejudice under Civil Procedure Rule 41(b), which in turn terminated the ex-wife's post-separation support claim (under N.C.G.S. § 50-16.1A(4)(c)). Consequently, after plaintiff filed a new complaint seeking alimony and postseparation support, the court's subsequent order awarding postseparation support to plaintiff was vacated on appeal because the court lacked subject matter jurisdiction to hear the refiled claim. Although the second order included a finding that the prior order constituted a dismissal without prejudice, this finding did not cure

the jurisdictional defect; further, plaintiff's argument that the finding was an amendment to the prior order pursuant to Civil Procedure Rule 60(a) was meritless, since that Rule does not grant trial courts the authority to correct substantive errors in their decisions.

Appeal by defendant from order entered 22 July 2020 by Judge David H. Hasty in District Court, Cumberland County. Heard in the Court of Appeals 30 April 2024.

Sandlin Law Firm, P.A., by Deborah Sandlin and Caroline J. Lonon, for plaintiff-appellee.

Harold Lee Boughman, Jr. for defendant-appellant.

STROUD, Judge.

Defendant ("Husband") appeals from an order awarding Plaintiff ("Wife") postseparation support ("Postseparation Support Order"). Because the trial court's prior order granting involuntary dismissal of Wife's alimony claim for failure to prosecute did not provide that the dismissal was without prejudice, the dismissal was with prejudice under North Carolina Rule of Civil Procedure 41(b). Because the parties had already been divorced and Wife's prior claim for alimony was dismissed with prejudice, the trial court erred by denying Husband's motion to dismiss Wife's new claim for postseparation support under North Carolina Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. We therefore vacate the Postseparation Support Order.

I. Background

Wife and Husband were married in September 2000 and separated in May 2017. Husband and Wife have two children together; one was born in 2003 and the other in 2005.

On 21 September 2017, Husband filed a complaint against Wife for child custody and child support in file number 17 CVD 7324. On 9 October 2017, Wife filed an answer and counterclaims. On 17 October 2017, Wife filed an amended answer and counterclaims for divorce from bed and board, child custody, child support, postseparation support, alimony, equitable distribution, and attorneys' fees. On 25 October 2017, Husband filed a reply to the amended answer.

On 24 September 2018, a judgment of absolute divorce was entered. The trial court severed Husband's claim for equitable distribution and

Wife's claims for postseparation support, alimony, and equitable distribution to be heard at a later date.

Wife's claim for postseparation support was heard on 16 April 2019. The trial court entered an order on 27 January 2020 concluding that Wife was a dependent spouse and Husband was a supporting spouse. Husband was ordered to pay Wife postseparation support of $1,400.00 per month, beginning 1 March 2019, and continuing every month until further order of the trial court.

Wife's claim for alimony was set for hearing on 17 February 2020, and Wife did not appear for this hearing. On 16 March 2020, the trial court entered an order dismissing Wife's claim for alimony for "failure to prosecute" ("Order of Dismissal"). The Order of Dismissal in its entirety stated:

> THIS CAUSE coming on to be heard and being heard before the Honorable David H. Hasty, Judge presiding over the February 17, 2020 Session of Civil Court for Domestic Relations for the Twelfth Judicial District, Cumberland County, North Carolina, upon a hearing of [Wife]'s claim for Alimony; [Husband] was present in [c]ourt and was represented by Attorney Harold Lee Boughman, Jr. and [Wife] was not present in [c]ourt and was not represented by an attorney; and the [c]ourt, after hearing statements of counsel, finds that [Wife]'s claim for alimony should be dismissed for failure to prosecute.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:
>
> 1. [Wife]'s claim for alimony is hereby dismissed.
>
> 2. This matter is retained for further Orders of the [c]ourt.

Husband's counsel served the Order of Dismissal on Wife on 16 March 2020. Wife did not appeal from the Order of Dismissal or seek modification of the Order of Dismissal.

Three days later, on 19 March 2020, Wife filed a new complaint including claims for alimony, postseparation support, and attorneys' fees in file number 20 CVD 1968. In this complaint, Wife made allegations regarding her entitlement to postseparation support and alimony and she also alleged:

> 9. [Wife] had a prior claim pending for alimony in 17 CVD 7324, which was dismissed for failure to prosecute on February 17, 2020 when [Wife] was ill and unable to be present. She is refiling those claims well within one year of that dismissal.

On 2 April 2020, Husband filed an answer and motion to dismiss Wife's claims for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted under North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6). Husband contended the trial court did not have "subject matter jurisdiction" because the parties were "divorced on September 24, 2018" and "[w]hen the [c]ourt dismissed [Wife]'s claim for alimony based upon failure to prosecute, [Wife]'s claim for post separation is dismissed with prejudice pursuant to [North Carolina General Statute Section] 50-16.1A.(4)." He also moved to dismiss under North Carolina Rule of Civil Procedure 12(b)(6) based on "failure to state a claim upon which relief may be granted" because the trial court had dismissed Wife's alimony claim "based upon failure to prosecute" so "[Wife]'s claim for post separation is dismissed with prejudice pursuant to [North Carolina General Statute Section] 50-16.1A.(4)."

On 14 May 2020, the trial court heard both Husband's motion to dismiss Wife's complaint and Wife's claim for postseparation support. On 22 July 2020, the trial court entered the Postseparation Support Order finding that Wife's prior claims for postseparation support and alimony were "previously dismissed, without prejudice" and that Wife could refile her postseparation support claim. Husband's motion to dismiss was denied. Husband was ordered to pay Wife the sum of $1,300.00 per month, beginning 1 May 2020, "until the death of either party, the remarriage or cohabitation of [Wife], or the entry of an order on the issue of permanent alimony, which ever first occurs."

On 29 June 2023, the trial court entered an order denying Wife's claim for alimony and dismissing her claim with prejudice. Wife's postseparation support was terminated. Husband appeals from the 22 July 2020 Postseparation Support Order.

II. Appellate Jurisdiction

"Postseparation support is only intended to be temporary and ceases when an award of alimony is either allowed or denied by the trial court." *Rowe v. Rowe*, 131 N.C. App. 409, 411, 507 S.E.2d 317, 319 (1998). Thus, while the 22 July 2020 Postseparation Support Order was not a final order, it became appealable upon entry of the 29 June 2023 order which denied Wife's claim for alimony and dismissed her claim with prejudice.

See Thompson v. Thompson, 223 N.C. App. 515, 517, 735 S.E.2d 214, 216 (2012) ("The [postseparation support] order is reviewable once the trial court has entered an order awarding or denying alimony." (citation omitted)). On 27 July 2023, Husband entered timely notice of appeal.

III. Analysis

On appeal, Husband presents two issues: (1) whether the trial court erred in denying Husband's motion to dismiss for lack of subject matter jurisdiction because Wife's claim for postseparation support terminated pursuant to North Carolina General Statute Section 50-16.1A(4)(c) when the trial court previously dismissed Wife's claim for alimony based on her failure to prosecute the claim pursuant to Rule 41(a)(2) of the North Carolina Rules of Civil Procedure; and (2) whether the trial court erred in denying Husband's motion to dismiss for failure to state a claim upon which relief may be granted because Wife's claim for postseparation support terminated pursuant to North Carolina General Statute Section 50-16.1A(4)(c) when her alimony claim was previously dismissed for her failure to prosecute the claim pursuant to Rule 41(a)(2).

Specifically, Husband argues that "[t]his case presents a conflict between a general statute of North Carolina Civil Procedure and a specific statute addressing post separation support in chapter 50 of the North Carolina General Statutes." Although North Carolina General Statute Section 50-16.2A addresses how a claim for postseparation support may be brought and what the trial court must consider in awarding postseparation support, North Carolina General Statute Section 50-16.1A(4), defines "Postseparation support." *See* N.C. Gen. Stat. § 50-16.2A (2023); *see also* N.C. Gen. Stat. § 50-16.1A(4) (2023). Husband's argument addresses the definition of postseparation support, which is:

> spousal support to be paid until the earlier of any of the following:
>
> a. The date specified in the order for postseparation support.
>
> b. The entry of an order awarding or denying alimony.
>
> c. The dismissal of the alimony claim.
>
> d. The entry of a judgment of absolute divorce if no claim of alimony is pending at the time of entry of the judgment of absolute divorce.
>
> e. Termination of postseparation support as provided in G.S. 50-16.9(b).

> Postseparation support may be ordered in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce. However, if postseparation support is ordered at the time of the entry of a judgment of absolute divorce, a claim for alimony must be pending at the time of the entry of the judgment of divorce.

N.C. Gen. Stat. § 50-16.1A(4).

Overall, Husband presents this case as primarily a question of statutory construction of Section 50-16.1A(4)(c) – "the dismissal of the alimony claim" – and determining whether this statute or Rule 41(a)(2) should apply to this situation. He argues we should determine that this situation is controlled only by Section 50-16.1A(4)(c) because it conflicts with Rule 41(a)(2).

Wife states the issue on appeal as whether a dismissal without prejudice of a party's alimony claim bars Wife from refiling her claim for postseparation support when she refiles her alimony claim. Wife contends Section 50-16.1A(4)(c) is ambiguous and we must consider the legislative history of our former statute regarding alimony *pendente lite* and our current statute regarding postseparation support to resolve this interpretative dilemma.

The parties' briefs are somewhat like the proverbial "two ships passing in the night," and for reasons we have been unable to ascertain from the record, neither has directly addressed the real issue in this case: the straightforward application of *Rule 41(b)*, not Rule 41(a)(2). Rule 41 of the North Carolina Rules of Civil Procedure addresses both voluntary and involuntary dismissals of claims. Rule 41(a)(2) addresses *voluntary* dismissals. Wife did not take a voluntary dismissal of her alimony claim. Here, the dismissal was an *involuntary* dismissal for failure to prosecute. Rule 41(b) provides as follows:

> (b) Involuntary dismissal; effect thereof.--*For failure of the plaintiff to prosecute* or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts

> may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). *Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal.*

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2023) (emphasis added).

Despite their arguments about Section 50-16.1A and Rule 41(a)(2), both parties have acknowledged that the trial court's Order of Dismissal *appears* to be an order for involuntary dismissal under Rule 41(b). Husband states:

> There is no dispute that [Wife]'s claim for alimony was dismissed for failure to prosecute on 16 March 2020 at the time when a post separation order entered on 27 January 2020 was in effect. [Wife]'s claim for post separation support was not dismissed but terminated due to the dismissal of [Wife]'s alimony claim. The [O]rder of [D]ismissal for failure to prosecute does not indicate whether the dismissal is "with" or "without" prejudice. Although the Order states the grounds for dismissal as a "failure to prosecute", it appears the dismissal was made pursuant to Rule 41(a)(2) which allows a party to refile a new action based on the same claim within one year of the dismissal.

Based upon his conclusion that it "appears" the dismissal was made under Rule 41(a)(2), Husband then proceeds with his arguments about the Postseparation Support Order based on this assumption. Despite the trial court's "finding" that the Order of Dismissal was without prejudice, the Order of Dismissal does not "appear" to be a dismissal without prejudice. It is clearly an order for involuntary dismissal under Rule 41(b) for failure to prosecute, which is a dismissal with prejudice since the Order of Dismissal does not state that it is "without prejudice." It is

well-established that the trial court must *specifically* state if an order of dismissal under Rule 41(b) is "without prejudice." Otherwise, the dismissal is with prejudice. *See Johnson v. Bollinger*, 86 N.C. App. 1, 9, 356 S.E.2d 378, 383 (1987) ("Since the dismissal order operates as an adjudication on the merits *unless the order specifically states to the contrary*, the party whose claim is being dismissed has the burden to convince the court that the party deserves a second chance; thus, the party should move the trial court that the dismissal be without prejudice. [*Whedon v.*] *Whedon*, 313 N.C. [200], 212-13, 328 S.E.2d [437], 444-45 [(1985)] (quoting W. Shuford, N.C.Civ.Prac. and Proc. Sec. 41-8)." (emphasis added)). Wife never moved that the trial court condition the terms of its dismissal. Absent such a motion as contemplated by the Supreme Court in *Whedon*, this record is devoid of any facts from which the trial court or this Court could determine why Wife should be given a chance to re-file her claim. Nor did Wife appeal the Order of Dismissal, so it is a binding order for purposes of this appeal.

Wife notes that the Postseparation Support Order on appeal states that Wife's "[c]omplaint made claims for postseparation support and alimony as this [c]ourt previously dismissed, *without prejudice*, those claims for lack of prosecution in file 17 CVD 7324." (Emphasis added.) Wife clearly has good reason not to dispute Husband's assumption regarding the "appearance" of the Order of Dismissal as being without prejudice, so she contends we must accept his assumption as correct because the same judge stated in the order on appeal that the Order of Dismissal was "without prejudice":

> Despite Husband's Motions to Dismiss on the basis that the alimony and postseparation support claims were dismissed with prejudice, *Judge Hasty, the same judge who dismissed the alimony claim for failure to prosecute, effectively amended his previous order dismissing the claim to clarify the dismissal was indeed without prejudice in the 17 July 2020 Postseparation Support Order.* (R pp 49-50). *The court in effect amended or clarified his order sua sponte as allowed in N.C. R. Civ. P. R. 60(a) when it determined its original dismissal of the alimony claim was without prejudice and [Wife] should be able to refile. The trial judge may correct any clerical mistakes arising from an oversight or omission on his own initiative. Id.* For argument's sake and given the fact the issue the dismissal without prejudice has not been raised, [Wife] proceeds under the assumption that everyone has accepted the judge's ruling on that issue. Judge

> Hasty found, consistent with [Wife]'s argument herein, that the dismissal of the alimony claim without prejudice, while terminating [Husband]'s obligation to pay under the previous postseparation support order, did not terminate [Wife]'s right to refile her claims within one year of the dismissal without prejudice. (R p 50).

(Emphasis added.)

But even if we assume that the trial court intended the Order of Dismissal to be without prejudice, as Wife suggests, the Postseparation Support Order does not indicate that the trial court was "amending" the Order of Dismissal, either *sua sponte* or otherwise, nor did Wife request any such amendment. Wife does not cite any authority to support her contention that under Rule 60 the trial court has the authority to *sua sponte* amend an assumed "clerical error" in the Order of Dismissal without entering an order noting this correction or even mentioning it on the record.[1] *See Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664 (1985) ("The court's authority under Rule 60(a) is limited to the correction of clerical errors or omissions. Courts do not have the power under Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions. We have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error." (citations omitted)). Omitting the provision that the dismissal was "without prejudice," even if done by mistake, is not a mere clerical error, and this assumed unwritten "correction" of the Order of Dismissal would have a substantive effect since it would "alter [ ] the effect of the original order." *Angarita v. Edwards*, 278 N.C. App. 621, 630, 863 S.E.2d 796, 803 (2021). Wife did not appeal the Order of Dismissal, so even if that Order is erroneous in some way, it is not subject to collateral attack in this appeal. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 676, 360 S.E.2d 772, 777 (1987) ("An erroneous order is one rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles. An erroneous order may be remedied by appeal; it may not be attacked collaterally." (citations and quotation marks omitted)).

We also appreciate Wife's contention that Husband's brief has failed to argue directly that the Order of Dismissal was actually with prejudice under Rule 41(b), and in most cases, if an appellant fails to make an

1. No transcripts of any hearing were provided for this appeal.

argument, we need not address it. But unfortunately for Wife, in this case the issue is the subject matter jurisdiction of the trial court to order postseparation support after her claim for alimony had been dismissed with prejudice. This Court has an obligation to address a lack of subject matter jurisdiction, even *ex mero motu*, if neither party raises the issue. *See 4U Homes & Sales, Inc. v. McCoy*, 235 N.C. App. 427, 432, 762 S.E.2d 308, 312 (2014) ("A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." (citation omitted)). Put another way, "[s]ubject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006). In addition, "subject matter jurisdiction may not be waived, and this Court has not only the power, but the duty to address the trial court's subject matter jurisdiction on its own motion or *ex mero motu*." *Rinna v. Steven B.*, 201 N.C. App. 532, 537, 687 S.E.2d 496, 500 (2009) (citation omitted). And although we would be required to address subject matter jurisdiction even if Husband had not raised it, here, Husband's motion to dismiss under Rules 12(b)(1) and 12(b)(6) alleged the claims should be dismissed for lack of subject matter jurisdiction.

This Court cannot address a case based upon assumptions of the parties or claims about what may "appear" to be, particularly where the trial court's Order of Dismissal was clear and unambiguous. We are required to rely upon the trial court's Order of Dismissal as it is, not as the parties have treated it in their briefs or as the trial court treated it in the Postseparation Support Order. In the Postseparation Support Order on appeal, the trial court made the following findings regarding Husband's motion to dismiss for lack of subject matter jurisdiction:

> 6. This action for postseparation support and alimony was filed by [Wife] on March 19, 2020. [Husband] was served with process and filed responsive pleadings. This matter is before the [c]ourt upon . . . [Wife]'s issue of postseparation support and . . . [Husband]'s Motion to Dismiss.
>
> 7. . . . [Wife]'s Complaint made claims for postseparation support and alimony as this [c]ourt previously dismissed, *without prejudice*, those claims for lack of prosecution in file 17 CVD 7324.
>
> 8. In File #17 CVD 7324 [Husband] was ordered to pay postseparation support to . . . [Wife] in the amount of $1400.00 but terminated when the court dismissed . . . [Wife]'s alimony claim on March 12, 2020.

> 9. [Husband] alleges that . . . [Wife]'s claim for postseparation support should be dismissed as postseparation support terminates when alimony is dismissed and cannot be refiled.
>
> 10. [Wife] alleges that postseparation support is ancillary to alimony and the dismissal terminates any obligation under an Order for Postseparation Support but, like alimony, can be refiled and is not barred from being refiled within one year of being involuntarily dismissed.
>
> 11. The [c]ourt determines that the issue of postseparation support can be refiled and [Husband]'s Motion to Dismiss should be denied.

(Emphasis added.)

The Postseparation Support Order has no labeled conclusion of law addressing the motion to dismiss but the trial court "determined" in the findings of fact that the Order of Dismissal did not bar Wife from refiling her claim within one year. But despite the label of "findings," the trial court's statements in findings numbers 7 and 11 are conclusions of law, not findings of fact. "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, 67 S.E.2d 639, 645 (1951) (citations omitted). These "findings" are legal conclusions about the effect of the Order of Dismissal on Wife's refiled claim based upon "fixed rules of law," including North Carolina General Statute Section 50-16.1A(4) and Rule 41(b). Despite the trial court's labels of these statements as findings of fact, these are conclusions of law, and we must review conclusions of law *de novo*:

> Appellate review of the trial court's conclusions of law is de novo. [*Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000)]. "The labels 'findings of fact' and 'conclusions of law' employed by the lower tribunal in a written order do not determine the nature of our standard of review. If the lower tribunal labels as a finding of fact what is in substance a conclusion of law, we review that 'finding' as a conclusion de novo." *In re Estate of Sharpe*, 258 N.C. App. 601, 605, 814 S.E.2d 595, 598 (2018) (citing *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011)).

Knuckles v. Simpson, 293 N.C. App. 260, 264-65, 900 S.E.2d 336, 340 (2024).

The effect of the Order of Dismissal is controlled by both North Carolina General Statute Section 50-16.1A(4) and by Rule 41(b). Under Rule 41(b), the Order of Dismissal states that Wife's alimony claim was dismissed for failure to prosecute and it does not state that the dismissal is without prejudice. In 1985, our Supreme Court addressed some then-recent revisions to Rule 41 and the trial court's discretion under Rule 41(b) to grant involuntary dismissal either with or without prejudice:

> One of the more far-reaching changes in North Carolina civil trial practice effected by the rules is found in the method for testing the sufficiency of evidence. Rule 41(b) deals with an involuntary dismissal in an action tried by the court without a jury, while Rule 50 covers the motion for a directed verdict in a jury trial. Perhaps the most significant change lies in the fact that a dismissal for insufficiency operates as an adjudication on the merits unless the court specifies otherwise. Under previous law, a compulsory nonsuit allowed the plaintiff to have an automatic second chance on his claim. Too often this right resulted in the unnecessary crowding of court dockets and harassing of defendants with claims that did not deserve a second chance. Rule 41(b) allows the court to dispose of such a claim in final fashion, while at the same time protecting those parties who can demonstrate that they should be afforded another opportunity to produce sufficient evidence.
>
> W. Shuford, N.C. Civil Practice and Procedure, § 41.3.
>
> The same writer offers these further observations on the effect of an involuntary dismissal under Rule 41(b):
>
> > *The major exception to the general proposition that an involuntary dismissal operates as a final adjudication is found in the power lodged by Rule 41(b) in the trial judge to specifically order that the dismissal is without prejudice and, therefore, not an adjudication on the merits. Unless the order dismissing the action states specifically to the contrary, the dismissal under Rule 41(b) does constitute an adjudication on the merits*[.]
>
> *Id.* at § 41-8.

Whedon, 313 N.C. at 212, 328 S.E.2d at 444 (some emphasis added) (some emphasis omitted).

The Order of Dismissal simply cannot be construed as "without prejudice," and the trial court erred by its tacit conclusion that the prior dismissal was without prejudice. The Order of Dismissal does not specifically state that it is "without prejudice" nor does it specify "that a new action based on the same claim may be commenced within one year or less after such dismissal." N.C. Gen. Stat. § 1A-1, Rule 41(b). And although both parties recognized in their briefs that the language of the Order of Dismissal did "appear" to be an involuntary dismissal under Rule 41(b) because it does not state it is "without prejudice," Husband has not argued that there is any language in the Order of Dismissal which may render it unclear or ambiguous but seems to rely entirely on the trial court's finding in the Postseparation Support Order that the prior Order of Dismissal was without prejudice. Although we recognize the possibility that an order of dismissal might somehow be worded in a way to convey the same meaning as "without prejudice" without necessarily using the exact words "without prejudice," here, the Order of Dismissal simply does not include any such language.

The only additional language in the decree of the Order of Dismissal beyond dismissing the alimony claim is this oft-used phrase: "This matter is retained for further Orders of the [c]ourt." No case addresses what this phrase actually means. In most instances, it at least implies that there may be other claims or motions still pending in the case and the trial court anticipates ruling on those matters later, if needed, *in the same proceeding*.[2] Here, it appears there were still some existing claims in file number 17 CVD 7324 after the dismissal of the alimony claim, since there were claims for child custody and child support in the same case and the youngest child did not attain the age of 18 until August 2023. But whatever the intent of the sentence in the Order of Dismissal, use of these words in the Order does not change the effect of the Order under Rule 41(b). Wife's alimony claim in the prior case, file number 17 CVD 7324, was in fact dismissed with prejudice by the Order of Dismissal. Her alimony claim had been dismissed even if the child custody and child support claims still existed, and there was nothing for the trial court to "retain" as to the alimony claim for later orders. Wife recognized the effect of the Order of Dismissal, as indicated by her

2. Our interpretation of this sentence as *not* indicating a dismissal "without prejudice" is also supported by the trial court's other orders in this case, file number 20 CVD 1968. For example, the trial court's last order entered on 29 June 2023, which explicitly dismissed Wife's alimony claim "with prejudice" and terminated her postseparation support also included the same phrase, "This matter is retained for further Order of the [c]ourt."

allegation in her complaint that her "prior claim" for "alimony in 17 CVD 7324" was "dismissed for failure to prosecute on February 17, 2020 when [Wife] was ill and unable to be present." For this reason, Wife filed her new complaint for alimony and postseparation support and issued a new summons in file number 20 CVD 1968 to attempt to assert new claims for alimony and postseparation support against Husband. We cannot interpret the phrase "[t]his matter is retained for further Orders of the [c]ourt" as meaning that the dismissal was without prejudice, especially where Rule 41(b) clearly requires the order to *specifically state* that the dismissal is "without prejudice" or that "it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal." N.C. Gen. Stat. § 1A-1, Rule 41(b) (emphasis added).

IV. Conclusion

The trial court erred by denying Husband's motion to dismiss Wife's postseparation claim because the prior Order of Dismissal was with prejudice under Rule 41(b), and the trial court did not have subject matter jurisdiction to rule on Wife's new postseparation support claim. The 22 July 2020 Postseparation Support Order is therefore vacated.

VACATED.

Judges COLLINS and WOOD concur.

STATE v. CLARK

[299 N.C. App. 445 (2025)]

STATE OF NORTH CAROLINA
v.
DAMIAN DANELLE CLARK, DEFENDANT

No. COA24-909

Filed 18 June 2025

Criminal Law—motion to suppress—affidavit accompanying warrant application—not conclusory—not stale

In a drug trafficking and firearms prosecution, the trial court properly denied defendant's motion to suppress evidence obtained during the search of a residence pursuant to a warrant where competent evidence supported a finding of fact which defendant contended was merely a recitation of conclusory and stale assertions from a detective's affidavit accompanying the warrant application. The underlying circumstances presented in the application (including corroborating information) supported the credibility and reliability of the informant upon whom the detective relied, and the information relied upon dated from only one to two weeks past—not an unreasonable delay given the ongoing nature of the alleged trafficking behavior—and thus was not stale.

Appeal by Defendant from judgments entered 1 & 2 May 2024 by Judge William A. Wood II in Cabarrus County Superior Court. Heard in the Court of Appeals 21 May 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Christine Wright, for the State.

Everson Law Office, PLLC, by Cynthia Everson, for Defendant.

GRIFFIN, Judge.

Defendant Damian D. Clark appeals from judgments entered after the trial court denied his Motion to Suppress. Defendant pled guilty to trafficking opium or heroin, possession of a firearm by a felon, and possession of a stolen firearm. Defendant contends (1) the trial court's findings are not supported by competent evidence; and (2) the trial court's conclusions of law are not supported by its findings. We affirm the trial court's order denying Defendant's Motion to Suppress.

I. Factual and Procedural Background

On 4 May 2022, Detective A.L. Favia applied for a search warrant for property located at 1451 Tygress Drive, Kannapolis, NC 28081. In support of the warrant, Detective Favia indicated she received an anonymous tip from a credible and reliable informant, who "provided information . . . on a number of occasions prior to the application for [the] search warrant." Detective Favia specified "on multiple occasions within the past week/two weeks" the informant had "purchased schedule II-controlled substances from the residence 1451 Tygress Drive, Kannapolis, NC 28081 utilizing Cabarrus County Sheriffs' [O]ffice special funds." All the sales were "arranged and carried out by [Defendant]." The schedule II-controlled substances "[were] turned over to detectives and placed into evidence immediately after the purchase." After reviewing the information presented to him, Magistrate Bill Baggs II found probable cause and issued the search warrant.

Upon executing the search warrant, officers seized 119.7 grams of suspected heroin, 81.3 grams of marijuana, two handguns, scales, and assorted ammunition.

On 6 June 2022, Defendant was indicted by a Cabarrus County Grand Jury for felony trafficking in opium or heroin by possessing 28 grams or more of heroin. On 13 February 2023, the Grand Jury returned a superseding indictment alleging the substance to be fentanyl instead of heroin.

On 26 April 2024, Defendant filed a Motion to Suppress alleging the search warrant lacked probable cause. On 30 April 2024, a suppression hearing was held and the trial court denied Defendant's Motion. On 1 May 2024, Defendant pled guilty pursuant to a plea agreement to trafficking opium or heroin, possession of a firearm by a felon, and possession of a stolen firearm. Defendant reserved the right to appeal the denial of his Motion to Suppress. The order denying Defendant's Motion was entered 2 May 2024. Defendant timely appeals.

II. Analysis

Defendant alleges the trial court erred by denying his Motion to Suppress. Specifically, Defendant contends (1) the trial court's findings are not supported by competent evidence; and (2) the trial court's conclusions of law are not supported by its findings.

"Our review of a trial court's denial of a motion to suppress is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event

they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Eddings*, 280 N.C. App. 204, 209, 866 S.E.2d 499, 503 (2021) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). We review a trial court's conclusions of law de novo. *State v. Jones*, 267 N.C. App. 615, 620, 834 S.E.2d 160, 164 (2019).

"An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *State v. Brown*, 248 N.C. App. 72, 74, 787 S.E.2d 81, 84 (2016) (citation and internal marks omitted).

A. Findings

Defendant challenges Finding of Fact 13 as unsupported by competent evidence. He argues Finding of Fact 13 is a recitation of Detective Favia's search warrant application unsupported by probable cause.

Finding of Fact 13 states the following:

> Probable cause for the issuance of the search warrant included the following: A) over the several months preceding the issuance of the search warrant, detectives with the Cabarrus County Sheriff's Office received reliable information from trusted sources indicating that [Defendant] was involved with the purchase and sale of [s]chedule II[-] controlled substances, B) within the couple of weeks preceding the issuance of the search warrant, Detective Favia met with an individual referred to in the search warrant as [Informant], C) [Informant] is not identified by name in the search warrant due to fear of personal retaliation should his/her identity be known, D) [Informant] has been proven credible and reliable due to having provided information to Detective Favia on a number of occasions prior to the application for this search warrant which she had personally verified to be true and correct, E) throughout this investigation, including multiple times in the week/two weeks preceding the application for this search warrant, [Informant] has purchased [s]chedule II[-]controlled substances from the residence located at 1451 Tygress Dr., Kannapolis, NC, F) Cabarrus County Sheriff's Office funds were utilized for these purchases, G) each of the sales was arranged and carried out by [Defendant],

> H) the purchased [s]chedule II[-] controlled substances were turned over to detectives and placed into evidence immediately after the purchase, I) based on Detective Favia's training and experience, she knows that individuals involved with the illegal sale of narcotics commonly possess firearms in order to protect themselves or their controlled substances, J) Detective Favia's application for the search warrant requested court authorization based on probable cause for the search of any and all evidence that is related to the crime of possession with the intent to sale/deliver a schedule II[-]controlled substance at 1451 Tygress Dr., Kannapolis, NC.

A trial court's findings must be supported by competent evidence. *Eddings*, 280 N.C. App. at 209, 866 S.E.2d at 503. "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Maye*, 295 N.C. App. 248, 252, 905 S.E.2d 293, 296 (2024) (citation and internal marks omitted).

"Under North Carolina law, an application for a search warrant must be supported by an affidavit detailing 'the facts and circumstances establishing probable cause to believe that the items are in the places . . . to be searched.' " *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824 (2015) (quoting N.C. Gen. Stat. § 15A-244(3) (2023)). Under the probable cause standard, "[a] magistrate must make a practical, common-sense decision, based on the totality of the circumstances, whether there is a fair probability that contraband will be found in the place to be searched." *Id.* (citation and internal marks omitted). The magistrate is permitted to draw "reasonable inferences from the evidence in the affidavit supporting the application for the warrant[.]" *Id.* at 164, 775 S.E.2d at 824–25 (citation and internal marks omitted). "[The] evidence is viewed from the perspective of a police officer with the affiant's training and experience, and the commonsense judgments reached by officers in light of that training and specialized experience[.]" *Id.* 164–65, 775 S.E.2d at 825 (citations and internal marks omitted).

Probable cause does not require certainty, but only "a probability or substantial chance of criminal activity." *Id.* at 165, 775 S.E.2d at 825 (citation and internal marks omitted). We give great deference to a magistrate's determination of probable cause, and we are only "responsible for ensuring that the issuing magistrate had a 'substantial basis for . . . conclud[ing] that probable cause existed.' " *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983) (alterations in *Gates*)).

Here, Defendant contends the warrant lacked probable cause because Detective Favia's assertions in his warrant application were "conclusory" and "stale."

1. "Conclusory"

Defendant alleges Detective Favia's assertions regarding the credibility and reliability of the informant were "conclusory" because Detective Favia merely stated the informant was credible and reliable without any additional information. We disagree.

We recognize "[p]robable cause cannot be shown by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based." *State v. Campbell*, 282 N.C. 125, 130–31, 191 S.E.2d 752, 756 (1972) (citation and internal marks omitted). "The magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was credible or his information reliable." *State v. Edwards*, 286 N.C. 162, 165, 209 S.E.2d 758, 760 (1974) (citation and internal marks omitted).

Here, there were sufficient "underlying circumstances" presented in the application to support the credibility and reliability of the informant. The record shows the informant had previously provided information to Detective Favia "on a number of occasions" prior to the application for the search warrant at issue, and Detective Favia "personally verified" that information "to be true and correct." "[T]hroughout [the] investigation" and "multiple times" in the week/two weeks preceding the application, the informant purchased schedule II-controlled substances from the residence sought to be searched. The informant was given funds by the Cabarrus County Sheriff's Office, and sales were "arranged and carried out" by Defendant. The controlled substances "were turned over to detectives and placed into evidence immediately after the purchase."

Contrary to Defendant's contention, Detective Favia did not merely state the informant was credible and reliable. Instead, Detective Favia provided a detailed explanation showing how the informant was reliable through collecting evidence at the residence in question. Detective Favia involved the informant in the investigation and obtained corroborating evidence through a series of staged drug deals to support the informant's original tip. *See State v. Bone*, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001) ("[A]n officer may rely upon information received through an informant, rather than upon his direct observations, so long as the

informant's statement is reasonably corroborated by other matters within the officer's knowledge." (citation and internal marks omitted)). Thus, we hold there was sufficient information in the warrant application to support the credibility and reliability of the informant, and the information presented was not conclusory.

2. "Stale"

Next, Defendant contends the information in the warrant application was "stale" because "it is unclear how much time lapsed between the information provided by the informant and the application for the search warrant." We disagree.

"The test for staleness of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued." *Brown*, 248 N.C. App. at 76, 787 S.E.2d at 85 (citation and internal marks omitted). This Court has held that there is no hard and fast rule for how much time is allowed to pass between the alleged criminal activity and the affidavit seeking the warrant. *Id.* (citation omitted). "The general rule is that no more than a reasonable time may have elapsed." *Id.* (citation omitted). "The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock." *Id.* (citation omitted).

Even though we measure staleness based on what is "reasonable," we have held "an interval of two or more months between the alleged criminal activity and the affidavit" is an "unreasonably long delay." *State v. Lindsey*, 58 N.C. App. 564, 565–66, 293 S.E.2d 833, 834 (1982) (citation and internal marks omitted). However, criminal activity observed "within a day or two of the affidavit and warrant application" is generally not stale. *Brown*, 248 N.C. App. at 76, 787 S.E.2d at 85 (citing *State v. Walker*, 70 N.C. App. 403, 405, 320 S.E.2d 31, 33 (1984) (upholding a search warrant where an informant had seen marijuana within 48 hours of the warrant application)).

Additionally, the affidavit must specify when the informant observed the activity, so the magistrate can properly evaluate whether probable cause exists at the time of issuing the warrant. *See id.* at 80, 787 S.E.2d at 87 (reversing a trial court's suppression order where the officer stated when he spoke to the informant but "failed to state the time the informant's observations were made." (citation and internal marks omitted)).

Here, Detective Favia stated in her affidavit:

> Throughout this investigation, including on multiple occasions within the past week/two weeks, [Informant] has

> purchased schedule II-controlled substances from the residence 1451 Tygress Dr., Kannapolis, NC 28081 utilizing Cabarrus County Sheriffs' [O]ffice special funds. All sales were arranged and carried out by [Defendant]. The purchased schedule II[-]controlled substance was turned over to detectives and placed into evidence immediately after the purchase.

Here, it is apparent from Detective Favia's affidavit the informant obtained the controlled substances from Defendant at his residence within a week or two weeks of the warrant application. Thus, the affidavit does specify "the time the informant's observations were made." *Id.*

The only question left for us to decide is whether one or two weeks is an "unreasonable delay."

In *State v. McCoy*, this Court had to determine whether circumstances of two prior drug deals in different motel rooms within a ten-day period would "reasonably lead[] to the inference that cocaine could be found in the third room." *State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 357 (1990). We looked at two factors to make this determination: "(1) the amount of criminal activity and (2) the time period over which the activity occurred." *Id.* at 577, 397 S.E.2d at 358. There, we stated the following regarding time:

> Absent additional facts tending to show otherwise, a one-shot type of crime, such as a single instance of possession or sale of some contraband, will support a finding of probable cause only for a few days at best. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.

Id. (citations and internal marks omitted).

As a result of the "continuous nature" of the activity, we held ten days to be sufficient because there was a "reasonabl[e] probab[ility], judging from the totality of the circumstances, that the contraband sought could be found in the location to be searched." *Id.* at 578, 397 S.E.2d at 358. This Court reasoned that the defendant, who had been previously convicted of selling drugs, "had within a ten-day period rented three different motel rooms, each time for several days, in a city in which he had a local address, and that at two of those locations he had sold cocaine." *Id.* Thus, it was "reasonable to infer that when the suspect occupied the third room, he still possessed the cocaine." *Id.*

Here, similar to the facts in *McCoy*, there was a continuous pattern of drug deals between Defendant and the informant. Detective Favia stated in the warrant application that "throughout [the] investigation" and on "multiple occasions" in the week/two weeks preceding the application, the informant purchased schedule II-controlled substances from Defendant at his residence. Notably, the facts of the present case are even more compelling than in *McCoy*, because unlike *McCoy*, Defendant was not relocating to different locations or taking up residence in multiple motel rooms during the investigation. The evidence shows all the arranged drug deals occurred at 1451 Tygress Dr., Kannapolis, NC 28081, Defendant's residence.

Thus, considering the circumstances of the present case, and the continuous nature of the drug activity, we hold one or two weeks does not amount to an "unreasonable delay" because there is a "fair probability" the substances would still be at Defendant's residence. *See McKinney*, 368 N.C. at 164, 775 S.E.2d at 824. Accordingly, the information presented in the warrant application was not stale.

B. Conclusions of Law

Defendant contends the trial court's conclusions of law are unsupported by its findings of fact because, in his view, Finding of Fact 13 is unsupported by competent evidence.

As discussed above, Finding of Fact 13 is supported by competent evidence and is therefore binding on appeal. *See Eddings*, 280 N.C. App. at 209, 866 S.E.2d at 503.

"[A] trial court may not consider facts beyond the four corners of a search warrant in determining whether a search warrant was supported by probable cause at a suppression hearing." *Id.* at 211, 866 S.E.2d at 505 (citation and internal marks omitted). Here, the trial court did this and explained how the information presented in the affidavit was sufficient to establish probable cause in Finding of Fact 13.

As a result, the trial court denied Defendant's Motion to Suppress concluding the affidavit was not "conclusory" or "stale" and that "the evidence as a whole provides a substantial basis for concluding that probable cause exists to support the issuance of the search warrant[.]"

Because we held competent evidence supports the trial court's finding of probable cause based on the affidavit submitted, this in turn supports the trial court's conclusion that the information presented was not "conclusory" or "stale" and that probable cause existed to support the issuance of the warrant. *See State v. McHone*, 158 N.C. App. 117,

122, 580 S.E.2d 80, 84 (2003) (holding competent evidence sufficient to support the trial court's findings "which, in turn, support its conclusion that the affidavit did not contain sufficient information to establish probable cause"). As a result, we hold the trial court did not err in denying Defendant's Motion to Suppress.

III. Conclusion

For the aforementioned reasons, we hold the trial court properly denied Defendant's Motion to Suppress.

AFFIRMED.

Judges TYSON and COLLINS concur.

STATE OF NORTH CAROLINA
v.
JARON MONTE CORNWELL

No. COA23-36-2

Filed 18 June 2025

Indictment and Information—continuing criminal enterprise—non-jurisdictional, non-statutory defect—prejudice not established

On remand from the North Carolina Supreme Court for reconsideration in light of *State v. Singleton*, 386 N.C. 183 (2024) (holding that the Criminal Procedure Act abrogated any remaining portion of the common law jurisdictional indictment rule), the Court of Appeals held that, although defendant's indictment on a charge of continuing criminal enterprise (CCE)—related to his alleged involvement with a cocaine trafficking ring—was defective, defendant was not entitled to relief. While the indictment failed to enumerate the alleged underlying offenses comprising CCE, that defect was non-jurisdictional in nature, and defendant did not establish that the indictment failed to satisfy constitutional purposes. Further, defendant failed to establish that the flawed indictment was prejudicial in light of the overwhelming evidence of his guilt.

On remand from the Supreme Court of North Carolina for reconsideration in light of *State v. Singleton*, 386 N.C. 183 (2024). Appeal by defendant from judgments entered 11 October 2021 by Judge Martin

B. McGee in Catawba County Superior Court, Nos. 18CRS001848-170, 18CRS001849-170, 18CRS052417-170. Originally heard in the Court of Appeals 19 September 2023.

Attorney General Jeff Jackson, by Criminal Bureau Chief Benjamin O. Zellinger, for the State.

Jason Christopher Yoder for defendant.

FREEMAN, Judge.

On 4 November 2019, defendant was indicted for possession of a firearm by a convicted felon. On 20 September 2021, a grand jury issued superseding indictments charging defendant with conspiracy to traffic cocaine and continuing criminal enterprise ("CCE"). Defendant's matter came on for trial in Catawba County Superior Court on 4 October 2021. The State introduced extensive evidence tending to show defendant's significant involvement in a cocaine trafficking ring, including wiretaps, surveillance footage, and incriminating items seized from defendant's residence. The evidence tied defendant, referred to as the "Kingpin of Hickory" by an associate, to numerous drug transactions, including the purchase and transport of a one-kilogram brick of cocaine. The jury found defendant guilty of all charges.

Defendant initially announced in court he would not appeal his case, but he then returned to court two days later and gave oral notice of appeal. On appeal to this Court, defendant petitioned for a writ of certiorari "in the event that this Court finds his trial counsel's oral notice of appeal . . . was defective because it was not given 'at trial' as required by Rule 4(a)(1)." Because we determined defendant had "not properly appealed," this Court "allow[ed] his petition for writ of certiorari only in part with respect to the adequacy of his CCE indictment."[1] *State v. Cornwell*, No. COA23-36, 2024 WL 1406627, at *1 (N.C. Ct. App. Apr. 2, 2024).

This Court vacated defendant's conviction for CCE because the indictment charging defendant with that offense was "insufficient to

1. After our prior opinion issued, defendant filed a motion for us to reconsider our dismissal of the remainder of his appeal. Defendant has similarly argued in his supplemental brief that we should consider all of his original arguments on appeal. We decline defendant's invitation to expand the scope of our review on remand beyond that which is properly before us for reconsideration in light of *Singleton*.

support subject matter jurisdiction with respect to that charge." *Id.* The State filed a petition for discretionary review with the Supreme Court of North Carolina, and that Court entered an order allowing the State's petition "for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of this Court's decision in *State v. Singleton*[.]"

Upon remand, this Court ordered the parties to submit supplemental briefing on three issues. The parties' supplemental briefs have been filed and considered by this Court and this matter is now ripe for decision. For the reasons below, we conclude that although our precedent compels us to hold that the indictment charging defendant with CCE contained a non-jurisdictional defect, such defect did not prejudice defendant.

I. Factual and Procedural Background

As our prior opinion in this matter dealt solely with defendant's indictment for CCE, and as our Supreme Court's remand instructed us to reconsider that opinion in light of *Singleton*, our review is limited to that sole issue regarding defendant's indictment. Accordingly, we omit facts and procedure irrelevant to this issue.

The indictment charging defendant with CCE stated:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that from on or about December 1, 2017, through on or about May 30, 2018, in Catawba County, the Defendant named above unlawfully, willfully, and feloniously did engage in a continuing criminal enterprise by violating N.C.G.S. §90-95(h)(3)(c), by trafficking in cocaine, and by violating N.C.G.S. §90-95(a)(1) by selling and delivering cocaine. The violations were part of a continuing series of violations of Article 5 of Chapter 90 of the General Statutes, which the defendant undertook in concert with more than five other persons, including, Naeem Mungro, Gevon King, Terrence Geter, John Gaither, Devonta Beatty, Shamaine Edwards, and Robert Jenkins, with respect to whom the defendant occupied a position of organizer and a supervisory position and from which the defendant obtained substantial income and resources. This act was done in violation of N.C.G.S. §90-95.1.

In our original opinion in this case we relied on *State v. Guffey*, 292 N.C. App. 179 (2024), to analyze defendant's argument that this indictment was "fatally defective for failing to separately allege each

underlying offense as elements of CCE." *Cornwell*, 2024 WL 1406627, at *2. We concluded that:

> Here, the same issues that existed with the CCE indictment in *Guffey* are present. While the indictment specifies that "Defendant . . . unlawfully, willfully, and feloniously did engage in a continuing criminal enterprise by violating N.C.G.S. § 90-95(h)(3)(c), by trafficking in cocaine, and by violating N.C.G.S. § 90-95(a)(1) by selling and delivering cocaine" and names the participants of the alleged enterprise, a juror would have no way of knowing how many criminal acts were committed within the organization or how Defendant's acts advanced them. The indictment was therefore insufficient to confer subject matter jurisdiction over the trial court, and we must vacate the judgment with respect to that charge.

Id. at *3 (cleaned up).

As previously noted, our Supreme Court issued its opinion in *State v. Singleton*, 386 N.C. 183 (2024), shortly after we issued our initial opinion in this matter. In *Singleton*, the Supreme Court held that "an indictment raises jurisdictional concerns only when it wholly fails to charge a crime against the laws or people of this State." *Singleton*, 386 N.C. at 184-85. Before *Singleton* was issued, the State petitioned our Supreme Court for discretionary review of our original opinion in this case. The Supreme Court allowed the State's petition "for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of this Court's decision in *State v. Singleton*[.]" On remand, we ordered the parties to submit supplemental briefing on three issues:

> 1) [T]he validity of *State v. Guffey*, 292 N.C. App. 179 (16 January 2024), *disc. rev. denied* 904 S.E.2d 554 (Mem) (N.C. 21 August 2024), following *Singleton*;
>
> 2) [A]ssuming *Guffey* is still binding caselaw, whether the concerns *Guffey* addresses in continuing criminal enterprise indictments are constitutional or non-constitutional in nature; and
>
> 3) [A]ny arguments from the parties regarding the applicable prejudice standards discussed in *Singleton*, 386 N.C. at 211, so that the parties may carry their respective burdens to present prejudice arguments under N.C.G.S. § 15A-1443(a) and/or (b).

With the parties' supplemental briefing now in hand, we proceed to reconsider our previous opinion in light of our Supreme Court's decision in *Singleton*.

II. Standard of Review

"The sufficiency of an indictment is a question of law reviewed de novo." *State v. White*, 372 N.C. 248, 250 (2019).

III. Discussion

At the time we first considered this case, our courts followed the common law jurisdictional indictment rule. That rule provided that: (1) a valid indictment was necessary to bestow subject-matter jurisdiction on the trial court; (2) arguments regarding the validity of indictments could be raised at any time, including on appeal; and (3) the remedy for a fatally defective indictment was vacatur of the judgment for that indicted charge. *See generally State v. Rankin*, 371 N.C. 885 (2018). Applying this rule to defendant's indictment, we relied on *Guffey* to hold that defendant's CCE indictment was defective as it failed to specifically enumerate each of defendant's alleged underlying acts in the criminal enterprise. *Cornwell*, 2024 WL 1406627, at *3. Under the common law jurisdictional indictment rule, we were therefore compelled to vacate defendant's judgment "with respect to that charge." *Id.*

However, one month after our decision, the Supreme Court of North Carolina held that "the Criminal Procedure Act abrogated any remaining portion of the common law jurisdictional indictment rule" and that the "common law rule has been supplanted and is no longer the law in this State." *Singleton*, 386 N.C. at 209.[2] Our close reading of *Singleton* reveals a three-step process appellate courts must follow when reviewing allegedly defective indictments.

First, the court must determine whether the challenged indictment in fact contains a material defect. Second, if a material defect is present, the court must determine whether the defect is jurisdictional or non-jurisdictional in character. Third, depending on the character of the defect, the court must determine if the defendant is entitled to relief. Applying this framework here, we determine that although defendant's

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2. Although our Supreme Court cautioned that "where non-jurisdictional deficiencies exist in criminal indictments, the better practice is for defendants to raise the issue in the trial courts," *Singleton*, 386 N.C. at 210, "issues related to alleged indictment defects, jurisdictional or otherwise, remain automatically preserved despite a defendant's failure to object to the indictment at trial," *id.*

CCE indictment contained a non-jurisdictional defect, defendant is not entitled to relief because the defect was not prejudicial.

A. Review of Defendant's CCE Indictment

1. The Existence of a Defect

At the first step of our review process we must determine whether defendant's indictment contained a defect. As we relied on *Guffey* in reaching our prior conclusion that defendant's CCE indictment was defective, and as *Guffey* was issued prior to *Singleton*, the first issue we directed the parties to supplementally brief was the continuing validity of *Guffey* following *Singleton*.

Defendant relies on *In re Civil Penalty* to argue that we are bound by *Guffey* because that case has not been specifically overturned by our Supreme Court. *See In re Civil Penalty*, 324 N.C. 373, 384 (1989) ("[A] panel of the Court of Appeals is bound by a prior decision . . . addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court."). The State contends that *Singleton* overruled *Guffey* by rejecting *Guffey*'s premise "that an indictment flaw robs the trial court of subject matter jurisdiction, and that the judgment must be vacated."

The State appears to have misapprehended its first supplemental briefing task. While it is self-evident that *Singleton* overruled *Guffey* to the extent it treated all indictment flaws as jurisdictional errors, the crux of our request for supplemental briefing on the continued validity of *Guffey* related to the only portion of that opinion that could conceivably survive *Singleton*: the holding that a CCE indictment is defective if it fails to enumerate the alleged underlying offenses comprising the CCE.

Because *Singleton* does not specifically address this question, we agree with defendant that we are bound to follow that portion of *Guffey*. *See In re Civil Penalty*, 324 N.C. at 384 ("[A] panel of the Court of Appeals is bound by a prior decision . . . addressing *the same question* . . . unless overturned by an intervening decision from a higher court." (emphasis added)). Accordingly, we reiterate our previous conclusion that defendant's CCE indictment was defective because it failed to enumerate the underlying acts comprising the CCE and thereby failed to allege an essential element of the crime. *Cornwell*, 2024 WL 1406627, at *3 (cleaned up).

2. The Character of the Defect

Having concluded that defendant's CCE indictment was defective, we turn to the second step of our framework: determining whether such defect was jurisdictional or non-jurisdictional in character.[3] A jurisdictional defect "*only* aris[es] where an indictment wholly fails to allege a crime against the laws or people of this State." *Singleton*, 386 N.C. at 184 (emphasis added). This type of defect arises if the indictment charges "conduct that does not constitute a criminal offense," for example, charging "the accused with wearing a pink shirt on Wednesday," or "with a crime committed in another state." *Id.* at 205–06.

All other "species of errors," such as an indictment's failure "to provide notice sufficient to prepare a defense" or failure "to satisfy relevant statutory strictures," are non-jurisdictional defects. *Id.* at 210. This is so because "an indictment charging a defendant with violating the laws of this State is sufficient to invoke the superior court's jurisdiction without regard to an indictment's statutory or constitutional infirmities[.]" *Id.* at 211.

Here, there is no question that defendant's CCE indictment charged defendant "with violating the laws of this State," *id.*, as the indictment alleged that defendant "unlawfully, willfully, and feloniously did engage in a continuing criminal enterprise . . . in violation of N.C.G.S. §90-95.1," the CCE statute. Therefore, because the CCE indictment did not wholly fail to charge defendant with a crime against the laws or people of this State, the defect is non-jurisdictional in nature.[4]

3. Entitlement to Relief

Having concluded that defendant's indictment contained a non-jurisdictional defect, we now proceed to the third step of our

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3. In his supplemental brief, defendant contends "*Singleton* cannot be constitutionally applied to this case retroactively." However, our Supreme Court's mandate remanding this case for reconsideration in light of *Singleton* requires *Singleton*'s retroactive application here.

4. Defendant relies on *State v. Wilkins*, 295 N.C. App. 695 (2024), to argue that notwithstanding *Singleton*'s clear directives to the contrary, "where an indictment fails to allege facts supporting an essential element of the offense, it fails to state a crime and therefore is jurisdictionally defective." In *Wilkins*, we reviewed an indictment charging the defendant with the *common law* crime of obstruction of justice and held that the indictment did not "allege conduct that could be understood to constitute common law obstruction of justice and therefore fail[ed] entirely to allege a criminal act[.]" *Id.* at 701 n.2. *Wilkins* is inapposite here because there is no question that defendant's CCE indictment alleged a criminal act by charging him with violating a criminal *statute*, section 90-95.1.

framework: determining whether this non-jurisdictional defect entitles defendant to relief.[5] Under *Singleton*, "a defendant seeking relief" based on a non-jurisdictional indictment defect "must demonstrate not only that such an error occurred, but also that such error was prejudicial." *Singleton*, 386 N.C. at 210.

> In determining whether an error was prejudicial, the prejudicial error tests provided in section 15A-1443 are applicable. Subsection 15A-1443(a) is the appropriate test for indictment errors that fail to satisfy statutory strictures, and subsection 15A-1443(b) is the appropriate test for indictment errors that fail to satisfy the constitutional purposes of indictments. However, it would appear that the longer a defendant waits to raise issues related to deficient criminal pleadings, the more difficult it would be to establish prejudice.

Id. at 211 (cleaned up).

Under section 15A-1443, a defendant is prejudiced by a statutory defect "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2023). "The burden of showing such prejudice" for a statutory defect "is upon the defendant." *Id.* In contrast, a constitutional defect "is prejudicial unless the appellate court finds that [the defect] was harmless beyond a reasonable doubt." *Id.* § 15A-1443(b) (2023).

To determine which prejudicial error test to apply, we must first ascertain whether the indictment "fail[s] to satisfy constitutional purposes" or "fail[s] to satisfy relevant statutory strictures." *Singleton*, 386 N.C. at 210. "An indictment might fail to satisfy constitutional purposes by failing to provide 'notice sufficient to prepare a defense and protect against double jeopardy,' or it might fail to satisfy relevant statutory strictures by failing to 'assert[ ] facts supporting every element of a criminal offense.' " *Id.* (alteration in original) (first quoting *State v. Lancaster*, 385 N.C. 459, 462 (2023), then quoting N.C.G.S. § 15A-924(a)(5) (2023)).

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5. If the appellate court determines that a defendant has carried his or her burden of demonstrating an indictment contains a *jurisdictional* defect, the remedy remains vacatur of judgment. *See Singleton*, 386 N.C. at 184 ("To be sure, where a criminal indictment suffers from a jurisdictional defect, courts lack the ability to act. . . . Where a court has no power to act in the first instance, jurisdictional defects can be raised at any time.").

Here, defendant contends that because "*Guffey* raised multiple constitutional concerns, all of which apply to the indictment" here, "the indictment failed to provide constitutionally adequate notice to allow him to maintain a defense or allow [him] to protect himself against double jeopardy at the current trial or in a future trial." However, apart from these conclusory statements, defendant fails to articulate any facts demonstrating that this indictment defect prevented him from maintaining a defense or subjected him to multiple punishments for the same offense.

In *Guffey*, this Court "h[e]ld that each underlying act alleged under N.C.G.S. § 90-95.1 constitutes an essential element of the offense" and that the indictment there was fatally defective because it failed to allege these elements. *Guffey*, 292 N.C. App. at 185–86. While *Guffey* did discuss constitutional concerns, it did not create a per se rule that any *Guffey* defect automatically prevents a defendant from maintaining a defense or instantly subjects him or her to multiple punishments for the same offense. A defendant must still carry his or her burden of establishing that the defect actually, not theoretically, impaired his or her ability to present a defense or subjected him or her to multiple punishments for the same offense. Here, defendant has failed to carry this burden.[6]

As defendant has failed to establish that this indictment did not satisfy constitutional purposes, and as the defect stems from the indictment's omission of "an essential element of the offense," *Guffey*, 292 N.C. App. at 185, we conclude the indictment failed to satisfy relevant statutory strictures. *See* N.C.G.S. § 15A-924(a)(5) (providing that a criminal pleading must contain a "plain and concise factual statement in each count which . . . asserts facts supporting every element of a criminal offense[.]"). Accordingly, we apply subsection 15A-1443(a)'s prejudicial error test to determine if defendant is entitled to relief. *See Singleton*, 386 N.C. at 211 ("Subsection 15A-1443(a) is the appropriate test for indictment errors that fail to satisfy statutory strictures[.]").

Under subsection 15A-1443(a), defendant's burden is to establish a reasonable possibility that if the error had not been committed—i.e., if the indictment had properly alleged the underlying acts comprising the CCE—the jury would not have convicted him of that charge. Defendant contends that if the indictment had not been defective, "he could have prepared a defense to the Article 5 violations, requested a special verdict form, and identified convictions in a way that would

6. We note that defendant did not move for a bill of particulars or otherwise indicate any confusion about the charge against him at trial.

prevent double jeopardy." However, defendant fails to articulate how any of these actions would have created a reasonable possibility of a different result on the CCE charge.

Considering the overwhelming evidence of defendant's guilt as to both the underlying Article 5 violations and the CCE charge—including extensive video surveillance, wiretaps, and weapons and drug sale paraphernalia seized from defendant's residence—we hold that defendant has failed to establish prejudice under section 15A-1443(a). Accordingly, we conclude that defendant received a fair trial free from prejudicial error and is therefore not entitled to relief.

IV. Conclusion

In this case, the indictment charging defendant with CCE was defective because it failed to allege the underlying acts comprising the CCE. Under our Supreme Court's precedent in *Singleton*, this defect is non-jurisdictional and therefore does not afford defendant relief absent a showing of prejudice. Under the facts of this case, the failure to allege these underlying acts was a statutory defect that did not prejudice defendant because there is no reasonable possibility that, had the indictment properly alleged these underlying acts, the jury would have acquitted defendant of the CCE charge.

NO PREJUDICIAL ERROR.

Judges STROUD and FLOOD concur.

STATE v. FRALEY

[299 N.C. App. 463 (2025)]

STATE OF NORTH CAROLINA
v.
KIM YOST FRALEY, DEFENDANT

No. COA24-602

Filed 18 June 2025

1. Evidence—hearsay—exceptions—excited utterance—startling event—bank statement showing large sum of money missing

In a case involving multiple counts of exploitation of an older adult by defendant who, together with her husband, managed the finances of her mother-in-law, an elderly woman who later discovered upon reading a bank statement that a significant amount of money was missing from her bank account, the trial court properly admitted hearsay statements that the mother-in-law made immediately after reading the bank statement (including "someone is taking money out of my bank account," "I want it back now," and "[I] never told them nor gave permission to anyone to withdraw money from [my] account,") as substantive evidence that defendant withdrew the money for her personal use without her mother-in-law's knowledge or permission. Given the mother-in-law's circumstances—as an eighty-four-year-old widow who suffered from dementia and had no control over her finances—and visible emotion immediately after her discovery, the act of opening a bank statement and noticing a large sum missing from her life savings qualified as a sufficiently startling event such that the excited utterance exception to the rule against hearsay applied to her statements.

2. Crimes, Other—exploitation of an older adult—elements—acting knowingly and with deception—sufficiency of evidence

In a case involving multiple counts of exploitation of an older adult by defendant who, together with her husband, managed the finances of her elderly mother-in-law, the trial court properly denied defendant's motion to dismiss the charges where substantial evidence showed that, in withdrawing large sums of money from her mother-in-law's bank account without the latter's knowledge or permission, defendant acted knowingly and with deception. The State's evidence included testimony from defendant's sister-in-law, who described the mother-in-law's shock upon discovering that the money had been withdrawn, defendant's refusal to accept the sister-in-law's help with managing the mother-in-law's finances, and defendant's lies about the mother-in-law's tax documents going

missing. Additionally, a bank employee testified that defendant: insisted that the mother-in-law had authorized the withdrawals until, after the bank employee confronted defendant with the withdrawal forms, defendant confessed to copying her mother-in-law's signatures; and made suspicious statements concerning the withdrawals, such as "my husband, knew about this. It wasn't just me."

Appeal by Defendant from judgment entered 15 July 2022 by Judge Jonathan W. Perry in Rowan County Superior Court. Heard in the Court of Appeals 11 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Phillip K. Woods, for the State.

Appellate Defender Glenn Gerding, Assistant Appellate Defender Jillian C. Franke, for Defendant-Appellant.

CARPENTER, Judge.

Kim Yost Fraley ("Defendant") appeals from judgment entered after a jury found her guilty of two counts of exploitation of an older adult of more than $100,000 and one count of exploitation of an older adult of less than $20,000. Defendant argues the trial court erred by: (1) admitting hearsay statements from Edith Fraley ("Edith") as excited utterances, and (2) denying Defendant's motion to dismiss the exploitation charges for insufficient evidence. After careful review, we discern no error.

I. Factual & Procedural Background

On 18 May 2020, a Rowan County grand jury indicted Defendant for: two counts of obtaining property valued at $100,000 or more by false pretenses; two counts of exploitation of an older adult of more than $100,000; one count of obtaining property valued at $20,000 or more by false pretenses; and one count of exploitation of an older adult of less than $20,000. On 23 May 2022, Defendant's case proceeded to trial, and the evidence tended to show the following.

Edith was born in 1933. Edith's husband, who was the sole income provider and managed all the finances, passed away in 2012. Edith was diagnosed with dementia in 2013. In 2016, Edith's son, Bill Fraley ("Bill"), and his wife, Defendant, began caring for Edith. Bill and Defendant became Edith's power of attorney and managed her medical appointments, finances, mail, and taxes. Defendant was employed at Thrivent Financial, Edith's bank, as an office professional from 2007 to 2018.

Cynthia Fraley ("Cynthia"), Edith's daughter, often visited Edith. In September 2017, while Cynthia was visiting Edith, Cynthia observed Edith open her mail, which included bank statements. Defendant and Bill usually picked up Edith's mail, but they were out of town on vacation on this occasion. According to Cynthia, as Edith read her bank statements, Edith appeared surprised and instantly became upset and angry. Cynthia further testified that, immediately after reading her bank statements, Edith exclaimed "that she didn't know who had been doing it, that she wanted her money back right then, [and that] she had given nobody permission to get money out of her account."

In February 2018, Edith was admitted to the hospital with health problems. Subsequently, Cynthia, Bill, and their brother, Robert Fraley, were informed that Edith was going to require full-time care either at home or in an assisted living facility. When Cynthia and her brothers began using Edith's Thrivent Financial bank account to pay for her care, they discovered "someone had been in there taking withdrawals out and it was down to very, very little." As a result, Cynthia filed a report with Thrivent Financial and reached out to law enforcement, who began an investigation into Edith's finances.

Edith passed away in 2019; consequently, she was unavailable to testify at trial. Thus, Defendant objected to Edith's statements as inadmissible hearsay, including "someone is taking money out of my bank account," "I want it back now," and "[I] never told them nor gave permission to anyone to withdraw money from [my] account." When the trial court conducted a voir dire on the matter, the State sought to admit these statements as exceptions to the hearsay rule, arguing excited utterances or then-existing mental, emotional, or physical conditions. The trial court ruled the statements were admissible as excited utterances.

At the close of the State's evidence, Defendant moved to dismiss all charges for insufficient evidence. The trial court granted Defendant's motion to dismiss as to the charges of obtaining property by false pretenses but denied the motion as to the exploitation charges. At the close of Defendant's evidence, Defendant renewed her motion to dismiss the exploitation charges. According to Defendant, the State did not present substantial evidence to prove Defendant knowingly deceived Edith. The trial court denied Defendant's motion.

The jury found Defendant guilty of two counts of exploitation of an older adult of more than $100,000 and one count of exploitation of an older adult of less than $20,000. The trial court sentenced Defendant to: sixteen months minimum to twenty-nine months maximum for the first count of exploitation of an older adult of more than $100,000;

sixteen months minimum to twenty-nine months maximum for the second count of exploitation of an older adult of more than $100,000; and six months minimum to seventeen months maximum for the conviction for exploitation of an older adult of less than $20,000. The trial court also ordered Defendant to pay $267,698.27 in restitution, less the restitution or settlement amount in Defendant's related civil case.[1] Defendant gave oral notice of appeal in open court.

In December 2022, Defendant withdrew her appeal, which according to Defendant, was based on representations from her trial counsel. Subsequently, Defendant contacted North Carolina Prisoner Legal Services, who determined that Defendant withdrew her appeal because she erroneously believed she would risk receiving a longer sentence if she prosecuted her appeal. Counsel from North Carolina Prisoner Legal Services filed a petition for writ of certiorari ("PWC") with this Court asking for Defendant's appeal to be reinstated, and for the superior court to conduct an indigency determination. On 24 October 2023, this Court granted Defendant's PWC.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Issues

The issues are whether the trial court erred by: (1) admitting Edith's statements as excited utterances and (2) denying Defendant's motion to dismiss the exploitation charges for insufficient evidence.

IV. Analysis

A. Excited Utterances

[1] First, Defendant argues the trial court erred by admitting Edith's hearsay statements as excited utterances. In particular, Defendant asserts that seeing an unexpected balance in a bank statement is not a sufficiently startling event. We disagree.

A trial court's determination as to the admissibility of hearsay is reviewed de novo. *State v. Lowery*, 278 N.C. App. 333, 338, 860 S.E.2d 332, 336 (2021). " 'Under a *de novo* review, [this Court] considers the matter

1. A civil case related to the instant case was pending during Defendant's criminal trial. In particular, Edith filed a lawsuit against Defendant, Bill, and Chapman Signs based on the same allegations made during Defendant's criminal trial.

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) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Hearsay is "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) (2023). "Hearsay is not admissible except as provided by statute or by [the Rules of Evidence]." N.C. Gen. Stat. § 8C-1, Rule 802 (2023). One such hearsay exception is the excited utterance exception. N.C. Gen. Stat. § 8C-1, Rule 803(2) (2023). An excited utterance is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.*

The excited utterance exception requires: "(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985) (citation omitted). We recognize excited utterances as an exception to the hearsay rule because:

> [C]ircumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces spontaneous and sincere utterances . . . . The trustworthiness of this type of utterance lies in its spontaneity. . . . There is simply no time to fabricate or contrive statements spontaneously made during the excitement of an event.

State v. Reid, 335 N.C. 647, 662, 440 S.E.2d 776, 782 (1994) (quotation marks and citation omitted).

Here, the State elicited three of Edith's statements through Cynthia's testimony, including: "someone is taking money out of my bank account;" "I want it back now;" and "[I] never told them nor gave permission to anyone to withdraw money from [my] account." The State sought to use these statements to prove that Defendant withdrew money for personal use from Edith's bank account without Edith's knowledge or permission. Both parties concede the statements are hearsay and, therefore, are inadmissible unless an exception applies. *See* N.C. Gen. Stat. § 8C-1, Rule 801(c).

The trial court ultimately admitted Edith's statements under the excited utterance exception. Defendant does not challenge the spontaneity of the statements, instead arguing the circumstances were not

sufficiently startling as required for excited utterances. In essence, Defendant argues that opening a bank statement and discovering an unexpectedly low balance is not a sufficiently startling event. Defendant's argument, however, overlooks significant context and prior caselaw regarding the excited utterance exception.

It is well established that "[w]hether a statement is an excited utterance is determined by *the state of mind of the speaker*." *State v. Wilkerson*, 363 N.C. 382, 417, 683 S.E.2d 174, 195 (2009) (citation omitted and emphasis added). Whether an event is sufficiently startling or stressful to the declarant involves a primarily subjective standard. *State v. Thomas*, 119 N.C. App. 708, 713, 460 S.E.2d 349, 352 (1995). Specifically, we must consider whether circumstances were capable of "suspending [the declarant's] reflective thought." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985).

In September 2017, Edith—an approximately eighty-four-year-old widow with dementia—made the challenged statements immediately upon her discovery that a significant amount of money was missing from her bank account. Leading to this discovery, Edith did not manage her finances so that she was aware of each withdrawal as they occurred. As a result, this was an instance where Edith discovered a large sum of money missing at once.

Given the context of her finances and visible emotion immediately after she read her bank statements, Edith's circumstances demonstrate the suspension of her reflective thought. *See Smith*, 315 N.C. at 86, 337 S.E.2d at 841. In evaluating "the state of mind of the speaker," when Edith made the challenged statements, she was under the stress of excitement from discovering a large sum of money was missing from her life savings. *See Wilkerson*, 363 N.C. at 417, 683 S.E.2d at 195. Accordingly, the trial court did not err in allowing Edith's statements as excited utterances.

Additionally, Defendant argues that even if Edith's statements were excited utterances, they are unreliable and should not have been admitted at trial. Specifically, Defendant contends that Edith's dementia makes her statements unreliable. Given the circumstances surrounding Edith's statements and Defendant's own assertion at trial that Edith knowingly authorized Defendant to make the withdrawals despite her dementia, Defendant's argument does not overcome the presumption of reliability for statements that qualify as a hearsay exception. *See State v. Dawkins*, 162 N.C. App. 231, 234, 590 S.E.2d 324, 327–28 (2004). Therefore, we need not address Defendant's residual hearsay argument under *State v. Stutts*, 105 N.C. App. 557, 414 S.E.2d 557 (1992). Accordingly, Defendant's argument fails.

B. Motion to Dismiss

[2] Finally, Defendant argues the trial court erred by denying her motion to dismiss the exploitation charges. Specifically, Defendant contends the State did not present sufficient evidence to prove she knowingly acted with deception. We disagree.

"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). Under a de novo review, " '[this 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 (quoting *In re Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319).

With a motion to dismiss, " 'the question [] 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) (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980).

In making this determination, the evidence must " 'be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom . . . .' " *State v. Winkler*, 368 N.C. 572, 574–75, 780 S.E.2d 824, 826 (2015) (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980) (citations omitted)). In other words, if the record developed at trial contains "substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.* at 575, 780 S.E.2d at 826 (internal quotation marks and citations omitted). " 'Contradictions and discrepancies do not warrant dismissal of the case; rather, they are for the jury to resolve. Defendant's evidence, unless favorable to the State, is not to be taken into consideration.' " *State v. Agustin*, 229 N.C. App. 240, 242, 747 S.E.2d 316, 318 (2013) (quoting *State v. Franklin*, 327 N.C. 162, 172, 393 S.E.2d 781, 787 (1990)).

A person commits exploitation of an older adult if they: (1) stand in a position of trust and confidence with an older adult; and (2) knowingly, by deception; (3) obtain or use the older adult's funds, assets or property; (4) to temporarily or permanently deprive the older adult of

the use, benefit, or possession of the funds, assets, or property or to benefit someone else; and (5) the value of the funds, property, or assets reaches a certain dollar amount. *See* N.C. Gen. Stat. § 14-112.2(b) (2023).

Here, Defendant only challenges the sufficiency of the evidence as to one element of the exploitation charges—whether she acted knowingly, by deception. As explained above, however, the State provided admissible evidence that Edith was unaware of the extent of the withdrawals Defendant made from Edith's bank account. Particularly, Cynthia testified that as Edith discovered the withdrawals from her bank account, Edith exclaimed, "someone is taking money out of my bank account," "I want it back now," and "[I] never told them nor gave permission to anyone to withdraw money from [my] account."

In addition, Cynthia testified that, on several occasions, she offered to help Defendant manage Edith's finances to which Defendant told Cynthia to "keep [her] nose out of [Defendant's] business" and that Defendant would handle Edith's finances by herself. Cynthia similarly testified that when she attempted to complete Edith's taxes in 2018 and asked Defendant for Edith's tax-related paperwork from the previous years, because Defendant was then responsible for Edith's taxes, Defendant repeatedly told Cynthia that Edith's tax paperwork was lost. But Cynthia later discovered Defendant was lying because she had not filed taxes for Edith since 2015.

Finally, Thrivent Financial employee Alayne Rossum testified that she interviewed Defendant following Cynthia's complaint to Thrivent Financial about the withdrawals from Edith's account. Rossum stated that after she asked Defendant if she knew why she was being investigated, Defendant inquired, "if it was having anything to do with the withdrawals that were made from [Edith's] account?" Rossum also testified that Defendant was "adamant" that Edith signed the withdrawal forms until Defendant admitted she copied Edith's signature after Rossum confronted Defendant with the withdrawal signatures that did not match Edith's signature. In addition, when discussing the withdrawals with Rossum, Defendant said "Bill, my husband, knew about this. It wasn't just me."

In the light most favorable to the State, Edith's excited utterances and the testimony by Cynthia and Rossum are evidence that "a reasonable mind might accept as adequate to support" that Defendant acted knowingly, with deception. *See Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169. Because the State presented substantial evidence of each element of exploitation of an older adult, the trial court did not err by denying Defendant's motion to dismiss.

V. Conclusion

As Edith's statements were spontaneous and made in the context of a sufficiently startling event, the trial court properly admitted them as excited utterances. Additionally, the trial court did not err by denying Defendant's motion to dismiss the exploitation charges. Accordingly, we discern no error.

NO ERROR.

Judges ZACHARY and MURRY concur.

STATE OF NORTH CAROLINA
v.
SHANNON EDWARD GAULT, DEFENDANT

No. COA24-5

Filed 18 June 2025

1. Probation and Parole—subject matter jurisdiction—to revoke probation—probation violation report—adequate notice of alleged violation

The trial court had jurisdiction to revoke defendant's probation where the State's probation violation report alleged that defendant, a registered sex offender, was "charged" with a failure to "register" a social media site "with the Sheriff's department," and that this was "a violation of [defendant's] probation." The violation report gave defendant sufficient notice of the alleged probation violation such that he could prepare his defense, where: it stated the condition of probation he allegedly violated—that he commit no criminal offense; mentioned the specific acts that the State contended constituted the violation; and indicated which criminal offense he allegedly committed, referring to his failure to report an online identifier pursuant to N.C.G.S. § 14-208.11(a)(10), which is a Class F felony.

2. Probation and Parole—revocation of probation—alleged violation—insufficiency of evidence

The trial court's judgment revoking defendant's probation was reversed where the State presented insufficient evidence to support the allegations in its probation violation report—that defendant, a registered sex offender, was "charged" with a failure to "register" a social media site "with the Sheriff's department," and that this was

"a violation of [defendant's] probation." First, although the report alleged that defendant violated a condition of his probation by committing a crime on "18 January 2023," all of the evidence offered at the revocation hearing referenced events that occurred on a later date (in March 2023). Second, although the evidence established that defendant had accounts on certain social media platforms, there was no evidence showing that he failed to register these accounts within the ten-day window prescribed under N.C.G.S. §§ 14-208.11(a)(10) and 14-208.9(e) (requiring registered sex offenders to report any "online identifier" to the registering sheriff), thus committing a crime.

Appeal by defendant from judgment entered 26 June 2023 by Judge Angela B. Puckett in Superior Court, Surry County. Heard in the Court of Appeals 13 August 2024.

Attorney General Jeff Jackson, by Assistant Attorney General Megan Shook, for the State.

Jason Christopher Yoder for defendant-appellant.

STROUD, Judge.

Defendant appeals from a judgment revoking his probation and activating his sentence. On appeal, Defendant argues that the trial court lacked jurisdiction to revoke his probation. Alternatively, Defendant argues that the evidence was insufficient to establish that he violated a condition of his probation. Although the trial court had jurisdiction to rule on the probation violation, the State failed to present evidence of the violation alleged in the probation violation report. We reverse the trial court's judgment.

I. Factual and Procedural Background

On 18 July 2022, Defendant entered a plea of guilty to second-degree exploitation of a minor and disseminating obscenity. Under a plea agreement, Defendant's charges were consolidated into one judgment, and he was sentenced to 20 to 84 months of imprisonment, suspended for 36 months of supervised probation. As a condition of probation, Defendant was prohibited from accessing the internet during the thirty-six-month probationary period. The trial court additionally ordered no contact between Defendant and the minor victim, and he was required to register as a sex offender.

On 21 March 2023, Defendant's supervising probation officer, Officer Lyle Burnette ("Burnette"), filed a report alleging that Defendant had violated the terms of his probation. The violation report stated:

> Of the conditions of probation imposed in that judgment, the defendant has willfully violated:
>
> 1. General Statute 15A-1343(b) (1) "Commit no criminal offense in any jurisdiction" in that . . . DEFENDANT WAS CHARGED WITH A FAILURE TO REGISTER IN REGARDS TO HAVING SOCIAL MEDIA CITE (sic) NOT REGISTERED WITH THE SHERIFF'S DEPARTMENT ON 1/18/23. THIS IS A VIOLATION OF . . . DEFENDANTS PROBATION.

Defendant denied the allegation and requested a hearing on the violation.

On 26 June 2023, the trial court held Defendant's probation violation hearing. Defendant's counsel first sought a continuance, explaining that the violation involved a new felony charge for which he did not have discovery. The trial court denied Defendant's counsel's request. At the hearing, Burnette did not testify. Instead, the trial court heard testimony from another probation officer, Officer Seth Cook ("Cook"), who conducted the check-up on Defendant alongside Burnette.

Cook testified he and Burnette performed a "multiple sex offender check up" in March 2023. Cook was aware that Defendant was "not to have in his possession any social media [or] any pornographic material[.]" Also, that sex offenders under supervision are required to register all social media accounts with the sheriff's office. When they entered Defendant's apartment, he was on Facetime with a female who appeared to be young. Cook detained Defendant and went through his phone. On his phone, Cook found pornographic websites and multiple social media applications, including Snapchat and Facebook.

To Cook's knowledge, Defendant did not have any social media accounts registered with the sheriff's office; however, he testified that Burnette was the one who checked the registration status. During his testimony, Cook accessed Burnette's narrative notes and testified about their contents. He testified that Burnette spoke to a sergeant in the transportation department at the sheriff's office, who confirmed that Defendant did not have any accounts or "online identifier[s]" registered.

Burnette's notes also included several screenshots from Defendant's phone. The screenshots were taken from various online platforms that both Burnette and Cook discovered during their examination of his

phone. One screenshot was from Snapchat and displayed Defendant's username as "RHEC_Shannon33." Cook confirmed that Snapchat is a social media-based company. Another screenshot was of a forum on the Reddit platform, which is an "online multi-purpose forum where you register to get an identifier, which you can then post to that [forum]." However, a user may access Reddit without registering for an account. The screenshot stated, "Top Stories for Shannon" and the specific forum was titled "I'm 15 and my crush is 40. Is it normal?" The other screenshots on Defendant's phone were "pornographic in nature." However, the State presented no evidence of any actions of Defendant on or around 18 January 2023, the date stated in both the probation violation report and in the order. The testimony all related to the visit to Defendant's home in March 2023.

Based on this evidence, the trial court concluded that Defendant was in violation of his probation by failing to register "a social media [site] with the Sheriff's department." As a result, Defendant's probation was revoked and his sentence was activated. Defendant provided oral notice of appeal following sentencing.

That same day, the trial court documented its oral findings and conclusions in a supplemental order with written findings of fact:

> The [c]ourt after hearing all of the evidence presented by both the State and by . . . Defendant finds that the [c]ourt is reasonably satisfied in its discretion that . . . Defendant did violate the condition of his probation that he not commit any new criminal offense in any jurisdiction in that on January 18, 2023 . . . [D]efendant did have a social media cite (sic), to wit Snapchat and Reddit, that was not registered with the Sheriffs Department that was required by law due to [D]efendant's underlying conviction in this case.
>
> The [c]ourt finds the condition was a valid a condition of probation and . . . Defendant violated the condition willfully and without valid excuse at a time prior to the expiration or termination of his probation.

II. Analysis

Defendant asserts three arguments on appeal: (1) the trial court lacked jurisdiction to revoke his probation for commission of a criminal offense because the violation report failed to state any criminal conduct or provide adequate notice of the criminal conduct alleged; (2) alternatively, the trial court erred by revoking his probation because the

State failed to prove the allegation in the violation report; and (3) the trial court's findings of fact were not supported by competent evidence, therefore, it erred by concluding that Defendant committed a new criminal offense based on the evidence. We hold the trial court had jurisdiction to revoke Defendant's probation and he received adequate notice of the alleged criminal offense. However, we further hold the trial court erred by revoking Defendant's probation, as the State failed to prove the allegation in the violation report and presented insufficient evidence of the violation.

A. Subject Matter Jurisdiction

[1] Defendant first argues the trial court lacked subject matter jurisdiction to revoke his probation because the probation violation report failed to allege any criminal conduct and failed to provide adequate notice of the alleged offense, which would have allowed him to prepare his defense.

"[A]n appellate court necessarily conducts a statutory analysis when analyzing whether a trial court has subject matter jurisdiction in a probation revocation hearing, and thus conducts a *de novo* review." *State v. Satanek*, 190 N.C. App. 653, 656, 660 S.E.2d 623, 625 (2008) (citation omitted). "A defendant may raise this issue at any time, even for the first time on appeal." *State v. Knox*, 239 N.C. App. 430, 432, 768 S.E.2d 381, 383 (2015) (citation omitted).

Under North Carolina law, a registered sex offender must "inform the registering sheriff of any new or changes to existing online identifiers that the person uses or intends to use." N.C. Gen. Stat. § 14-208.11(a)(10) (2023). An "online identifier" is defined as "[e]lectronic mail address, instant message screen name, user ID, chat or other Internet communication name, but it does not mean social security number, date of birth, or pin number." N.C. Gen. Stat. § 14-208.6(1n) (2023). If an offender changes or obtains a new online identifier, this information must be reported within ten days to the registering sheriff. N.C. Gen. Stat. § 14-208.9(e) (2023). A failure to report an online identifier is a Class F felony. N.C. Gen. Stat. § 14-208.11(a).

Put together, if a registered sex offender fails to report an online identifier to the sheriff within ten days, he is guilty of a Class F felony and therefore, committed a criminal offense within our jurisdiction. Of relevance here, a trial court may revoke probation if the defendant commits a criminal offense within any jurisdiction. *See* N.C. Gen. Stat. § 15A-1343(b)(1) (2023) ("As regular conditions of probation, a defendant must . . . [c]ommit no criminal offense in any jurisdiction.").

In order to revoke a defendant's probation, the trial court must, at the discretion of the defendant, "hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision." N.C. Gen. Stat. § 15A-1345(e) (2023). If a defendant elects to hold a hearing, "[t]he State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged." *Id.* "The purpose of the notice mandated by this section is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act." *State v. Hubbard*, 198 N.C. App. 154, 158, 678 S.E.2d 390, 393 (2009) (citation omitted). Stated differently, "[a] statement of a defendant's alleged actions that constitute the alleged violation will give that defendant the chance to prepare a defense because he will know what he is accused of doing." *State v. Moore*, 370 N.C. 338, 342, 807 S.E.2d 550, 553 (2017).

Notwithstanding, "[a] court's jurisdiction to review a probationer's compliance with the terms of his probation is limited by statute." *State v. Burns*, 171 N.C. App. 759, 760, 615 S.E.2d 347, 348 (2005). "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *State v. McCaster*, 257 N.C. App. 824, 827, 811 S.E.2d 211, 213 (2018) (citation omitted). Thus, as North Carolina General Statute Section 15A-1345(e) prescribes a certain limitation, a notice requirement, before the trial court can act, it is jurisdictional. Moreover, without adequate notice and a statement of the alleged violation, the trial court lacks jurisdiction to revoke a defendant's probation. *See id.* at 828, 811 S.E.2d at 214 ("Without prior and proper statutory notice and a statement of violations provided to Defendant, the trial court lacked jurisdiction to revoke her probation.").

Our Supreme Court in *Moore* articulated the standard for what constitutes a sufficient statement of an alleged violation to invoke the trial court's jurisdiction. *Moore*, 370 N.C. at 340-46, 807 S.E.2d at 552-55. There, the Supreme Court held, "while the condition of probation which [the d]efendant allegedly violated might have been ambiguously stated in the [violation] report, the report also *set forth the specific facts that the State contended constituted the violation*." *Id.* at 342, 807 S.E.2d at 553 (emphasis added). Accordingly, the "[d]efendant received notice of the specific behavior [the d]efendant was alleged and found to have committed in violation of [the d]efendant's probation." *Id.*

The Court in *Moore* established, "the notice needed to contain a statement of the actions defendant allegedly took that constituted

a violation of a condition of probation—that is, a statement of what the defendant allegedly *did* that violated a probation condition." *Id.* at 344, 807 S.E.2d at 554-55. As the State alleged that the defendant violated the condition that he "commit no criminal offense[,]" the defendant, therefore, "needed to receive a statement of the criminal offense or offenses he allegedly committed." *Id.*

Defendant argues he was not given sufficient notice of the alleged violation in two ways. First, the report failed to state a criminal offense, as the failure to report a "social media cite" is not a crime. Second, that the report failed to identify the case file number, the county where the alleged violation occurred, the statutory subsection of the alleged criminal offense, and what he failed to register.

The violation report stated Defendant "willfully violated: [North Carolina] General Statute [Section] 15A-1343(b)(1) 'Commit no criminal offense in any jurisdiction.' " As to the term "cite," we note that the violation report and other documents refer to a social media "cite." Briefs for both Defendant and the State consider the word "cite" as a misspelling of the word "site" as a shortened form of the word "website" and we agree and will interpret the probation violation report accordingly.[1] According to *Moore*, we are to interpret the violation report using the "natural, approved, and recognized meaning" of the words. *Id.* at 344, 807 S.E.2d at 554. Although the statute gives a definition for "online identifier," the relevant statutes do not include a definition of the words "site" or "website." Since the statutes do not provide a definition, we use the dictionary definition. *See Surgical Care Affiliates, LLC v. N.C. Indus. Comm'n*, 256 N.C. App. 614, 621, 807 S.E.2d 679, 684 (2017) ("When a statute employs a term without redefining it, the accepted method of determining the word's plain meaning is not to look at how other statutes or regulations have used or defined the term—but to simply consult a dictionary." (citation omitted)). Using the word in context, the relevant definition for the word "site" in Merriam-Webster's Collegiate Dictionary is "one or more Internet addresses at which an individual

1. Article 26 does not include a definition of a "site" or "social media site." North Carolina General Statute Section 14-202.5 has a definition of "commercial social networking Web Site" but this definition applies only for the purposes of North Carolina General Statute Section 14-202.5 which applies to "high-risk sex offenders." N.C. Gen. Stat. § 14-202.5 (2023). There is no indication Defendant was charged with any violation under this section. In addition, the United States Supreme Court has held this statute to be unconstitutional. *See Packingham v. North Carolina*, 582 U.S. 98, 103, 198 L. Ed. 2d 273 (2017).

or organization provides information to others." Merriam-Webster's Collegiate Dictionary (11th ed. 2003).

The violation report alleged that Defendant was "*charged*" with a failure to "*register*" a social media site "*with the Sheriff's department*," and that this was "*a violation of [ ] Defendants probation*." Defendant is correct in his assertion that the failure to report use of a social media site does not constitute a *per se* criminal offense. However, as discussed *supra*, because of Defendant's status as a registered sex offender, he was required to report "online identifiers" to the registering sheriff. *See* N.C. Gen. Stat. § 14-208.11(a)(10). The failure to report an online identifier to the registering sheriff is a Class F felony, a criminal offense. *See* N.C. Gen. Stat. § 14-208.11(a). The commission of a criminal offense is a violation of Defendant's probation. *See Moore*, 370 N.C. at 345, 807 S.E.2d at 555 ("While incurring criminal charges is not a violation of a probation condition, criminal charges are alleged criminal offenses. And committing a criminal offense is a violation of a probation condition.").

We hold the violation report provided Defendant with sufficient notice of his action which allegedly violated a condition of his probation. The report stated the condition of probation that Defendant allegedly violated, that he commit no criminal offense, and cited to the proper statute. It included "a statement of what [D]efendant allegedly *did* that violated a probation condition[,]" which was his failure to register a social media site with the sheriff's office. *Id.* at 344, 807 S.E.2d at 554-55. Likewise, it included "a statement of the criminal offense . . . that he allegedly committed[,]" as Defendant was "charged" for his failure to register, which is a Class F felony, and that the offense was a violation of his probation terms. *Id.*

For these reasons, we hold the probation violation report provided Defendant sufficient statutory notice of the alleged probation violation. The report included a statement of what Defendant allegedly did that violated a probation condition and specifically, the condition he allegedly violated. Thus, because Defendant had adequate notice, the trial court had subject matter jurisdiction during his probation revocation hearing.

B. Probation Revocation

[2] Defendant next argues that the State failed to present sufficient evidence to support the allegations in the probation violation report. He further asserts that, due to this insufficient evidence, the trial court's findings of fact were not supported by competent evidence and the trial court abused its discretion in concluding that Defendant violated his probation.

"Probation violation hearings are generally informal, summary proceedings and the alleged probation violations need not be proven beyond a reasonable doubt." *State v. Johnson*, 246 N.C. App. 132, 135, 782 S.E.2d 549, 552 (2016) (citation omitted). During a probation revocation hearing, the evidence must "reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended." *State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (citation omitted). "The burden of proof rests upon the State to show a defendant willfully violated his probation conditions." *Johnson*, 246 N.C. App. at 135, 782 S.E.2d at 552 (citation omitted).

"In order to revoke a defendant's probation for committing a criminal offense there must be some form of evidence that a crime was committed." *State v. Graham*, 282 N.C. App. 158, 160, 869 S.E.2d 776, 778 (2022). "The evidence is sufficient when 'the trial court can independently find that the defendant committed a new offense.' " *State v. McCullough*, 297 N.C. App. 183, 188, 909 S.E.2d 889, 894 (2024) (citations omitted).

Before the trial court may revoke a defendant's probation, it must "make findings to support the decision and a summary record of the proceedings." N.C. Gen. Stat. § 15A-1345(e). The findings of fact must outline the evidence which the trial court relied on and the reason for its decision. *Johnson*, 246 N.C. App. at 136, 782 S.E.2d at 552. If the trial court concludes that a probation condition has been violated, its findings must be supported by competent evidence. *State v. Jones*, 225 N.C. App. 181, 183, 736 S.E.2d 634, 636 (2013).

This Court reviews the trial court's decision to revoke a defendant's probation for abuse of discretion. *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (citation omitted). "An abuse of discretion occurs when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Pettiford*, 282 N.C. App. 202, 206, 869 S.E.2d 772, 776 (2022) (citations and quotation marks omitted). "Though trial judges have discretion in probation proceedings, that discretion implies conscientious judgment, not arbitrary or willful action. It takes account of the law and the particular circumstances of the case, and is directed by the reason and conscience of the judge as to a just result." *State v. Talbert*, 221 N.C. App. 650, 653, 727 S.E.2d 908, 911 (2012) (citations and quotation marks omitted).

Although the probation violation report met the notice requirement under North Carolina General Statute Section 15A-1345(e), we hold the

evidence at the hearing was insufficient to support the revocation of Defendant's probation.

We must first address the date of the violation as alleged in the violation report versus the evidence presented at the hearing. The probation violation report specifically alleged that Defendant failed to register a "social media [site]" with the sheriff's office on 18 January 2023. The report was filed on 21 March 2023. At the hearing, Cook testified that he and Burnette performed the check-up on Defendant sometime in March 2023. In the trial court's supplemental order, it found that "on January 18, 2023 . . . [D]efendant did have a social media [site.]" Also, the violation report, citing the 18 January 2023 date, was incorporated by reference in the trial court's judgment. Thus, the violation report alleged, and the trial court's subsequent order and judgment found, that Defendant violated a condition of his probation on 18 January 2023; however, the evidence and testimony at the hearing only referenced the March 2023 date. There was no evidence presented as to 18 January 2023 and the State made no attempt to reconcile this discrepancy.

This Court previously addressed a similar issue in *State v. Melton*, 258 N.C. App. 134, 811 S.E.2d 678 (2018). There, the violation report alleged that the defendant violated her probation when she absconded from 2 November 2016 to 4 November 2016, the date the reports were filed. *Id.* at 136, 811 S.E.2d at 680. At the hearing, the State presented evidence of the defendant absconding during that specific period; however, it also presented evidence outside of that date range. *Id.* Ultimately, the defendant's probation was revoked and she appealed, arguing that the trial court erred by revoking her probation because there was insufficient evidence to support a finding that she absconded during the period alleged in the violation reports. *Id.*

The Court in *Melton* recognized, "[i]n order to provide a defendant with notice of the allegations against him, as required by [North Carolina General Statute Section] 15A-1345(e), probation violation reports must contain a statement of the specific violations alleged." *Id.* at 137, 811 S.E.2d at 681. In applying the notice requirement, this Court limited its review to whether there was sufficient evidence that the defendant absconded based on the dates alleged in the violation reports, from 2 November 2016 to 4 November 2016. *Id.* at 137, 811 S.E.2d at 681. After considering all the evidence, this Court held, "there was insufficient evidence that [the] defendant willfully refused to make herself available for supervision from 2 November to 4 November 2016 (*the only time period we can consider under the violation report and the court's written finding*)." *Id.* at 139, 811 S.E.2d at 682 (emphasis added).

While the Court in *Melton* addressed an absconding violation, and here Defendant is alleged to have violated probation through the commission of a criminal offense, we consider its analysis and application of the notice requirement to be persuasive. Here, the probation violation report, incorporated by reference into the trial court's judgment, along with the trial court's written findings of fact, alleged that Defendant failed to register a "social media cite" with the sheriff's office on 18 January 2023. Therefore, under *Melton*, our review is limited to the consideration of evidence from 18 January 2023.

As discussed *supra*, there was no evidence regarding a violation on 18 January 2023, "the only time period we can consider under the violation report and the court's written finding." *Id.* Even if the alleged date was a mere oversight, the burden was on the State to prove that Defendant violated his probation; consequently, it was the State's responsibility to identify and address this error. *Johnson*, 246 N.C. App. at 135, 782 S.E.2d at 552. There is insufficient evidence, much less *competent* evidence, to show Defendant violated his probation by committing a criminal offense on the alleged date.

This holding is further supported by considering, in combination, the specific timing requirements outlined in North Carolina General Statute Section 14-208.9(e) and the purpose of the notice requirement. A registered sex offender has ten days to report a new online identifier, or any changes to an existing one, to the registering sheriff. N.C. Gen. Stat. § 14-208.9(e). Thus, the date alleged in the violation report, along with the date on which the ten-day period ended, is determinative. Even if we were to assume the violation report contained a typographical error and was intended to state "3/18/23" rather than "1/18/23," the report's filing date of 21 March 2023 would fall within the ten-day period, meaning Defendant would not yet be in violation of his probation for the alleged criminal offense.

The State contends to the extent that the trial court incorporated a specific date into its revocation order that was not supported by the evidence, that is not dispositive where the *conduct* underlying the violation was supported by Cook's testimony. This argument contradicts the controlling statutory authority and established case law.

First, the date of establishing or changing an online identifier on social media "site" is critical because Defendant had ten days to register an online identifier with the sheriff before he would have committed the criminal offense alleged as a violation of probation. *See id.* There is no evidence in the record as to the specific date on which Burnette and

Cook conducted the check-up or when the ten-day period began and ended. There is no evidence showing when Burnette inquired with the sheriff about Defendant's registration status, nor whether this occurred after the ten-day period had expired. Absent this evidence, this Court cannot determine the timing that would have proven Defendant violated North Carolina General Statute Section 14-208.11(a).

Moreover, in addition to the 18 January 2023 date, we cannot conclude that the evidence was sufficient to support a finding that Defendant committed a criminal offense by failing to register a "social media [site]," specifically Snapchat and Reddit. The State presented evidence of the alleged violation through Cook's testimony. Cook testified that he found multiple social media applications, including Snapchat, on Defendant's phone. Cook's involvement was limited to the check-up on Defendant, with his remaining testimony based only on Burnette's narrative notes. We acknowledge that during a probation revocation hearing, the trial court is "not bound by the formal rules of evidence" and may consider hearsay evidence. *Murchison*, 367 N.C. at 465, 758 S.E.2d at 359 (citation omitted).

However, this Court has held that evidence was insufficient when the State only relied upon a violation report and testimony from the probation officer stating that the defendant was arrested for a crime, as this evidence only showed that he was arrested, not that he committed a crime. *See Graham*, 282 N.C. App. at 160, 869 S.E.2d at 778. The same is true here. The State presented the violation report and testimony from Cook, stating that Defendant had unregistered online identifiers. Cook was not aware, even with Burnette's notes, who was contacted in the sheriff's office, when the sheriff was contacted, and how the sheriff learned that Defendant had unregistered Snapchat and Reddit accounts. Further, there was no evidence of registration documentation showing what Defendant had or had not registered. Thus, the evidence showed only that Defendant had accounts on Snapchat and Reddit in March 2023, and the trial court could infer he used some sort of online identifier on these accounts. The evidence, however, did not show that Defendant failed to register these accounts within the ten-day period after he created or changed an online identifier, thus committing a crime.

We hold there was insufficient evidence to show that Defendant failed to register an online identifier within ten days of its creation or change to the registering sheriff. Therefore, the trial court abused its discretion by revoking Defendant's probation on the grounds that he committed a criminal offense under North Carolina General Statute Section 15A-1343(b)(1).

III. Conclusion

We hold the violation report complied with the notice requirement under North Carolina General Statute Section 15A-1345(e), so the trial court had subject matter jurisdiction in Defendant's probation revocation hearing. We further hold, however, that there was insufficient competent evidence that Defendant violated his probation by committing a criminal offense. The trial court's judgment revoking Defendant's probation is reversed.

REVERSED.

Chief Judge DILLON and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
TYSHON GEROD SOLOMON

No. COA24-748

Filed 18 June 2025

1. Homicide—first-degree murder—defendant as perpetrator—sufficiency of evidence—surveillance and tracking data

In a first-degree murder prosecution arising from the fatal drive-by shooting of two victims, the State presented substantial evidence of defendant's identity as the perpetrator to survive defendant's motion to dismiss, including defendant's locations, cell phone communications, and actions taken before and after the shootings. Although circumstantial, the evidence consisting of video surveillance footage, cell phone analysis, ankle monitoring data, and internet search history raised more than mere suspicion or conjecture as to defendant's participation in the shootings.

2. Evidence—prior crime—murder trial—Rule 404(b)—identity of defendant as shooter—prejudice analysis

In a first-degree murder prosecution arising from the fatal drive-by shooting of two victims, the trial court's admission of defendant's involvement in a prior drive-by shooting—for which defendant pleaded guilty to assault with a deadly weapon with intent to kill—did not amount to prejudicial error. Leaving aside the question of whether the separate shooting incidents were sufficiently

similar for purposes of proving defendant's identity as the perpetrator in the instant case, defendant could not show prejudice given the overwhelming other evidence of his guilt—even if circumstantial—and, therefore, there was not a reasonable possibility that the jury would have acquitted him absent the challenged evidence.

3. Criminal Law—prosecutor's closing argument—defendant's propensity to commit drive-by shootings—not grossly improper

In a first-degree murder prosecution arising from the fatal drive-by shooting of two victims, the prosecutor's statement that defendant "like[d] to shoot out of the backs of cars at people," in reference to evidence of a prior drive-by shooting involving defendant which was introduced at trial, was not so grossly improper as to require the trial court to intervene ex mero motu. Taking the statement in context of the prosecutor's entire closing, in which the prosecutor reminded the jury that the prior incident was introduced solely for the purpose of showing defendant's identity as the perpetrator in the instant case, the statement did not impede defendant's right to a fair trial.

Appeal by defendant from judgments entered 2 June 2023 by Judge Keith O. Gregory in Wake County Superior Court. Heard in the Court of Appeals 25 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General John H. Schaeffer, for the State.

William D. Spence for defendant.

FREEMAN, Judge.

Defendant appeals from judgments entered upon a jury verdict finding him guilty of two counts of first-degree murder. Defendant argues the trial court erred by: (1) denying his motion to dismiss; (2) admitting evidence of his commission of a drive-by shooting in 2017; and (3) failing to intervene *ex mero motu* during the State's closing argument. After careful review, we conclude defendant received a fair trial free of prejudicial error.

I. Factual and Procedural Background

On 4 September 2019, Vincent Arocho and Jaquan Dumas were sitting in Mr. Arocho's parked car when they were murdered in a drive-by

shooting in Raleigh. Mr. Arocho, who suffered nine gunshot wounds—including six gunshot wounds to the head—was found in the driver's seat with his seatbelt still on. Mr. Dumas, who suffered seven gunshot wounds, was found lying on the street beside the vehicle's open passenger door. Witnesses at a nearby daycare center heard the shots, saw a white car driving away from the scene, and called 911.

As part of its investigation into the murders, the Raleigh Police Department collected video surveillance footage from several nearby businesses. These businesses included a Taco Bell, a McDonald's, a non-profit center, a Food Lion, and the daycare center. Footage from the nearby McDonald's showed a white vehicle driving from the McDonald's parking lot to the Food Lion parking lot at 12:06 p.m., about an hour before the murders occurred. Then, at 12:08 p.m., footage from the Taco Bell showed the white vehicle park outside the restaurant. The footage captured three occupants exit the vehicle, interact with a fourth individual in the parking lot, and then enter the restaurant with the fourth individual. Based on this footage and interior surveillance footage from the Taco Bell, police identified these individuals as Jesse Dontez Fraizer, Jonathan Isaiah Manning, Bert Thomas Lucas, Jr., and defendant. Both Mr. Frazier and defendant were known to police as members of the Bloods gang.

The surveillance footage showed defendant place his phone to his ear at 12:15 p.m., and defendant's cell phone records later revealed that defendant received a call from Mr. Arocho at this time. The individuals re-entered the white vehicle at 12:26 p.m. and left the Taco Bell parking lot. Surveillance footage showed that defendant was not driving the vehicle.

At 1:16 p.m., Mr. Arocho's vehicle arrived at the daycare center. About a minute later, the white suspect vehicle arrived with its passenger side pulling up to the driver's side of Mr. Arocho's vehicle. A burst of gunfire erupted from the white vehicle into Mr. Arocho's vehicle, at which point Mr. Dumas exited Mr. Arocho's vehicle to escape. The white vehicle then pulled in front of Mr. Arocho's vehicle, unleashed a second volley of gunfire towards Mr. Dumas, and left the scene. Footage from the McDonald's showed the same white vehicle "going outbound" away from the murder scene at 1:20 p.m. Police later located and stopped the white suspect vehicle and took its driver, Mr. Manning, into custody.

A few days after the murders, Mr. Lucas voluntarily spoke to police about his interaction with the other three suspects. According to Mr. Lucas, he approached the suspects in the Taco Bell parking lot and asked for a ride to a nearby friend's house. The suspects agreed, drove

Mr. Lucas to his destination, and then drove away. Mr. Lucas' friend was not at the destination so he decided to leave and walk back the way he came. As nearby surveillance footage corroborated Mr. Lucas' story and showed him walking down the street near the time of the murders, the police excluded Mr. Lucas as a suspect.

Raleigh police obtained and executed a search warrant on defendant's residence, where they found ammunition of the same caliber used to inflict some of the wounds on Mr. Arocho. Defendant's ankle monitor, a condition of his release from prison on a prior conviction stemming from a separate drive-by shooting, showed he was outside his home on the day of the shooting from 11:05 a.m. to 12:40 p.m. and from 12:44 p.m. to 1:37 p.m.

Cell phone analysis of defendant's cell phone revealed that the phone was new and had been activated less than four hours after the murders. However, because defendant used this new phone to log into his existing accounts, it contained all of defendant's old phone data. This data revealed that defendant contacted an individual regarding a drug sale and told the individual that defendant would be in a white car. Analysis of defendant's phone and Mr. Arrocho's phone showed the two had been in contact in the days leading up to the shooting and that the last four calls made by Mr. Arocho were to defendant. Cell phone analysis also placed defendant's phone "within a block or two" of the crime scene at the time of the shooting.

Less than four hours after the shooting, defendant used his newly activated phone to message a contact saved as "Wifeyyy," writing "My new number, Bae." "Wifeyyy" messaged defendant: "Oh, Bae. That shit all over the news. You never told me why." Defendant responded: "You know we can't talk on phones, Baby." Within the first 48 hours after the shooting, defendant exchanged 39 calls with suspects Mr. Frazier and Mr. Manning. Defendant also searched WRAL.com for stories about the shootings, visited Mr. Arocho's Facebook page, viewed numerous images of Mr. Arocho, and searched the Wake County Court Calendar for cases involving his own name.

Two days after the murders, Raleigh police spoke with defendant's probation and parole officer, John Kidd, and informed him that a warrant for defendant's arrest had been issued. After this discussion, defendant showed up unannounced and unscheduled at Officer Kidd's office. Defendant was subsequently arrested, and on 23 September 2019, defendant was indicted on one count of first-degree murder for the death of Mr. Dumas and one count of first-degree murder for the death of Mr. Arocho.

Defendant's matter came on for trial on 22 May 2023 in Wake County Superior Court. At trial, under Rule 404(b) and over defendant's objection, the State introduced evidence of defendant's involvement in a 2017 drive-by shooting for the purpose of proving defendant's identity. Defendant had pleaded guilty to a charge of assault with a deadly weapon with intent to kill stemming from that incident and had been released from prison one month prior to the murders of Mr. Arocho and Mr. Dumas. In closing arguments, the State referenced this incident and told the jury that defendant "likes to shoot out of the backs of cars at people, like he did" in the 2017 incident. Defendant did not object to the State's closing remarks.

At the conclusion of trial, and after the trial court denied defendant's motion to dismiss, the jury convicted defendant of both charges of first-degree murder under three different theories: premeditation and deliberation, lying in wait, and felony murder. The trial court sentenced defendant to consecutive terms of life imprisonment without parole. Defendant gave oral notice of appeal at the sentencing hearing and now argues the trial court erred in: (1) denying his motion to dismiss the first-degree murder charges; (2) admitting evidence of the 2017 shooting; and (3) failing to intervene *ex mero motu* during the State's closing argument.

II. Jurisdiction

This Court has jurisdiction to consider defendant's appeal of right from the Wake County Superior Court's final judgment. *See* N.C.G.S. § 7A-27(b)(1) (2023); *see also id.* § 15A-1444(a) (2023).

III. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298 (1982)). Similarly, "whether Rule 404(b) evidence is properly admitted is a question of law and is reviewed de novo on appeal." *State v. Pickens*, 385 N.C. 351, 355 (2023) (citing *State v. Beckelheimer*, 366 N.C. 127, 130 (2012)). "The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133 (2002) (citing *State v. Trull*, 349 N.C. 428, 451 (1998), *cert. denied*, 528 U.S. 835 (1999)).

IV. Discussion

Defendant raises three arguments on appeal. First, defendant contends the trial court erred in denying his motion to dismiss the

first-degree murder charges. Second, defendant argues the trial court erred by admitting evidence of defendant's involvement in the 2017 drive-by shooting under Rule 404(b). Finally, defendant contends the trial court erred in failing to intervene *ex mero motu* during the State's closing arguments. We address each argument in turn.

A. Defendant's Motion to Dismiss

[1] Defendant first argues the trial court erred in denying his motion to dismiss the charges of first-degree murder because "the State failed to present substantial evidence that defendant shot either Mr. Dumas or Mr. Arocho or had any part in the shootings." Specifically, defendant contends that because the State presented only circumstantial evidence "of defendant's identity as the perpetrator" or that defendant "was even present in the shooter's car," and because the State "presented no evidence that [d]efendant had . . . the opportunity to commit the crimes," the State's evidence raised only suspicion and conjecture as to defendant's guilt.[1] We disagree.

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged . . . and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98 (1980) (citations omitted). "Substantial evidence only requires more than a scintilla of evidence, or the amount necessary to persuade a rational juror to accept a conclusion." *State v. Dover*, 381 N.C. 535, 547 (2022) (cleaned up).

> In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. Moreover, any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered. Courts considering a motion to dismiss for insufficiency of the evidence should not be concerned with the weight of the evidence.

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1. Defendant also argues the trial court erred in denying his motion to dismiss because the State failed to present substantial evidence of defendant's motive. This argument is without merit as our Supreme Court has held that "proof of motive is not necessary to sustain a conviction for murder." *State v. Stone*, 323 N.C. 447, 453 (1988) (citing *State v. Landingham*, 283 N.C. 589, 600 (1973)).

> The test of the sufficiency of the evidence to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial, or both. Circumstantial evidence is proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. There is no logical reason why an inference which naturally arises from a fact proven by circumstantial evidence may not be made. Therefore, it is appropriate for a jury to make inferences on inferences when determining whether the facts constitute the elements of the crime. Thus, 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. (cleaned up).

Here, defendant relies on *State v. Stallings*, 77 N.C. App. 189 (1985), *disc. rev. denied*, 315 N.C. 596 (1986); *State v. Chavis*, 270 N.C. 306 (1967); *State v. Jones*, 280 N.C. 60 (1971); and *State v. Heaton*, 39 N.C. App. 233 (1978), to support his contention that the State failed to present substantial evidence of his identity as the perpetrator. Upon our review of these cases—decided between forty and fifty-nine years ago—we agree with the State that these cases "are distinguishable as none of them have the technological evidence present in this case." None of these cases involved evidence similar to the key circumstantial evidence presented by the State here, such as video surveillance, cell phone analysis, ankle monitoring data, or internet search history.

The evidence in this case, taken in the light most favorable to the State, tends to show that: (1) prior to the shootings, defendant set up a drug meet with an individual and informed that individual he would be in a vehicle similar to the suspect vehicle; (2) defendant was in contact with one of the victims directly before the shootings; (3) the last calls made by this victim were placed to defendant; (4) defendant left his home about thirty minutes before the shootings and returned about twenty minutes after the shootings; (5) defendant was a passenger in the suspect vehicle shortly before the shootings; (6) defendant's cell phone was within one or two blocks of the crime scene at the time of the shootings; (7) defendant had access to the same type of ammunition used in the shootings; (8) defendant activated a new cell phone mere hours after the shootings; (9) defendant exchanged incriminating messages with a contact mere hours after the shootings; (10) defendant exchanged nearly forty phone calls with other suspects within 48 hours of the shootings; (11) defendant conducted incriminating internet searches,

including a search for his own name on the Wake County Court Calendar, shortly after the shootings; and (12) defendant made a surprise visit to his probation and parole officer two days after the shootings.

Although we agree with defendant that "[w]hether there is sufficient evidence to go to the jury is often a difficult and troublesome question in a criminal case," the question in this case is neither difficult nor troublesome. The State's evidence here, taken together, raises far more than mere suspicion or conjecture as to defendant's identity as one of the perpetrators of this crime and was sufficient "to persuade a rational juror to accept [that] conclusion." *Dover*, 381 N.C. at 547 (cleaned up). Accordingly, the trial court did not err in denying defendant's motion to dismiss.

B. Evidence of the 2017 Shooting

[2] Defendant next argues the trial court erred in admitting evidence of his involvement in a 2017 drive-by shooting under Rule 404(b). Specifically, defendant contends the trial court's admission of this evidence for the purpose of proving defendant's identity constituted prejudicial error because the 2017 incident was not sufficiently similar to the shootings of Mr. Arocho and Mr. Dumas. We disagree.

Rule 404(b) of our Rules of Evidence provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (2023).

"Generally, Rule 404 acts as a gatekeeper against 'character evidence': evidence of a defendant's character . . . admitted 'for the purpose of proving that he acted in conformity therewith on a particular occasion.' " *State v. Pabon*, 380 N.C. 241, 258 (2022) (quoting N.C.G.S. § 8C-1, Rule 404(a)). Evidence proffered under Rule 404(b) "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. Al-Bayyinah*, 356 N.C. 150, 154 (2002).

However, because "Rule 404(b) states a clear general rule of *inclusion*," *Pabon*, 380 N.C. at 258 (cleaned up), character evidence is inadmissible *only* if its sole probative value "is to show that the defendant

has the propensity or disposition to commit an offense of the nature of the crime charged," *State v. Coffey*, 326 N.C. 268, 279 (1990). If the proffered evidence is "relevant to any fact or issue other than the defendant's propensity to commit the crime," *State v. Beckelheimer*, 366 N.C. 127, 130 (2012) (cleaned up), including but not limited to the purposes described in Rule 404(b), the evidence is admissible. To determine whether character evidence is admissible under Rule 404(b), our Courts rely on "the useful guidance of twin north stars: similarity and temporal proximity." *Pabon*, 380 N.C. at 259. As defendant does not contend the evidence here was too remote in time to the charged offenses, our analysis focuses on similarity.

"[P]rior bad acts are considered sufficiently similar under Rule 404(b) if there are some unusual facts present in both crimes that would indicate that the same person committed them." *Id.* (cleaned up). However, "[w]hen the State's efforts to show similarities between crimes establish no more than characteristics inherent to most crimes of that type, the State has failed to show that sufficient similarities existed for the purposes of Rule 404(b)." *State v. Carpenter*, 361 N.C. 382, 390 (2007) (cleaned up).

If an appellate court "determines in accordance with these guiding principles that the admission of the Rule 404(b) testimony was erroneous, it must then determine whether that error was prejudicial" by applying the prejudicial error test set forth in subsection 15A-1443(a) of our General Statutes. *Pabon*, 380 N.C. at 260. Under this subsection, the defendant bears the burden of demonstrating "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2023).

Here, the State sought to introduce evidence regarding defendant's involvement in a drive-by shooting that occurred in April 2017 for the purpose of establishing defendant's identity as the perpetrator of the charged offenses. In the 2017 incident, defendant, who was sitting in the back passenger seat of a white car, fired two or three shots at another vehicle carrying Taisha Ferrell and two other individuals. Defendant filed a motion to exclude evidence of this incident, and the trial court held a hearing on defendant's motion prior to trial.

At the hearing, the State argued there was sufficient evidence that defendant committed the prior act because defendant "pled guilty . . . to assault with a deadly weapon [with] intent to kill for which he was convicted and sent to prison for." The State contended the 2017 incident was substantially similar to the shootings of Mr. Arocho and Mr. Dumas

because both incidents involved: (1) "car-to-car combat"; (2) "shooting . . . from one car into another car"; (3) defendant in a vehicle with two other individuals; (4) "semiautomatic handguns"; (5) a shooting in a public place in southeast Raleigh; and (6) a white car. The trial court agreed the incidents were "similar in nature," determined the evidence was not unduly prejudicial under Rule 403, and allowed the evidence to be admitted with a limiting jury instruction that it be considered for identity purposes only.

On appeal, defendant argues the trial court erred in admitting this evidence because the two acts were not sufficiently similar and the evidence therefore served no proper purpose "other than to show defendant's propensity or disposition to commit an offense like the one he was on trial for." Defendant essentially contends that because the similarities between the two drive-by shootings "establish no more than characteristics inherent to most crimes of that type, the State has failed to show that sufficient similarities existed for the purposes of Rule 404(b)." *Carpenter*, 361 N.C. at 390 (cleaned up).

This case raises an interesting question: when reviewing whether similarities are merely "characteristics inherent to most *crimes of that type*," *id.* (emphasis added), should an appellate court construe "crimes of that type" as a broad or narrow category? For example, whether sufficient similarities exist between the two events in this case may turn on whether both crimes are categorized broadly as assaults with a deadly weapon or narrowly as drive-by shootings. Defendant appears to prefer this Court employ a narrow construction and argues the "details of the 2017 shooting were generic to the act of shooting into an occupied vehicle." The State appears to prefer a broader construction and contends the "2017 shooting . . . was sufficiently similar to the 2019 shootings[.]"

However, because defendant bears the burden of demonstrating both error and prejudice, we need not answer this question in the instant case. *See Pabon*, 380 N.C. at 260 (foregoing error analysis and resolving the defendant's 404(b) argument on prejudice grounds). Even if we presume, without deciding, that the trial court erred in admitting evidence of defendant's commission of the 2017 drive-by shooting, we are convinced that any such error was harmless. The State's other evidence in this case—discussed in detail above—was overwhelming despite its circumstantial nature, and defendant cannot demonstrate a reasonable possibility that he would have been acquitted absent the admission of the State's 404(b) evidence. Accordingly, the trial court did not prejudicially err in admitting evidence of the 2017 shooting.

C. The State's Closing Remarks

[3] Finally, defendant argues the trial court reversibly erred in failing to intervene *ex mero motu* during the State's closing argument. Specifically, defendant contends the State's comment that defendant "likes to shoot out of the back of cars at people, like he did Ms. Ferrell and her sister" was extreme and grossly improper. We disagree.

When, as here, a defendant fails to object to "comments made by the prosecutor during closing arguments, only an extreme impropriety will compel this Court to hold that the trial judge abused his [or her] discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." *State v. Parker*, 377 N.C. 466, 471 (2021) (cleaned up).

> 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.

Id. (quoting *State v. Jones*, 355 N.C. 117, 133 (2002)).

"A trial court is not required to intervene *ex mero motu* unless the argument strays so far from the bounds of propriety as to impede defendant's right to a fair trial." *Id.* at 472 (cleaned up). Thus, an argument is only "grossly improper" if it constitutes "conduct so extreme that it renders a trial fundamentally unfair and denies the defendant due process." *Id.* (quoting *State v. Fair*, 354 N.C. 131, 153 (2001)).

"To meet the gross-impropriety standard, a prosecutor's remarks must be both improper and prejudicial." *State v. Copley*, 386 N.C. 111, 117 (2024) (cleaned up).

> A statement is improper if calculated to lead the jury astray. That is because the lawyer's function during closing argument is to provide the jury with a summation of the evidence, which in turn serves to sharpen and

> clarify the issues for resolution by the trier of fact. Closing remarks must thus be limited to relevant legal issues, and counsel may not place before the jury incompetent and prejudicial matters. For that reason, incorrect statements of law in closing arguments are improper. And arguments stray beyond permissible bounds when lawyers become abusive, inject their personal experiences, express their 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.
>
> The prejudice prong looks to whether a prosecutor's remarks were so overreaching as to shift the focus of the jury from its fact-finding function to relying on its own personal prejudices or passions. Put differently, the closing comments must have veered far enough into improper terrain to impede the defendant's right to a fair trial. To examine prejudice, we assess the likely impact of any improper argument in the context of the entire closing. Rather than atomizing statements and wrenching them from their surroundings, we consult the setting in which the remarks were made and the overall factual circumstances to which they referred.

Id. at 117–18 (cleaned up).

Here, "[r]ather than atomizing" the statement defendant challenges "and wrenching [it] from [its] surroundings," *id.* at 118, we must consider the allegedly improper argument in context. The State's full closing argument regarding the 2017 incident, with the challenged statement italicized, was:

> You will also hear about prior bad acts and you'll be instructed with two limitations. One is going to be about April of 2017 that the defendant discharged a firearm at a vehicle. The evidence was received solely for the purpose of showing identity of the person that committed the crime charged in that case. We'll go to this part in a second, but first let's focus on the 2017 part. You can only consider it for identity. It's a limited purpose. And the law is designed that way. But what about 2017 that you heard goes towards identity? The identity of Mr. Solomon being the perpetrator of this double homicide. Because you heard that from testimony elicited by Mr. Cheston as he asked detective—yes, now Detective Kuchen about the

> distance between the area of Community Drive over to Solar Drive—and you heard a lot about Solar Drive, questions about that—was .66 miles. It's not within a block and a half. It's outside the range of those cell towers, but it's .66 miles. It's in Mr. Solomon's neighborhood. It's in the area that he fled to after he shot at Taisha Ferrell.
>
> He knows the neighborhood. He knows where to put people into place after he has them on the phone. He knows how to navigate the area. *And he likes to shoot out of the backs of cars at people, like he did Ms. Ferrell and her sister.* It goes to his identity and that's the only purpose you can use it for, to be clear, but the similarities are uncanny.

Even if we presume such statement improperly expressed the prosecutor's opinion, we cannot say this statement "veered far enough into improper terrain to impede the defendant's right to a fair trial." *Copley*, 386 N.C. at 118. Properly viewed in the context of the prosecutor's repeated cautions and reminders that the 2017 evidence was to be considered solely for the purpose of identity, this statement was not "so overreaching as to shift the focus of the jury from its fact-finding function to relying on its own personal prejudices or passions." *Id.* Accordingly, we conclude this statement was not grossly improper and the trial court did not err in failing to intervene *ex mero motu*.

V. Conclusion

The State's extensive technological evidence—including surveillance, cell phone analysis, and monitoring of defendant's ankle monitor—tended to show defendant's identity as one of the perpetrators of this double murder and was therefore sufficient to survive defendant's motion to dismiss. Due to this extensive evidence, any error in admitting 404(b) evidence of defendant's commission of a drive-by shooting in 2017 was harmless. Finally, the State's reference to the 2017 incident during closing arguments was not so grossly improper as to require the trial court to intervene *ex mero motu*. Defendant received a fair trial, free of prejudicial error.

NO PREJUDICIAL ERROR.

Chief Judge DILLON and Judge HAMPSON concur.

STATE OF NORTH CAROLINA
v.
MARSHJE TREANNAH SWINSON

No. COA24-414

Filed 18 June 2025

1. Homicide—second-degree murder—malice—intentional act—use of deadly weapon—sufficiency of evidence

In a prosecution of multiple charges arising from an altercation in which two people were shot, one fatally, the State presented substantial evidence from which a jury could find that defendant acted with malice to support second-degree murder. Testimony from multiple witnesses stating that they saw defendant raise a gun and fire at the victim supported an inference that defendant acted intentionally. Moreover, although defendant's account of the incident differed in some details, she related pulling out the gun and cocking it before the victim was shot; in any event, any inconsistencies in the evidence were for the jury to resolve, and did not require dismissal of the charge.

2. Sentencing—classification—second-degree murder—malice theory—unambiguous verdict

The trial court properly sentenced defendant as a Class B1 felon after she was convicted of second-degree murder where there was no evidence that defendant was merely reckless in her handling of the gun used in the incident—which would support depraved-heart malice, the only malice theory that would require classifying second-degree murder as a B2 offense—and, therefore, the jury's general verdict of guilty was not ambiguous. Further, where the evidence showed that defendant acted intentionally when she shot the victim, the trial court did not err, much less plainly err, by failing to instruct the jury on depraved-heart malice.

3. Assault—assault with deadly weapon with intent to kill inflicting serious injury—intent element—sufficiency of evidence

In a prosecution of multiple charges arising from an altercation in which two people were shot, one fatally (for which defendant was found guilty of second-degree murder), the State presented substantial evidence to support the charge of assault with a deadly weapon with intent to kill inflicting serious injury; specifically, the evidence supported an inference of defendant's intent to kill, including that

defendant raised her loaded and cocked gun and shot at the second victim, who was running toward defendant immediately after the first victim was shot.

Appeal by defendant from judgment entered 15 June 2023 by Judge George Robert Hicks III in Duplin County Superior Court. Heard in the Court of Appeals 16 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Reginaldo E. Williams, Jr., for the State.

William D. Spence for defendant.

FREEMAN, Judge.

Defendant appeals from judgment entered upon a jury verdict of guilty on the charges of second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon inflicting serious injury. On appeal, defendant argues that the trial court erred by: (1) denying her motion to dismiss the second-degree murder charge; (2) sentencing her as a Class B1 felon instead of a Class B2 felon for the second-degree murder conviction; and (3) denying her motion to dismiss the assault with a deadly weapon with intent to kill inflicting serious injury charge. After careful review, we conclude that defendant received a trial free of prejudicial error.

I. Factual and Procedural Background

In October 2020, defendant was living with the murder victim, Lonnel Henderson, at the Wells Trailer Park. On the morning of 23 October, defendant and Lonnel had a volatile argument and defendant left to stay with Lonnel's sister, Lannel Henderson, in the same park.

Later that day, defendant went shopping with her cousin, Zeniqua Carr. Defendant then returned to Lonnel's trailer with Lannel to retrieve some personal belongings while Zeniqua waited outside. Defendant visibly carried a handgun in her pants. Lonnel, who was inside the trailer, noticed that defendant was carrying a handgun and the two began arguing. At this point, two of Lonnel's other sisters, Shardonnay Langley and Kyra Pearsall, came to the trailer and the argument escalated. Ultimately, the argument moved outside where it turned into a physical altercation.

At trial, the State and defendant presented conflicting evidence as to what occurred next. The State's evidence tended to show that

once outside of the trailer, Lonnel pushed Zeniqua to the ground, then Shardonnay jumped on top of her and began beating her. Defendant then took out her gun and used it to hit Shardonnay on the back of her head. Shardonnay continued to fight Zeniqua, and Lonnel knocked the gun out of defendant's hand. Zeniqua then picked up the gun, and defendant told her, "There's one in the head, [Zeniqua]," which meant there was "one bullet ready to be fired." Zeniqua handed the gun back to defendant. Defendant raised the gun and shot Lonnel.

Shardonnay then ran at defendant. Defendant again raised the gun and shot Shardonnay; the bullet grazed her forehead, causing her to bleed. Lonnel died at the scene of a gunshot wound to the chest, as the bullet entered his shoulder and pierced both of his lungs and his pulmonary artery.

In contrast, defendant's testimony painted a different version of events. According to defendant, Lonnel pushed Zeniqua to the ground and began hitting her, while Shardonnay started "coming at" defendant after the fracas started. Defendant then pulled out the gun "for her safety," cocked it, and asked everyone to "chill" and "leave [Zeniqua] alone." Then, Shardonnay tried "to grab the gun out of [her] hand," and defendant "kept trying to move it so the gun was pretty much going which or every way." During this clash, the gun discharged, and defendant saw Lonnel holding his arm. Shardonnay "still kept trying to fight like nothing ever happened," which resulted in the gun "going off a second time." After the second shot went off, Shardonnay let go of the gun and "ended up trying to get towards her brother." Defendant testified that she did not know who pulled the trigger for either shot.

Defendant left the trailer park after the shootings. Early the next morning, defendant voluntarily went to the Wallace Police Department where she was placed under arrest. Defendant was indicted for the first-degree murder of Lonnel Henderson. Defendant was also indicted for the attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon inflicting serious injury upon Shardonnay Langley.

Defendant's matter came on for trial on 30 May 2023. At the close of evidence, defendant moved to dismiss the murder and assault with a deadly weapon with intent to kill inflicting serious injury charges. The trial court denied these motions. The jury found defendant guilty of second-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon inflicting serious injury.

The trial court found no aggravating or mitigating factors and sentenced defendant to 240–300 months imprisonment upon the Class B1 felony conviction of second-degree murder. The trial court further sentenced defendant to 73–100 months imprisonment for the assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury convictions, to run consecutively with defendant's second-degree murder sentence. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to review "any final judgment of a superior court, other than one based on a plea of guilty or nolo contendere[.]" N.C.G.S. § 7A-27(b)(1) (2023); *see also* N.C.G.S. § 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."). Accordingly, we have jurisdiction over defendant's appeal of right.

III. Standard of Review

We review a denial of a motion to dismiss de novo to determine whether "there was substantial evidence (1) of each essential element of the offense charged, and (2) that defendant is the perpetrator of the offense[.]" *State v. Collins*, 283 N.C. App. 458, 465 (2022) (cleaned up). We review sentencing errors de novo. *State v. Mosley*, 256 N.C. App. 148, 150 (2017).

IV. Discussion

Defendant argues that the trial court erred by: (1) denying her motion to dismiss the second-degree murder charge; (2) sentencing her as a Class B1 felon instead of a Class B2 felon upon conviction of second-degree murder; and (3) denying her motion to dismiss the assault with a deadly weapon with intent to kill inflicting serious injury charge. We address each argument in turn.

A. Motion to Dismiss the Second-Degree Murder Charge

[1] Defendant first contends that the trial court erred in denying her motion to dismiss the second-degree murder charge. Specifically, defendant argues the State failed to present substantial evidence that she acted with the malice necessary to sustain a conviction of second-degree murder.

To survive a motion to dismiss, the State must submit substantial evidence of each essential element of the charge. *Collins*, 283 N.C. App.

at 465. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Vause*, 328 N.C. 231, 236 (1991) (cleaned up). This evidence need only be more than a "mere scintilla, which only raises a suspicion or possibility of the fact in issue." *State v. Earnhardt*, 307 N.C. 62, 66 (1982) (quoting *State v. Johnson*, 199 N.C. 429, 431 (1930)). "[I]t is well settled that the evidence is to be considered in the light most favorable to the State and that the State is entitled to every reasonable inference to be drawn therefrom." *State v. Alexander*, 337 N.C. 182, 187 (1994). "Any contradictions or conflicts in the evidence are resolved in favor of the State[.]" *State v. Miller*, 363 N.C. 96, 98 (2009).

The elements of second-degree murder are "(1) the unlawful killing, (2) of another human being, (3) with malice, but (4) without premeditation and deliberation." *State v. Arrington*, 371 N.C. 518, 523 (2018) (cleaned up). "Intent to kill is not a necessary element of second-degree murder, but there must be an intentional act sufficient to show malice." *State v. Brewer*, 328 N.C. 515, 522 (1991). There are three theories of malice:

> (1) express hatred, ill will, or spite; (2) commission of inherently dangerous acts in such a reckless and wanton manner as to manifest a mind utterly without regard for human and social duty and deliberately bent on mischief; or (3) a condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.

State v. Coble, 351 N.C. 448, 450–51 (2000) (cleaned up). The second kind of malice is commonly referred to as depraved-heart malice. *State v. Fuller*, 138 N.C. App. 481, 484 (2000). The third kind of malice, condition of mind malice, may be "established by [an] intentional infliction of a wound with a deadly weapon that results in death." *Coble*, 351 N.C. at 451 (cleaned up).

This Court has held that the State presented substantial evidence of malice by showing a defendant's intentional act under circumstances analogous to those present here. For instance, evidence that a defendant shot two people at close range after a heated argument was "sufficient evidence presented that defendant unlawfully murdered [the victim] with malice." *State v. Stitt*, 201 N.C. App. 233, 246 (2009). In another case, when "the State presented evidence that [the] defendant retrieved a gun from his vehicle and intentionally fired the gun" at the victim, we held that there was "sufficient evidence for the jury to infer malice on

the part of defendant" to survive a motion to dismiss. *State v. Banks*, 191 N.C. App. 743, 746, 751 (2008).

Here, defendant's argument that there was insufficient evidence to show malice fails. The State's evidence, viewed in the light most favorable to the State, provided more than a "mere scintilla of evidence," *Earnhardt*, 307 N.C. at 66 (citation omitted), that defendant acted intentionally when she retrieved and fired the gun. Specifically, the State presented the testimonies of three witnesses who saw defendant raise the gun and shoot Lonnel. Their testimonies further established that defendant was in control of the gun when it was discharged because Shardonnay was occupied with fighting Zeniqua at the time Lonnel was shot. Additionally, defendant's own testimony showed that she pulled out the gun and cocked it before Lonnel was shot.

Though portions of defendant's evidence conflict with the State's evidence, "[a]ny contradictions or conflicts in the evidence are resolved in favor of the State." *Miller*, 363 N.C. at 98. Accordingly, defendant's contradictory evidence does not impact our analysis of whether the State presented substantial evidence to survive defendant's motion to dismiss.

This evidence, including the testimony that defendant raised the gun and shot Lonnel, is sufficient to allow a reasonable mind to accept as adequate to support the conclusion that defendant acted intentionally when she fired the gun. And because evidence of such intentional conduct is "sufficient evidence for the jury to infer malice on the part of the defendant," *Banks*, 191 N.C. App. at 751, the trial court did not err by denying defendant's motion to dismiss the second-degree murder charge.

B. Sentencing

[2] Defendant next asserts that the trial court erred in sentencing her as a Class B1 felon upon her conviction of second-degree murder because the jury's verdict was ambiguous. Specifically, defendant argues her testimony "that she did not intend to shoot [Lonnel] and that the gun went off during a struggle for the gun" was sufficient evidence to support sentencing as a Class B2 felon because this testimony demonstrated that she acted with depraved-heart malice.

"Any person sentenced who commits second degree murder shall be punished as a Class B1 felon[.]" N.C.G.S. § 14-17(b) (2023). However, if "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[,]" then the defendant "shall be punished as a Class B2 felon." *Id.* (emphasis added). In other words, a defendant convicted of second-degree murder can be sentenced as a Class B2 felon *only if* there is no evidence to show that they acted with anything other than depraved-heart malice. *See id.*

When a defendant is charged with second-degree murder, the trial court may provide the jury with special verdict form to identify under which theory of malice it found the defendant guilty. *See State v. Borum*, 384 N.C. 118, 118 (2023). Otherwise, the trial court gives the jury a general verdict form, which means that the specific theory for the jury's finding is unknown. *See Mosley*, 256 N.C. App. at 149.

When there is no evidence "presented that would support a finding that an accused acted with depraved-heart malice, . . . it would be inferred from a general verdict that the jury found the accused guilty of B1 second-degree murder." *State v. Lail*, 251 N.C. App. 463, 471 (2016). However, a general verdict form is ambiguous for sentencing purposes when "the jury is . . . presented with evidence that may allow [it] to find that either B2 depraved-heart malice or another B1 malice theory existed." *Id.* at 475. With a verdict so ambiguous, "neither we nor the trial court [are] free to speculate as to the basis of a jury's verdict, and the verdict should be construed in favor of the defendant." *Mosley*, 256 N.C. App. at 153.

In determining whether the defendant in *Mosley* was entitled to resentencing as a Class B2 felon, we reasoned:

> In the case *sub judice*, . . . there was evidence of defendant's reckless use of a rifle, a deadly weapon. Specifically, defendant testified that as he was arguing with the victim, he was holding the rifle with his finger on the trigger and without the safety on. Defendant stated this was how he always handled the rifle—finger on the trigger and no safety. Defendant testified that in this instance, the gun went off when the victim grabbed the barrel of the rifle and he pushed her away. There was also testimony about the safety of the rifle and testimony from a firearm expert that "you would never teach anyone to have their finger on the trigger until they are ready to fire."

Id. at 152–53 (cleaned up).

We held that this was evidence "from which the jury could have found depraved-heart malice to convict [the] defendant of a Class B2

second degree murder." *Id.* at 153. Because the evidence there *could* have supported a finding of depraved-heart malice, we concluded that the jury's general verdict form was ambiguous and that the trial court therefore erred by sentencing the defendant as a Class B1 felon rather than construing the verdict in favor of the defendant. *Id.*

On the other hand, in *State v. Crisp*, we concluded the defendant was not entitled to resentencing in part because there was no "*reckless use* of a deadly weapon constitut[ing] depraved heart malice." 281 N.C. App. 127, 137 (2021) (emphasis added) (citing *Mosley*, 256 N.C. App. at 152–53). There, we determined the evidence that the defendant "left an empty-chambered gun unattended, or that [the victim] grabbed the gun, which [the defendant] maintain[ed] *he did not use* and believed was unloaded" was "insufficient to show that [the defendant] committed an inherently dangerous act" that would support a finding of depraved-heart malice. *Id.* (emphasis added). Because this evidence—which did not indicate the defendant's reckless use of a deadly weapon—could not support a finding of depraved-heart malice, the general verdict was unambiguous and the trial court did not err by sentencing the defendant as a Class B1 felon. *Id.*

Here, defendant's contention that the jury's verdict was ambiguous because this case is "identical" to *Mosley* fails because there was no "evidence of defendant's reckless use . . . [of] a deadly weapon." *Mosley*, 256 N.C. App. at 152. At trial, the State's evidence tended to show that the defendant intentionally raised the gun and shot Lonnel. Defendant's own testimony, on the other hand, failed to provide evidence of her reckless use of the firearm. Specifically, when repeatedly asked to describe "how the gun discharged," defendant testified:

> Q. Now, you testified that you shot twice?
>
> A. I did not say I shot twice. I said someone's trying to get the gun out of my hand and fight me while the gun was in my hand, and that's how the gun went off.
>
> Q. Okay. Twice?
>
> A. Yes. It went twice. She never stopped trying to fight. She kept going . . .
>
> A. She kept trying to fight me with the gun in my hand repeatedly. That's how the gun went off the first time, and she kept going, and that's how it went off the second time.
>
> . . .

> Q. Did you fire the handgun that night, Ms. Swinson?
>
> A. No, sir, I did not.
>
> . . .
>
> Q. Do you know how the gun discharged that night?
>
> A. Because me and Shardonnay—again, like I stated, she kept trying to fight me with the gun in my hand, was trying to jump on me with the gun in my hand. And I constantly kept saying, Shardonnay stop, stop Shardonnay, stop. She wouldn't stop. That's when the first shot went off.
>
> . . .
>
> Q. Originally, where was it when you—you had possession of it?
>
> A. I had it right here, like on my side, telling her to stop.
>
> Q. When Shardonnay was grabbing for the handgun, where did it go, to the best of your recollection?
>
> A. Pretty much like I said, pretty much everywhere 'cause I kept saying to Shardonnay, stop. So I'm trying to pull, and she's keep trying to fight me and keep swinging and swinging and swinging. I'm, Shardonnay, stop, and that's when the first pow went off. Like I said I just stood there after the first pow went off.

Thus, according to defendant, she did not recklessly use the firearm because she did not *use* the firearm at all. Unlike in *Mosley*, where the defendant testified that "he was holding the rifle with his finger on the trigger and without the safety on" and that "the gun went off when the victim grabbed the barrel of the rifle and he pushed her away," 256 N.C. App. at 152–53, defendant here did not provide any evidence that she was using the firearm in such a reckless manner or any explanation of how the gun discharged. Instead, according to defendant, the gun mysteriously fired twice because Shardonnay "kept going."

Neither version of events—the State's version in which defendant intentionally fired two shots, or defendant's version in which she did nothing wrong and the gun mysteriously fired two shots—constitute the kind of reckless conduct that could support depraved-heart malice. Based on the evidence presented at trial, the jury only could have found defendant guilty of second-degree murder under the theories that support sentencing as a Class B1 felon. Therefore, the jury's verdict is

unambiguous, and the trial court did not err by sentencing defendant as a Class B1 felon.

Defendant alternatively argues that the trial court plainly erred by failing to instruct the jury on the depraved-heart theory of malice. An instruction on depraved-heart malice would be warranted when there is evidence presented at trial that would support a finding that a defendant acted with depraved-heart malice. *See Lail*, 251 N.C. App. at 475; *see also State v. Clark*, 201 N.C. App. 319, 323 (2009) ("An instruction on a lesser-included offense must be given only if the evidence would permit the jury to rationally find [the] defendant guilty of the lesser offense and to acquit him of the greater." (citation omitted)). "When determining whether there is sufficient evidence for submission of a lesser included offense to the jury, we view the evidence in the light most favorable to defendant." *Clark*, 201 N.C. App. at 323 (citation omitted).

As discussed above, the evidence in this case, even in the light most favorable to defendant, could not support a finding that defendant acted with depraved-heart malice because the evidence does not demonstrate reckless use of the firearm. Accordingly, the trial court did not err, let alone plainly err, by failing to instruct the jury on the depraved-heart theory of malice.

C. Motion to Dismiss Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Injury Charge

[3] Finally, defendant contends the trial court erred by denying her motion to dismiss the assault with a deadly weapon with intent to kill inflicting serious injury charge. Defendant specifically argues the State did not present substantial evidence that defendant had an intent to kill.

"The essential elements of assault with a deadly weapon with intent to kill inflicting serious injury are (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death." *State v. Liggons*, 194 N.C. App. 734, 742 (2009) (cleaned up); *see also* N.C.G.S. § 14-32(a) (2023) ("Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon.").

"An intent to kill is a mental attitude, and ordinarily it must be proved . . . by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be reasonably inferred." *State v. Cauley*, 244 N.C. 701, 708 (1956). "An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. Thacker*,

281 N.C. 447, 455 (1972). "The surrounding circumstances include the foreseeable consequences of a defendant's deliberate actions[,] as a defendant must be held to intend the normal and natural results of his deliberate act." *Liggons*, 194 N.C. App. at 739 (cleaned up).

Here, the State offered evidence that defendant raised her loaded and cocked gun and shot at Shardonnay while she was running towards defendant. Shardonnay's death would have been a natural and foreseeable consequence of shooting directly at her, so the jury could have reasonably found that defendant acted with intent to kill when she shot at Shardonnay.

Considering the evidence in the light most favorable to the State, there was substantial evidence to show that defendant acted with intent to kill Shardonnay. Therefore, the trial court did not err by denying defendant's motion to dismiss the assault with a deadly weapon with intent to kill inflict serious injury.

V. Conclusion

The trial court correctly denied defendant's motion to dismiss the second degree murder charge because the State presented substantial evidence that defendant acted with malice. Because there was no evidence presented by either party to support that defendant acted with depraved-heart malice such to render the jury's verdict ambiguous, the trial court properly sentenced defendant as a Class B1 felon upon the conviction of second-degree murder. Finally, the trial court also correctly denied defendant's motion to dismiss the assault with a deadly weapon with intent to kill inflicting serious injury charge because the State presented substantial evidence that defendant acted with intent to kill. Accordingly, we conclude that defendant received a fair trial, free from prejudicial error.

NO ERROR.

Judges HAMPSON and GORE concur.

STATE v. TATE

[299 N.C. App. 507 (2025)]

STATE OF NORTH CAROLINA
v.
PAUL EMMANUEL TATE, JR., DEFENDANT

No. COA24-450

Filed 18 June 2025

1. Jury—due process right to a unanimous jury—jury instructions and verdict sheets—no error

In a prosecution that resulted in defendant being found guilty of second-degree rape—where the indictment alleged that defendant "knew" the victim was mentally incapacitated and was physically helpless (due to having consumed alcohol), while the jury was instructed that, to convict defendant, it must find beyond a reasonable doubt that he "knew or should reasonably have known" of the victim's condition—defendant's due process rights to a unanimous jury verdict and to be convicted only of an offense for which he was charged were not violated. First, N.C.G.S. § 15-144.1(c) provides that short-form indictments for second-degree rape (based on victim incapacity) need not allege the element of actual or constructive knowledge of the victim's condition. Second, the disjunctive instruction on knowledge did not deny defendant a unanimous jury verdict because defendant's actual versus constructive knowledge of the victim's incapacity did not implicate separate criminal acts, but, instead, constituted alternative factual avenues to prove the same element.

2. Sexual Offenses—inability of the victim to consent—defendant's knowledge of the victim's condition—evidence sufficient

In a prosecution that resulted in defendant being found guilty of second-degree rape (of a woman who had become incapacitated due to alcohol consumption), the trial court properly denied defendant's motion to dismiss for insufficient evidence of two elements: the victim's incapacity and defendant's knowledge of her condition. The evidence of the victim's incapacity included records of the victim's blood and urine alcohol levels, statements and testimony from the victim, and comments made by defendant to investigators about the victim's intoxication level; the evidence of defendant's knowledge of the victim's condition included defendant's comments to investigators that the victim was "wasted" and "a drunk bitch" at the time he had sex with her.

3. Constitutional Law—Confrontation Clause—DNA analyses—challenge to one witness not preserved—no error regarding other witness

In a rape prosecution, the admission of DNA results from a private laboratory and related testimony from two employees of the State Crime Lab, did not offend defendant's Sixth Amendment rights. As to one employee's testimony, defendant made only general objections and an objection on hearsay grounds and, thus, did not preserve his constitutional arguments for appellate review. As to the second employee's testimony (to which defendant made a specific, timely objection on Confrontation Clause grounds), the out-of-court statement introduced—test results from the private lab, which found male DNA in the swabs from the victim's rape kit—satisfied only one of the two requirements needed to implicate defendant's Confrontation Clause rights. While the DNA profile produced by the private lab was used by the employee to identify defendant after the profile was matched, first, to a state database, and, then, after independent analyses conducted by the employee, to defendant's sample (and, thus, constituted hearsay), it was not testimonial because it was not generated solely to aid a police investigation. Finally, even assuming any error in the admission of the DNA results, any error was harmless in light of the other evidence of defendant's guilt.

Appeal by defendant from judgment entered 2 February 2023 by Judge Marvin K. Blount, III in Superior Court, Pitt County. Heard in the Court of Appeals 14 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General J. Joy Strickland, for the State.

Cooley Law Office, by Craig M. Cooley, for defendant-appellant.

STROUD, Judge.

Defendant Paul Tate appeals from judgment entered following a jury trial finding him guilty of second-degree rape. On appeal, Defendant contends the trial court's jury instructions violated his due process right to a unanimous jury verdict. Defendant also contends the trial court erred in denying his motion to dismiss because there was not sufficient evidence that Robin was incapable of consenting to sexual activity and that Defendant knew or should have known Robin was mentally incapacitated or physically helpless. Defendant also contends the trial court

violated his rights under the confrontation clause of the 6th Amendment of the United States Constitution by allowing expert testimony from employees of the State Crime Lab based in part on DNA test results generated by Sorenson, a private third-party laboratory, since the State did not present testimony from the Sorenson analyst who did the initial DNA testing. We have carefully analyzed these three issues and for the reasons discussed below, the trial court did not commit any reversible error.

I. Background

Defendant's indictment and conviction arose from an alleged sexual assault on Robin[1] which occurred on 1 June 2011. Robin testified she spent the day visiting some friends from high school in Greenville, North Carolina. After lunch, Robin and her friends went to the pool at her friend's apartment community. Robin testified that she had "a few beers" while at the pool that day, and eventually began "drinking a clear liquor . . . straight from the bottle."

Although Robin could "vivid[ly]" remember "going to the pool," she could not recall many details regarding the rest of her time there. One interaction she recalled, however, was with a group of "three guys that were hanging out . . . [and] playing beer pong[ ] . . . across the pool." One of these men presented Robin with the question of "[i]f [she] could handle him and his two friends." Following this interaction, the next thing Robin could remember was "[b]eing in a car, falling out of it, and throwing up." Robin recognized that it was now dark outside, at least two white men were in the car with her, and she had been taken to an apartment complex she did not recognize.

Robin's next memory was waking up on a bed with a guy behind her having vaginal sex with her. Robin could also remember a second man wearing swim trunks being "called in" and she was "motioned" to perform oral sex on him. After the second man left, the man behind Robin "motioned" a third man into the room, apparently for Robin to perform oral sex on him also. At this point, Robin began regaining awareness and "realized something wasn't right[.]"

The two men in the room began having a conversation and discussing how the second man "ran out of the room." Robin recognized "things stopped[ ]" and the two men left the room, presumably to "check [on] the friend that left[.]" After the men left, Robin fled the apartment. Robin ran to a nearby apartment complex she recognized because she had

1. Stipulated pseudonym agreed to by the parties to protect the identity of the victim.

once lived there with her daughter's father. Someone at the complex assisted Robin in transporting her to the hospital. Robin was placed in a room at ECU Health's Emergency Department shortly "after midnight" on 2 June 2011.

While at the hospital, Robin had a sexual assault forensic examination performed by a nurse who had specialized training in performing such examinations. The nurse gathered samples and evidence from Robin and performed various examinations used for reported sexual assaults. In one of the forms filled out by the Sexual Assault Nurse Examiner ("SANE"), she noted Robin had some "bleeding in her vaginal canal." After completion of this examination, the nurse packaged the samples in the sexual assault kit and delivered it to Detective Smith, a law enforcement officer with the Greenville Police Department assigned to the special victims' unit in 2011.

After receiving the sexual assault kit, Detective Smith went to the apartment complex where Robin and her friends went to the pool. The apartment community staff told Detective Smith neither of their security cameras covering the area were operational. Detective Smith placed Robin's sealed sexual assault examination kit and other evidence into a locker at the Greenville Police Department.

In his testimony, Detective Smith indicated the case went "inactive" for some time as there was not enough evidence to move forward any further. However, a few years later, James Tilly joined the Greenville Police Department on a federal grant designated to "help law enforcement track, catalogue, and test . . . untested [sexual assault] kits[.]" On 12 December 2017, Mr. Tilly acquired Robin's sealed, untested sexual assault kit and mailed it to Sorenson Labs, a private DNA testing facility in Utah. Sorenson's analysis of Robin's test kit returned positive for the presence of male DNA from her vaginal, rectal, and oral swabs. Mr. Tilley then sent these results to the North Carolina State Crime Lab in 2018. Cortney Cowan, forensic scientist with the State Crime Lab, reviewed the data compiled by Sorenson, extracted the "unknown component" of the DNA mixture, i.e., the male portion of the DNA, and entered it into the State's DNA database.

In June or July of 2019, Detective Michael Cunningham with the Greenville Police Department was assigned to Robin's case. While reviewing Robin's case file and the DNA data, Detective Cunningham saw Defendant's DNA came back as an initial match for the male DNA extracted by the State Crime Lab. Detective Cunningham determined Defendant was incarcerated at Carteret Correctional Center and he

began the process of obtaining a search warrant to collect Defendant's DNA. Detective Cunningham met with Defendant in November of 2019, read over the search warrant with Defendant and provided him a copy, and obtained a buccal swab from the inside of Defendant's cheek for further DNA testing. Detective Cunningham testified this additional DNA testing was routine practice to ensure the DNA of the suspect returned the same match as the initial report. Blood and urine samples were also obtained from Defendant using a State Bureau of Investigation suspect kit.

Tricia Daniels, a forensic scientist for the North Carolina State Crime Lab, tested the samples obtained from Defendant and compared them to the DNA profile generated by Sorenson from Robin's sexual assault test kit. At trial, after being tendered as an expert in her field, Ms. Daniels opined the DNA samples collected from Defendant were a probable match to DNA results generated by Sorenson. Specifically, she testified that

> [t]he probability of randomly selecting an unrelated individual with a DNA profile that is consistent with the deduced DNA profile obtained from the sperm fraction of the vaginal swabs as provided by Sorenson Forensics item 1-1 is approximately 1 in 101 sextillion in the Caucasian population, 1 in 271 sextillion in the African-American population and 1 in 452 sextillion in the Hispanic population using the population databases generated by NIST.

On 25 October 2021, Defendant was indicted for one count of second-degree forcible rape against Robin. Trial began on 30 January 2023, and the jury returned a guilty verdict on 1 February 2023. Judgment was entered 2 February 2023. Defendant gave oral notice of appeal and timely filed written notice of appeal to this Court that same day.

II. Analysis

Defendant presents three main arguments on appeal. First, Defendant argues the trial court's jury instructions violated his due process right to a unanimous jury verdict. Second, Defendant argues the trial court erred in denying his motion to dismiss, contending the State did not present substantial evidence of each element of second-degree forcible rape. Finally, he argues the trial court violated his Confrontation Clause rights by allowing introduction of the private lab DNA results, through testimonies of State Crime Lab analysts, without also requiring the State to present the analyst who actually performed the analysis for testimony. We address each argument in turn.

A. Jury Instructions and Verdict

[1] Defendant first argues the trial court's jury instructions and verdict sheets violated his due process right to a unanimous jury. At trial, Defendant's counsel objected to the jury instruction as including the constructive knowledge element of second-degree rape, arguing Defendant's indictment was premised only on actual knowledge of Robin's incapacitation. Defendant's counsel specifically objected to and challenged this instruction on due process grounds, contending Defendant was not put on notice of needing to prepare a defense as to allegedly having constructive knowledge of Robin's incapacitation. Defendant further contends this instruction was a "fatally ambiguous disjunctive instruction regarding the knowledge element[ ]" which denied Defendant the right to a unanimous jury verdict. We disagree.

"The Due Process Clause prohibits any state from depriving 'any person of life, liberty, or property, without due process of law.' " *State v. Joyner*, 284 N.C. App. 681, 693, 877 S.E.2d 73, 83 (2022) (quoting U.S. Const. amend. XIV). "When determining whether a defendant's due process rights were violated, we apply a *de novo* standard of review." *Id.* (citation omitted).

Defendant was indicted for one count of second-degree rape on 25 October 2021 for acts occurring in June of 2011. Because Defendant's actions giving rise to the indictment occurred in 2011, we must look to the version of North Carolina General Statute Section 14-27.3 ("the Statute") in effect at that time, which was later recodified as Section 14-27.22 by Session Law 2015-181, Section 4(a), effective 1 December 2015.[2]

North Carolina General Statute Section 14-27.3 provided, in relevant part:

> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know

2. Section 14-27.22 only changed the name of the offense to "second-degree forcible rape"; the elements remained the same. *See* S.L. 2015-181, § 4(a).

> the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C. Gen. Stat. § 14-27.3 (2011). Defendant's first argument on appeal centers mainly on Subsection (a)(2) of the Statute and the element "should reasonably know the other person . . . is mentally incapacitated or physically helpless." *Id.*

Defendant's indictment indicated

> [t]he jurors of the State . . . present that . . . [D]efendant . . . willfully and feloniously did carnally know and abuse [Robin], who was at the time was [sic] mentally incapacitated, physically helpless and by force and against her will. . . . [D]efendant knew that [Robin] was mentally incapacitated and was physically helpless."

Defendant specifically contends "[t]he State didn't charge [him] with a constructive knowledge offense, *i.e.*, while [he] didn't actually know or believe Robin was physically helpless and/or mentally incapacitated, the circumstances surrounding the vaginal intercourse reasonably should've informed him Robin was one or both."

The trial court instructed the jury that "to find . . . Defendant guilty of this offense the State must prove . . . Defendant knew or should reasonably have known that the alleged victim was mentally incapacitated and/or physically helpless." Defendant argues the trial court should have only instructed the jury that Defendant "knew" Robin was mentally incapacitated, since that was the only language in Defendant's indictment. Because Defendant's indictment did not include the constructive knowledge language of "or should reasonably [have] known[,]" as outlined by the Statute, Defendant contends this instruction violated his due process right of a unanimous verdict by "allow[ing] the jury to potentially convict him for an offense not charged in the indictment." This argument is without merit.

In making his argument, Defendant relies heavily on our Supreme Court's decision in *State v. Gibson*, which provided "[i]t is an elementary rule in the criminal law that a defendant must be convicted, if at all, of the particular offense alleged in the bill of indictment." 169 N.C. 380, 382, 85 S.E. 7, 8 (1915).

> In *Gibson*, our Supreme Court reversed a conviction for obtaining money under false pretenses where the indictment alleged that the defendant had obtained $350.00 and the evidence was that the defendant signed and obtained a

> promissory note for that amount. The Court reasoned that there was a substantial difference between "money" and a "promissory note," and they concluded that the difference between the allegation and the evidence was fatal.

State v. Walston, 140 N.C. App. 327, 335-36, 536 S.E.2d 630, 636 (2000) (citations omitted). The reversal of the conviction in *Gibson* was "based on the assertion, not that there is no *proof* of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has been committed." *Gibson*, 169 N.C. at 385, 85 S.E. at 9 (emphasis in original).

However, since *Gibson*, our North Carolina General Assembly has enacted "short-form" indictment statutes that provide "it is not necessary [for an indictment] to allege every matter required to be proved on the trial[.]" N.C. Gen. Stat. § 15-144.1(a) (2023). "If the victim is a person who . . . is mentally incapacitated or physically helpless, it is sufficient to allege that the defendant unlawfully, willfully, and feloniously did carnally know and abuse a person who . . . was mentally incapacitated or physically helpless[.]" N.C. Gen. Stat. § 15-144.1(c). An indictment for second-degree rape need not allege every element of the crime to be proven at trial, including the elements of knowledge or constructive knowledge as Defendant argues.

Our Supreme Court recently upheld a short-form indictment for second-degree rape where, similar to this case, the indictment did not specifically allege the element of knowledge:

> A plain reading of section 15-144.1(c) demonstrates that the indictment here clearly alleged a crime and was not required to allege actual or constructive knowledge of the victim's physical helplessness. Certainly, such knowledge is an element of the offense and must be proven at trial, but the purpose of short-form indictments is to relieve the State of the common law requirement that every element of the offense be alleged. In other words, while there is a knowledge element necessary to sustain a conviction at trial, that element is not required to be alleged in the indictment. It cannot reasonably be said that this indictment deprived [the] defendant of notice of the charge such that he could not prepare a defense, or that the court could not enter judgment.

State v. Singleton, 386 N.C. 183, 213, 900 S.E.2d 802, 823 (2024) (citations, quotation marks, and emphasis omitted).

Here, based on our Supreme Court's reasoning in *Singleton*, Defendant's indictment put him on sufficient notice of the alleged offense for him to reasonably anticipate needing to prepare a defense as to the element of knowledge. *See id.* The State's indictment was not fatally deficient in not including the element of constructive knowledge, nor was the trial court precluded from including it in the jury instruction due to its absence from the indictment.

Further, Defendant argues the "disjunctive instruction regarding the knowledge element[ ]" denied him of "his Sixth Amendment and due process right to a unanimous jury verdict for the charged offense." Specifically, Defendant contends instructing the jury that it could find he knew *or* reasonably should've known Robin's compromised state was "disjunctive" in allowing the jury two alternatives for returning a guilty verdict as to the single offense charged. We disagree.

As noted by our Supreme Court in *State v. Walters*, "[t]wo lines of cases have developed regarding the use of disjunctive jury instructions." 368 N.C. 749, 753, 782 S.E.2d 505, 507 (2016) (citations and quotation marks omitted). In *State v. Lyons*, relying on *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), our Supreme Court provided that

> a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense.

330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991) (emphasis in original).

> In contrast, this Court has recognized a second line of cases stemming from *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990), standing for the proposition that if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied. In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct.

Walters, 368 N.C. at 753, 782 S.E.2d at 507-08 (emphasis in original) (citations, quotation marks, and brackets omitted).

Also, in *State v. Haddock*, this Court explained that "[t]o decide whether the underlying acts joined by the disjunctive are separate offenses or merely alternative ways to establish a single offense, this

Court considers the gravamen of the offense, determined by considering the evil the legislature intended to prevent and the applicable statutory language." 191 N.C. App. 474, 480, 664 S.E.2d 339, 344 (2008) (citation omitted). This Court in *Haddock* explained "mental incapacity and physical helplessness are but two alternative means by which the force necessary to complete a rape may be shown, and not discrete criminal acts[.]" *Id.* at 481, 664 S.E.2d at 345. Similarly, here, whether Defendant knew or reasonably should've known of Robin's compromised state "are but two alternative means by which" the element of knowledge "may be shown, and not discrete criminal acts[.]" *Id.*

Here, Defendant's case falls squarely into the second category identified in *Hartness* as the disjunctive elements of knowledge are not separate criminal acts, but merely alternative avenues to conclude the existence of a single element of the crime. *See State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180-81 (1990).

We conclude no error in the trial court's jury instruction as the jury instruction was not "fatally" disjunctive and did not deny Defendant the opportunity to receive a unanimous jury verdict.

B. Motion to Dismiss

[2] Defendant next argues the trial court erred in denying his motion to dismiss, contending the State "failed to present substantial evidence regarding each element" of second-degree rape. Specifically, Defendant contends the State failed to present substantial evidence: (1) "proving Robin was incapable of consenting to the encounter . . . with [Defendant]"; and (2) "proving [Defendant] knew or reasonably should've known Robin was mentally incapacitated and/or physically helpless[.]" We disagree.

We review the issue of the denial of the motion to dismiss *de novo*:

> In evaluating the correctness of the trial court's decision concerning a motion to dismiss for insufficiency of the evidence, a reviewing court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator, with substantial evidence consisting of that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. In the course of making this inquiry, the reviewing court must view the evidence in the light most favorable to the State, with the State being entitled to every reasonable intendment and every reasonable inference to

> be drawn therefrom. As long as the record contains substantial evidence, whether direct or circumstantial, or a combination, to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied. Whether the State presented substantial evidence of each essential element of the offense is a question of law, so, accordingly, we review the denial of a motion to dismiss de novo.

State v. Elder, 383 N.C. 578, 586, 881 S.E.2d 227, 234 (2022) (citations, quotation marks, and brackets omitted).

On the special verdict forms, the jury concluded "[t]he victim was mentally incapacitated[ ]" and "incapable of appraising the nature of the . . . conduct" and "incapable of resisting an act of vaginal intercourse[.]" However, the jury also determined "[t]he victim was [not] physically helpless[.]" Essentially, Defendant was convicted of second-degree forcible rape because he had intercourse with Robin, who was mentally incapable of assessing the nature of the act or resisting, and that Defendant knew or should have known of this mental incapability. Defendant's conviction hinged on the elements of (1) "[b]y force and against the will" of another person "who was mentally incapacitated[,]" and (2) Defendant's knowledge of such mental incapacitation. *See* N.C. Gen. Stat. § 14-27.3. Defendant argues there was insufficient evidence as to either of these elements for his conviction.

Under North Carolina General Statute Section 14-27.20(2),[3] an individual is considered "[m]entally incapacitated" when "due to any act is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act." N.C. Gen. Stat. § 14-27.20(2) (2023).

Defendant argues "the only evidence" presented as to Robin's compromised state "came from Robin herself[,]" and this evidence was not sufficient to survive Defendant's motion to dismiss. However, even if the only evidence was Robin's testimony – and it was not in this case – "[o]ur courts have repeatedly held victim statements and testimony alone are sufficient evidence to support a conviction." *State v. Gibbs*,

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3. During the time of Defendant's actions in 2011, the definition of mentally incapacitated was contained in North Carolina General Statute Section 14-27.1. This statute was later recodified as Section 14-27.20 by Session Law 2015-181, Section 2, effective 1 December 2015. The language of this section remained unchanged.

293 N.C. App. 707, 713-14, 901 S.E.2d 649, 655 (2024) (citations omitted). Here, there was evidence supporting Robin's intoxication and her mental incapacity other than her testimony. In fact, some of this evidence came from Defendant's own comments to investigators: Detective Cunningham testified that when he met with Defendant in November of 2021, Defendant described Robin as a "drunk bitch" and "wasted" the night of the incident. Evidence of Robin's alcohol levels also corroborated her testimony about her intoxication.

During trial, Melanie Thornton, forensic scientist supervisor with the North Carolina State Crime Lab, was tendered and accepted without objection from Defendant as an expert in the field of forensic toxicology. She testified as to the alcohol levels in Robin's blood and urine, collected at the hospital following the incident. Ms. Thornton testified Robin's urine sample returned "0.15 grams of alcohol per 100 milliliters" and her blood alcohol content ("BAC") returned "0.02 grams of alcohol per 100 milliliters[.]" These test results corroborate Robin's testimony regarding her mental state, and Defendant's statement to Detective Cunningham that Robin was "wasted" the night of the incident and further evidences Robin was mentally incapacitated and incapable of appraising the nature of the conduct and incapable of resisting an act of vaginal intercourse when taken in the light most favorable to the state.

Robin testified there were some holes in her memory and that she had difficulty remembering "in a chronological order" the events occurring that afternoon at the pool and into the evening. Though she did not remember exactly when she left the pool, nor under what circumstances, her next memory was "[b]eing in a car, falling out of it, and throwing up." Her next memory was "[c]oming to on [a] bed[ ]" with a man behind her having sex with her. All the while she "wasn't sure what was going on[.]" After another man entered the room, attempting to perform more sexual acts with her, Robin testified:

> That's when I realized something wasn't right and I tried – I knew I had to talk myself through and figure out what was going on because everything was – I was so confused, where I was, how I was there. I had to talk myself – you need to figure out what's going on. You need to figure yourself out, you need to – I had to like have a conversation with myself in my mind.

Robin's testimony, along with the testimony of Ms. Thornton corroborating the presence of alcohol in her system and Defendant's statements to Detective Cunningham Robin was a "drunk bitch" and was "wasted," is

sufficient evidence to allow a reasonable jury to accept as true Robin was mentally incapacitated during the incident.

Defendant also argues there was insufficient evidence to prove Defendant was aware of Robin's mental incapacitation. But as noted above, Defendant described Robin as a "drunk bitch" and "wasted" the night of the incident to Detective Cunningham.

Viewed in the light most favorable to the State, we conclude the evidence presented was sufficient to allow a reasonable jury to accept as true that Robin was mentally incapacitated at the time of this incident, and that Defendant knew of such mental incapacitation. The trial court did not err in denying Defendant's motion to dismiss.

C. Confrontation Clause

[3] Defendant argues the trial court improperly allowed into evidence the DNA results generated by Sorenson, a private, third-party laboratory, "without [also] forcing the State to produce the . . . analyst who performed the . . . DNA testing[.]" Specifically, Defendant contends the DNA results from Sorenson was introduced through testimony of Cortney Cowan and Tricia Daniels, both employees of the State Crime Lab, and his Sixth Amendment Confrontation Clause rights were violated when he was not given the opportunity to cross-examine the Sorenson analyst who conducted the analysis.

"The standard of review for alleged violations of constitutional rights is *de novo*. Once error is shown, the State bears the burden of proving the error was harmless beyond a reasonable doubt." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citations omitted).

We first note Defendant's argument regarding the testimony of Ms. Cowan is an issue not properly preserved 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).

Ms. Cowan testified that she had received the testing information from Sorenson and did a technical review of the data. She then took the "portion of the mixture that was from the unknown component" and entered this information into the DNA database to submit a "routine inquiry." In summary, Ms. Cowan did not compare the DNA information from Sorenson to a known sample from Defendant; she merely processed the Sorenson test results and submitted the unknown DNA sample to the DNA database. The database then matched the DNA

profile to Defendant, and Ms. Cowan sent the results "to the State Crime Lab" and notified Robin that there was "a positive hit in the DNA testing" in her case.

At trial, during Ms. Cowan's testimony, Defendant's counsel made four objections. The first three were general objections, indicating no specific ground for the objection. In the fourth and final objection, Defendant's counsel stated: "Objection; calls for hearsay." Ms. Cowan then testified about receiving the male DNA samples from Sorenson and sending them to the State Crime Lab.

In *State v. Mendoza*, this Court explained that

> North Carolina Rule of Appellate Procedure 10(a)(1) requires that a criminal defendant present *specific* and *detailed* objections to a trial court's evidentiary rulings in order to preserve an issue for appellate review. For example, in *State v. Rainey*, 198 N.C. App. 427, 680 S.E.2d 760 (2009), the defendant argued on appeal that certain evidence was barred by the Confrontation Clause. This Court held the defendant failed to properly preserve the issue for appellate review because, while [the] defendant had objected at trial on general constitutional and due process grounds, he did not specifically object on Confrontation Clause grounds.

250 N.C. App. 731, 748-49, 794 S.E.2d 828, 840 (2016) (emphasis added) (citations and quotation marks omitted).

In criminal cases, if an issue is unpreserved for appellate review through proper objection made to the trial court, the issue may still be reviewed by this Court under plain error review. *See* N.C. R. App. P. 10(a)(4). However, "[t]o have an alleged error reviewed under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (quoting N.C. R. App. P. 10(a)(4)) (other citations omitted). Here, in his brief on appeal, Defendant did not "specifically and distinctly" contend the issue was plain error. *See id.* Because Defendant did not present "specific and detailed objections" on grounds of Confrontation Clause violations at trial, nor did he allege plain error in his brief on appeal, the issue regarding Ms. Cowan's testimony was not properly preserved for this Court's review.

During the testimony of Ms. Daniels, however, counsel for Defendant did specifically object on Confrontation Clause grounds. Our analysis of any alleged Confrontation Clause violations will be confined only to

the testimony of Ms. Daniels. Although some evidence regarding the Sorenson testing of the samples was presented through Ms. Cowan, Ms. Daniels was the witness who testified about the analysis of Defendant's DNA and the comparison of his DNA to the rape test kit information. Therefore, Defendant did not lose the opportunity to raise the Confrontation Clause argument by his failure to object to Ms. Cowan's testimony. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984) ("Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection the benefit of the objection is lost." (citation omitted)); *see also State v. Lewis*, 231 N.C. App. 438, 442, 752 S.E.2d 216, 219 (2013) (holding an issue was not preserved for this Court's review where the "defendant did not object to the evidence the first time it was introduced").

Ms. Daniels was the forensic scientist for the North Carolina State Crime Lab who analyzed the samples obtained from Defendant in 2019 and compared them to the DNA profile generated by Sorenson from Robin's sexual assault test kit.

In *Smith v. Arizona*, the United States Supreme Court explained "[t]he Confrontation Clause provides that 'in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him.' In operation, the Clause protects a defendant's right of cross-examination by limiting the prosecution's ability to introduce statements made by people not in the courtroom." 602 U.S. 779, 783-84, 219 L. Ed. 2d 420, 426 (2024) (brackets and ellipsis omitted) (quoting U.S. Const. amend. XI).

> The Clause's prohibition applies only to testimonial hearsay—and in that two-word phrase are two limits. First, in speaking about witnesses—or those who bear testimony—the Clause confines itself to testimonial statements[.]
>
> . . . .
>
> Second . . . , the Clause bars only the introduction of hearsay—meaning, out-of-court statements offered to prove the truth of the matter asserted. When a statement is admitted for a reason unrelated to its truth, we have held, the Clause's role in protecting the right of cross-examination is not implicated. That is because the need to test an absent witness ebbs when her truthfulness is not at issue.

Id. at 784-85, 219 L. Ed. 2d at 427 (citations and quotation marks omitted). The Court in *Smith* outlined a two-step approach to analyze when the Confrontation Clause is implicated: first, the evidence being

introduced by the State must be testimonial; second, it must be hearsay evidence, "offered to prove the truth of the matter asserted." *See id.* Here, Defendant contends the statements and results of the absent Sorenson analyst are both testimonial and hearsay in nature and the Confrontation Clause is implicated.

1. Hearsay

We must first consider whether the evidence from the DNA analysis by Sorenson was "offered to prove the truth of the matter asserted." *See id.* In *Smith*, the defendant was charged with various drug-related offenses after law enforcement "found a large quantity of what appeared to be drugs and drug-related items[ ]" in his possession. *Id.* at 789, 219 L. Ed. 2d at 430. The state then sent these seized items to the state crime lab for testing and analysis of the substances. *See id.* An analyst with the crime lab completed the requested testing, but at the trial, a "substitute" analyst was called to testify about the test results. *See id.* at 790, 219 L. Ed. 2d at 430-31. "Because [the substitute analyst] had not participated in the . . . case, [he] prepared for trial by reviewing [the original analyst]'s report and notes. And when [he] took the stand, he referred to those materials and related what was in them, item by item by item." *Id.* at 791, 219 L. Ed. 2d at 431. The defendant in *Smith* appealed his conviction, contending "the [s]tate's use of a 'substitute expert'—who had not participated in any of the relevant testing—violated his Confrontation Clause rights. . . . The real witness against him, [the defendant] urged, was [the original analyst], through her written statements; but he had not had the opportunity to cross-examine her." *See id.*

As to whether the original analyst's lab results were hearsay and offered "for their truth[,]" the Court in *Smith* stated that

> [i]f an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts.
>
> . . . .
>
> Or said a bit differently, the truth of the basis testimony is what makes it useful to the prosecutor; that is what supplies the predicate for—and thus gives value to—the state expert's opinion.
>
> . . . .
>
> Or to see the point another way, consider it from the fact-finder's perspective. In the view of the Arizona courts, an

> expert's conveyance of another analyst's report enables the factfinder to determine whether the expert's opinion should be found credible. That is no doubt right. The jury cannot decide whether the expert's opinion is credible without evaluating the truth of the factual assertions on which it is based. If believed true, that basis evidence will lead the jury to credit the opinion; if believed false, it will do the opposite. But that very fact is what raises the Confrontation Clause problem. For the defendant has no opportunity to challenge the veracity of the out-of-court assertions that are doing much of the work.

Id. at 795-96, 219 L. Ed. 2d at 434 (citations, quotation marks, and brackets omitted). The Court concluded the defendant's Confrontation Clause rights may have been violated because the substitute analyst's testimony relied only on the results obtained by the original analyst; his own personal knowledge of common lab practice and procedure never came into play. *See id.* at 799, 219 L. Ed. 2d at 436. "[T]he [s]tate used [the substitute analyst] to relay what [the original analyst] wrote down about how she identified the seized substances. [The substitute analyst] thus effectively became [the original analyst]'s mouthpiece." *Id.* at 800, 219 L. Ed. 2d at 437.

Recently, this Court was presented with a similar issue in *State v. Clark*, 296 N.C. App. 718, 909 S.E.2d 566 (2024). In *Clark*, this Court relied on *Smith* in holding that forensic lab results obtained by an original analyst cannot form the "basis" of a "substitute" expert's testimony, "[w]ithout independent testing on . . . [the] part [of the substitute expert.]" *Id.* at 722, 909 S.E.2d at 569.

After Ms. Daniels was tendered as an expert in the field of "forensic DNA analysis[,]" the following interaction occurred on direct examination by the State:

> Q. Ms. Daniels, first, I want to show you what's been marked as State's Exhibit 8. Can you tell me what that is? Do you recognize it?
>
> A. Yes, ma'am.
>
> Q. And how do you recognize it?
>
> A. State's Exhibit 8 is lab item number 2 that I received in this case. And the way that I recognize it is that it has our lab sticker on the outside of the envelope that bears our lab number, the item number, and it also has my initials and the date.

Q. What was included in that envelope sent to you?

A. A DNA standard from [Defendant].

. . . .

Q. Now, Ms. Daniels, I am showing you what has been marked as State's Exhibit 12, can you tell me what that is?

A. Yes, ma'am.

Q. What is it?

A. State's Exhibit 12 is the DNA extract from item 2 and, of course, mine in control. So it's basically my work product following my analysis.

. . . .

Q. Ms. Daniels, what were you asked to do with the samples that were sent to you in this particular case?

A. I received a – the standard, which is our item number 2, and was asked to compare it to a previous item, an item 1-1.

Q. And what was item 1-1?

A. Item 1-1 was a DNA profile generated from sperm fraction of the vaginal swabs.

Q. And who had performed the testing on those vaginal swabs?

A. That was performed by Sorenson Forensics.

Q. And that was a DNA profile that had been placed on file at the Crime Lab; is that right?

A. Yes, ma'am.

Q. And so your job, is it my understanding, was to compare –

A. Yes, ma'am.

Q. – the DNA profiles from item – that has been marked as State's Exhibit 8 and compare it to the DNA profile submitted by Sorenson Labs; is that correct?

A. Yes, ma'am, that's correct.

Q. And how did you go about doing that?

> A. Well, I went through my normal DNA process to develop a profile for item number 2, State's Exhibit 8, which is the standard from [Defendant]. And then following that I then performed a statistical analysis on that particular standard with the profile that was developed from item 1-1.
>
> Q. And were the samples that you received in this case tested using the procedures you've already described?
>
> A. Yes, ma'am.
>
> Q. And were you able to form an opinion and obtain a result in that comparison?
>
> A. Yes, ma'am.
>
> Q. And what was your opinion?
>
> . . . .
>
> A. The DNA profile obtained from [Defendant] item 2 is included as a possible contributor to the deduced DNA profile obtained from the sperm fraction of the vaginal swabs, item 1-1 as provided by Sorenson Forensics.

Robin's sexual assault test kit was sent to Sorenson, a private lab, only for the purpose of "male screening[,]" a process of simply determining the presence of *any* male DNA. Sorenson then provides a "raw DNA profile[,]" which the State can then use to determine "how many people are in the DNA profile[ ]" and extract any "unknown component[s]" to enter into the State's database. In addition, to provide context as to the role played by Sorenson, Detective Tilley testified that

> [p]rivate laboratories don't have access to the DNA databases that we utilize in forensic DNA casework so we have an agreement with those private laboratories . . . to receive the data that they generate in their casework. We do a full technical review of their data to ensure the quality of their results and to ensure that we agree with their conclusions that they generate. And the State Crime Laboratory is the laboratory that has access to these DNA databases.

Ms. Cowan had taken the Sorenson test results and submitted them to the DNA database which matched the male sample to Defendant. Sorenson's testing only identified the male portion of the DNA sample.

The case at bar is distinguishable from the scenarios presented in both *Smith* and *Clark*. For example, the substitute expert in *Smith*

came to the same conclusions as the original analyst, relying only on the original analyst's notes and records. *See Smith*, 602 U.S. at 791, 219 L. Ed. 2d at 431 ("And [the substitute expert] did come to the same conclusion [as the original analyst], in reliance on [the original analyst]'s records."). Similarly, in *Clark*, the substitute expert was called to testify the substance obtained from the defendant was methamphetamine, the same conclusion drawn by the original analyst. *See Clark*, 296 N.C. App. at 719, 909 S.E.2d at 567. Here, however, Ms. Daniels did not specifically testify about the lab results generated by Sorenson, nor the practices it may have used in obtaining the results. To the contrary, Ms. Daniels's testimony addressed her own practices and procedures, and the analyses she ran to match the DNA profile generated by Sorenson to Defendant's DNA from the State's database.

But after determining that Defendant was a potential match to the DNA in the rape kit, Ms. Daniels then performed her own independent research and analyses, unlike the substitute experts in both *Smith* and *Clark*. The Sorenson DNA test results simply showed that some male DNA was present in the rape kit taken from Robin; the unknown analyst at Sorenson did not give any opinion on whose DNA was in the kit. However, the DNA profile from Sorenson did form part of the basis for Ms. Daniels's own analyses and trial testimony, and Ms. Daniels did not perform any independent tests on the rape test kit. The conclusions reached by Sorenson and Ms. Daniels were not the same, since Sorenson's analysis returned a result of some presence of male DNA in Robin's sexual assault test kit swabs and the adjoining DNA profile, while Ms. Daniels's analysis returned a match to Defendant's DNA, but the results from Sorenson served as the basis for the results obtained by Ms. Daniels. At trial, the evidence based on the DNA profile generated by Sorenson was presented as true and Ms. Daniels's opinions depended on the truthfulness of the DNA profile, since this is the profile used to identify Defendant after it was matched to the State database and then matched after analysis of the buccal swab from Defendant in 2019. *See Smith*, 602 U.S. at 780, 219 L. Ed. 2d at 425 ("The truth of the basis testimony is what makes it useful to the [s]tate; that is what supplies the predicate for—and thus gives value to—the state expert's opinion. And from the factfinder's perspective, the jury cannot decide whether the expert's opinion is credible without evaluating the truth of the factual assertions on which it is based."). Because the DNA profile generated by Sorenson "gives value" to the match produced by Ms. Daniels, this out-of-court statement is hearsay since it was offered "for the truth" of Defendant being the perpetrator of this crime. *See id.*

2. Testimonial Evidence

The next question is whether the Sorenson lab test results were testimonial evidence. Even if the forensic results generated by Sorenson were hearsay, Defendant's Confrontation Clause rights were not implicated as they were not testimonial. The Confrontation Clause is not implicated unless the out-of-court statement offered against a defendant is both hearsay *and* testimonial. *See Smith*, 602 U.S. at 800, 219 L. Ed. 2d at 437 ("To implicate the Confrontation Clause, a statement must be hearsay ("for the truth") and it must be testimonial—and those two issues are separate from each other." (citation omitted)).

In *Smith*, the United States Supreme Court did not make a ruling on whether the out-of-court statements of the original analyst were testimonial, *see id.* at 800, 219 L. Ed. 2d at 437, as the only issue presented to the Supreme Court was whether they were offered "for their truth." *See id.* at 792-93, 219 L. Ed. 2d at 432.[4] Although the United States Supreme Court did not rule on the issue of whether the statements were testimonial, it did "offer a few thoughts, based on the arguments made . . . , about the questions the state court might usefully address if the testimonial issue remains live."[5] *Id.* at 801, 219 L. Ed. 2d at 438. The Court noted that the state court would need to "identify the out-of-court statement introduced, and must determine, given all the 'relevant circumstances,' the principal reason it was made." *Id.* at 801-02, 219 L. Ed. 2d at 437 (quoting *Michigan v. Bryant*, 562 U.S. 344, 369, 179 L. Ed. 2d 93, 114 (2011)).

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4. The Supreme Court did not address the issue of whether the evidence was testimonial because it was not presented to the Court:

> But that issue is not now fit for our resolution. The question presented in Smith's petition for certiorari did not ask whether [the substitute analyst]'s out-of-court statements were testimonial. Instead, it took as a given that they were. That presentation reflected the Arizona Court of Appeals' opinion. As described earlier, that court relied on the "not for the truth" rationale we have just rejected. It did not decide whether [the substitute analyst]'s statements were testimonial. Nor, to our knowledge, did the trial court ever take a stance on that issue. Because we are a court of review, not of first view, we will not be the pioneer court to decide the matter.

Smith, 602 U.S. at 801, 219 L. Ed. 2d at 437 (citations and quotation marks omitted).

5. The Supreme Court vacated the judgment of the Arizona Court of Appeals and remanded the case for that court "to address the additional issue of whether [the substitute analyst]'s records were testimonial (including whether that issue was forfeited)[.]" *Id.* at 803, 219 L. Ed. 2d at 439.

Here, the out-of-court statement introduced was the DNA test results from Sorenson which identified male DNA in the swabs in the rape test kit. So we must consider "given all the relevant circumstances, the principal reason" the Sorenson test was made. *See id.* (citation and quotation marks omitted).

In *Bullcoming v. New Mexico*, the United States Supreme Court addressed use of a "Report of Blood Alcohol Analysis" prepared by an analyst at the New Mexico Department of Health, Scientific Laboratory Division. 564 U.S. 647, 652-53, 180 L. Ed. 2d 610, 616 (2011). The Supreme Court determined that the report was "[a] document created *solely* for an 'evidentiary purpose,' . . . made in aid of a police investigation, [and] ranks as testimonial." *Id.* at 664, 180 L. Ed. 2d at 623 (emphasis added) (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311, 174 L. Ed. 2d 314, 321 (2009)). In *State v. Craven*, three different SBI agents had performed testing of substances seized from the defendant on different "buy dates," but only one of the agents testified at trial. 367 N.C. 51, 54, 744 S.E.2d 458, 460 (2013). Agent Schell testified about the test results of the other two agents as well as her own testing, but she

> merely parroted Agent Shoopman's and Agent Allcox's conclusions from their lab reports. Like the lab report in *Bullcoming*, these lab reports contained an analyst's certification prepared in connection with a criminal investigation or prosecution. Specifically, Agent Shoopman's and Agent Allcox's certifications stated: "This report represents a true and accurate result of my analysis on the item(s) described." There is no doubt that the lab reports were documents created solely for an evidentiary purpose, made in aid of a police investigation, and rank as testimonial. Thus, the statements introduced by Agent Schell constituted testimonial hearsay, triggering the protections of the Confrontation Clause.

Id. at 56-57, 744 S.E.2d at 461 (citations, quotation marks, brackets, and ellipses omitted). Our Supreme Court then concluded that the "admission of the out-of-court testimonial statements . . . was error[.]" *Id.* at 57, 744 S.E.2d at 462. Likewise, in *State v. Clark*, this Court addressed testimony by a surrogate expert who relied on testing by another analyst who was "unavailable to testify" about a "crystalline substance" found in a search of the defendant's home. *Clark*, 296 N.C. App. at 719, 909 S.E.2d at 567. The expert opined that the substance was methamphetamine but based his opinion only on the testing done by the other analyst. *See id.* This Court held that the statements in the lab report were "testimonial

as a matter of law[ ]" because they were "created *solely* to aid in the police investigation of [the d]efendant[.]" *Id.* at 723, 909 S.E.2d at 570.

But the facts and circumstances we are presented with here differ from those in the cases noted above, which dealt with laboratory testing done to identify controlled substances seized from or found with the defendant or to determine the defendant's blood alcohol level. Here, the testing involved has two phases. First, samples were taken from Robin immediately after the alleged rape, and those samples were tested for the presence of male DNA by Sorenson. Next, DNA samples were taken from Defendant, analyzed, and compared to the Sorenson test results, leading to Ms. Daniels's opinion outlined above. Here, the facts and circumstances are more similar to those presented in *Williams v. Illinois*, 567 U.S. 50, 183 L. Ed. 2d 89 (2012).

First, we recognize that *Smith v. Arizona* abrogated *Williams v. Illinois* on the issue of whether the test result were hearsay or used for the truth of the matter asserted. But *Smith* specifically did not address the second part of the *Williams* analysis, whether the test results were testimonial evidence, and *Smith* did not overrule or disapprove of this portion in *Williams*.[6] As noted by the United States Supreme Court in *Smith*, the *Williams* Court "failed to produce a majority opinion[,]" *Smith*, 602 U.S. at 788, 219 L. Ed. 2d at 429, and its opinions "have sown confusion in courts across the country about the Confrontation Clause's application to expert opinion testimony." *Id.* at 789, 219 L. Ed. 2d at 430 (citation and quotation marks omitted). However, the Court in *Smith* indicated much of the "confusion" coming from the opinions in *Williams* centered on the issue of whether out-of-court statements are to be considered hearsay. *See id.* ("Some courts have applied the *Williams* plurality's 'not for the truth' reasoning to basis testimony, while others have adopted the opposed five-Justice view. This case emerged out of that muddle." (footnote omitted)). As to whether the out-of-court statements are testimonial, the Court in *Smith* essentially left that an open-ended question for lower courts to decide. *See id.* at 801-02, 219 L. Ed. 2d at 438.

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6. The Supreme Court noted that "Smith argues that the State has forfeited the argument [that the report was not testimonial]: Arizona, he says, 'gave no hint in the proceedings below that it believed the [substitute analyst]'s statements were anything but testimonial.' . . . The State denies that assertion, pointing to a passage about *Williams* in its lower court briefing. . . . The dispute is best addressed by a state court. So we return the testimonial issue, including the threshold forfeiture matter, to the Arizona Court of Appeals." *Smith*, 602 U.S. at 801, 219 L. Ed. 2d at 438.

And in *Williams*, five justices supported the majority's conclusion that the DNA test results generated by the analysis of the samples from the victim were not testimonial, although only four agreed on the rationale.[7]

In *Williams*, DNA test results from samples obtained from a sexual assault victim were sent to a private laboratory for DNA testing and the Supreme Court addressed whether the test results were testimonial. *See Williams*, 567 U.S. at 56-57, 183 L. Ed. 2d at 98. At trial,

> the prosecution called an expert who testified that a DNA profile produced by an outside laboratory, Cellmark, matched a profile produced by the state police lab using a sample of [the] petitioner's blood. On direct examination, the expert testified that Cellmark was an accredited laboratory and that Cellmark provided the police with a DNA profile.
>
> . . . .
>
> The expert made no other statement that was offered for the purpose of identifying the sample of biological material used in deriving the profile or for the purpose of establishing how Cellmark handled or tested the sample. Nor did the expert vouch for the accuracy of the profile that Cellmark produced.

Id. Similar to the case at bar, the expert called to testify in *Williams* was an Illinois State Police analyst who received the DNA profile generated by a private, third-party lab, and through her own independent work, compared and matched the profile with DNA records in Illinois's database. *Id*. at 59, 183 L. Ed. 2d at 100.

In *Williams*, the Court explained that the Cellmark test's purpose was not testimonial, and this was an independent basis for the decision:

> As a second, independent basis for our decision, we also conclude that even if the report produced by Cellmark had been admitted into evidence, there would have been

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7. Justice Thomas agreed with this result as to whether the evidence was testimonial but used a different analysis in his concurring opinion. *See Williams*, 567 U.S. at 104, 183 L. Ed. 2d at 129 (Thomas, J., concurring). He disagreed with the majority opinion's ruling that the test results were not hearsay, essentially for the same reasons as the Supreme Court later ruled in *Smith v. Arizona*. *See id*. at 109, 183 L. Ed. 2d at 132 (Thomas, J., concurring). However, he agreed that the test results were not testimonial but rejected the "primary purpose" test used by the majority opinion. *See id*. at 113-14, 183 L. Ed. 2d at 135 (Thomas, J., concurring).

> no Confrontation Clause violation. The Cellmark report is very different from the sort of extrajudicial statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach. The report was produced before any suspect was identified. The report was sought not for the purpose of obtaining evidence to be used against petitioner, who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose. And the profile that Cellmark provided was not inherently inculpatory. On the contrary, a DNA profile is evidence that tends to exculpate all but one of the more than 7 billion people in the world today. The use of DNA evidence to exonerate persons who have been wrongfully accused or convicted is well known. If DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. The Confrontation Clause does not mandate such an undesirable development. This conclusion will not prejudice any defendant who really wishes to probe the reliability of the DNA testing done in a particular case because those who participated in the testing may always be subpoenaed by the defense and questioned at trial.

Id. at 58-59, 183 L. Ed. 2d. at 99 (citation omitted). Here, just as in *Williams*, Robin's sexual assault test kit was sent to Sorenson before Defendant was identified as a potential suspect. Robin's test kit went undisturbed for many years as the Greenville Police Department did not have enough evidence or resources at the time to move forward with the investigation. No progress occurred on solving Robin's case until the police department received funding specifically for testing un-tested sexual assault kits. Robin's test kit was delivered to Sorenson for the sole purpose of identifying the potential presence of any DNA other than her own, not to identify a potential suspect. Sorenson's DNA profile was not testimonial in nature since it was not generated "*solely* to aid in the police investigation" of Defendant. *Clark*, 296 N.C. App. at 723, 909 S.E.2d at 570 (emphasis original). And as in *Williams*, the profile provided by Sorenson "was not inherently inculpatory" but it tends to exculpate "all but one of the more than 7 billion people in the world today." *Williams*, 567 U.S. at 58, 183 L. Ed. 2d. at 99. Therefore, the trial court

did not err in allowing Ms. Daniels's testimony based on her comparison of Defendant's DNA profile with the DNA profile generated by Sorenson because the Sorenson report was not testimonial.

3. Harmless Error

Recognizing the evolving state of the law regarding use of lab testing results in this type of case, as a second and independent basis for our decision, if Defendant's confrontation rights were violated by the use of the Sorenson test results, this violation only amounts to harmless error.

> When violations of a defendant's rights under the United States Constitution are alleged, harmless error review functions the same way in both federal and state courts. 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.

State v. Ortiz-Zape, 367 N.C. 1, 13, 743 S.E.2d 156, 164 (2013) (citations and quotation marks omitted). Our Supreme Court has held admissions of testimonial evidence will be construed as "harmless error" in relation to an alleged Confrontation Clause violation where there is "other competent overwhelming evidence of [the] defendant's guilt[.]" *State v. Lewis*, 361 N.C. 541, 544, 648 S.E.2d 824, 827 (2007) (citation and quotation marks omitted).

In *Ortiz-Zape*, our Supreme Court concluded an alleged Confrontation Clause violation was harmless error where

> [t]he arresting officer testified that when he found the plastic baggy containing a white substance, he picked it up and asked [the] defendant, "What's this?" The officer further testified that defendant acknowledged it was his cocaine—and asserted it was for personal use and he was not dealing drugs.
>
> . . . .
>
> Under these facts, in which [the] defendant told a law enforcement officer that the substance was cocaine and defense counsel elicited testimony that the substance appeared to be cocaine, any possible error in allowing the expert opinion was harmless.

Ortiz-Zape, 367 N.C. at 14, 743 S.E.2d at 164-65 (citation omitted).

At trial, Detective Cunningham testified as to statements made by Defendant during an interview conducted in November of 2021. Detective Cunningham testified that during this interview Defendant recalled his interactions with Robin that day at the pool, describing her as "drunk" but alleged she was "not impaired to the point she was incapacitated[.]" Defendant also admitted to being present in the room where the incident occurred and to having sex with Robin until "she jumped up and ran out of the room." The statements made by Defendant during this interview corroborated many events described by Robin in her testimony. The entire purpose of the DNA evidence was to identify Defendant as the man who sexually assaulted Robin in 2011; Defendant admitted that he met Robin at the pool that day and had sex with her.

Under these facts, there was substantial evidence to convict Defendant of second-degree rape, even without the testimony of Ms. Daniels. Even if Defendant's Confrontation Clause rights were implicated, the admission of Ms. Daniels's testimony amounts only to harmless error.

III. Conclusion

We conclude no error was committed by the trial court as to the issues raised in Defendant's appeal. The instructions provided to the jury did not deprive Defendant of a unanimous verdict, nor were they disjunctive in outlining multiple avenues for finding Defendant guilty. Also, the trial court did not err in denying Defendant's motion to dismiss as there was substantial evidence that he had committed second-degree rape. Finally, though the DNA profile generated by Sorenson was hearsay evidence, Defendant's Confrontation Clause rights were not violated because these out-of-court lab results were not testimonial in nature.

NO ERROR.

Judges CARPENTER and GRIFFIN concur.

THOMAS THEUERKORN, PLAINTIFF
v.
MELISSA BETH HELLER, DEFENDANT

No. COA24-715

Filed 18 June 2025

1. Civil Procedure—Rule 60(a)—clerical error rather than substantive change—motion properly allowed

In a proceeding for equitable distribution, alimony, and child support, the trial court properly granted defendant's Civil Procedure Rule 60(a) motion to correct a clerical error in an order—where the court had left blank the amount of alimony awarded to defendant from plaintiff—because the original order already provided that plaintiff must pay defendant an alimony award and the amended order still required plaintiff to pay defendant an alimony award. Thus, the amended order did not alter the effect of the original order or change the source from which the award was derived, but rather only corrected the amount of money involved, a change not implicating a substantive right.

2. Divorce—equitable distribution—distributive award—no explicit finding of fact—ability to pay ascertainable from the record

In a proceeding for equitable distribution, alimony, and child support, the trial court did not abuse its discretion in ordering plaintiff to pay defendant a distributive award, rather than making an in-kind distribution, as provided for in N.C.G.S. § 50-20(e), where, although the court did not make an explicit finding of fact regarding plaintiff's ability to pay the award with liquid assets, plaintiff's ability to do so was ascertainable from unchallenged findings of fact, including that plaintiff was awarded portions of two retirement accounts, as well as a home with significant equity.

3. Divorce—alimony—income and expenses—insufficient findings of fact

In a proceeding for equitable distribution, alimony, and child support, the trial court erred in awarding alimony from plaintiff to defendant where the court's amended order incorrectly calculated plaintiff's income—by relying on plaintiff's income from a prior year instead of upon his current income, despite plaintiff having provided evidence regarding his current income—and failed to make findings of fact as to the parties' respective expenses or standards of living.

4. Child Custody and Support—child support award—parent's income—findings of fact insufficient

In a proceeding for equitable distribution, alimony, and child support, the trial court erred in calculating child support based upon plaintiff's income from a previous year (rather than his income at the time of the order's entry) without making findings of fact that would support such an award.

5. Appeal and Error—preservation of issues—affidavit treated as a pretrial order—failure to object at hearing

In a proceeding for equitable distribution, alimony, and child support, plaintiff's appellate argument—that the trial court erred in ordering that defendant's equitable distribution affidavit be treated as a pretrial order—was not preserved for appellate review where plaintiff did not raise a timely objection to the trial court's decision (because plaintiff, while duly noticed, did not attend the hearing or timely submit his own equitable distribution affidavit).

Appeal by plaintiff from orders entered 14 June 2024 by Judge David W. Aycock in Catawba County District Court. Heard in the Court of Appeals 22 May 2025.

Collins Family & Elder Law Group, by Rebecca K. Watts, for plaintiff-appellant.

Wesley E. Starnes, PC, by Wesley E. Starnes, for defendant-appellee.

FLOOD, Judge.

Plaintiff Thomas Theuerkorn appeals from the trial court's amended equitable distribution, alimony, and child support order entered 14 June 2024 (the "Amended Order"); and from the trial court's order, entered 14 June 2024, granting Defendant Melissa Beth Heller's Rule 60 motion (the "Rule 60 Order") to amend the equitable distribution, alimony, and child support order entered 27 March 2024 (the "Original Order"). On appeal, Plaintiff argues the trial court erred in: first, modifying the Original Order "under the guise of correcting a clerical error"; second, ordering a distributive award; third, awarding alimony, where the Amended Order incorrectly calculated Plaintiff's income and failed to include findings as to the parties' expenses; fourth, calculating child support using incorrect income information; and fifth, ordering Defendant's equitable distribution affidavit to be treated as the pretrial order, and "refusing to

allow [Plaintiff] to present evidence." Upon review, we conclude: first, the trial court did not abuse its discretion in granting Defendant's Rule 60 motion because the Amended Order corrected only a clerical error in the Original Order; second, the trial court did not err in ordering a distributive award because Plaintiff's ability to pay the award can be ascertained from the Record; third, the trial court erred in awarding alimony where it failed to make findings of fact as to Plaintiff's income; fourth, the trial court erred in calculating child support where it failed to make findings of fact as to Plaintiff's income; and fifth, Plaintiff's argument concerning the pretrial order is not preserved for appellate review. We therefore affirm the Rule 60 Order, affirm the Amended Order in part, vacate and remand the Amended Order as to alimony and child support, and dismiss Plaintiff's argument regarding the pretrial order.

I. Factual and Procedural Background

Plaintiff and Defendant married on 11 June 2011 and separated on 11 March 2022. Both parties were employed during their marriage and had three children together. On 20 May 2022, Plaintiff initiated the underlying action by filing an action for child custody and equitable distribution. On 2 September 2022, the trial court entered an order for child custody by agreement of the parties. On 6 October 2022, Defendant filed an answer and counterclaim for child custody, child support, equitable distribution, postseparation support, and alimony. On 8 May 2023, the trial court entered an order for postseparation support and temporary child support.

On 31 October 2022, Defendant filed a financial affidavit listing her gross monthly income as $3,519.17. On 7 November 2022, Plaintiff filed a financial affidavit listing his gross monthly income as $15,298. On 19 April 2023, Defendant filed an equitable distribution affidavit; Plaintiff did not file an equitable distribution affidavit. On 24 May 2023, Defendant filed a motion for the trial court to adopt her equitable distribution affidavit as the pretrial order. The trial court heard Defendant's motion on 16 January 2024, at which hearing "[P]laintiff was not present, but was duly noticed." Several days later, on 19 January 2024, the trial court entered an order adopting Defendant's equitable distribution affidavit as the pretrial order, and on 12 February 2024, entered an order granting Defendant's motion (the "February 2024 Order"). In the February 2024 Order, the trial court ordered, in relevant part, that "Plaintiff shall not introduce any evidence as to his retirement accounts[.]"

On 13 February 2024, the matters regarding equitable distribution, child support, and alimony came on for hearing. Plaintiff testified, in pertinent part, to the following:

> And here's a paycheck of mine. This is a recent one, as in this January. And my situation currently is such, that . . . it looks like this; I get $3,134.00 a month in my paycheck. . . . Now, there [are] bonus payments that are potentially coming this year, not guaranteed as always are bonus, but I have to make it there first.

Defendant, on cross-examination, introduced into evidence Plaintiff's pay stub "for the period ending on . . . December 31st, 2023[,]" as well as Plaintiff's W-2 showing his 2023 income. Defendant's counsel engaged in the following exchange with Plaintiff:

> Q: All right. And let me show you what's marked as Defendant's Exhibit 23[.]
>
> . . . .
>
> Q. . . . And it shows that your Medicare wages and tips for 2023 were $248,739.71, is that correct?
>
> A. . . . [T]hat is correct in the sense that this is the total number, but this is not what I get; not before tax or anything. This is including everything, my retirement, everything.
>
> . . . .
>
> Q. It is your gross income, correct?
>
> A. Yeah[.]

Plaintiff also testified as to his expenses, Defendant testified as to her income, and the trial court took judicial notice of Defendant's financial affidavit—which included her expenses.

In the Original Order, the trial court distributed assets and debts between the parties, and ordered Plaintiff to pay a distributive award of $132,840.26. In its award of alimony, the trial court found, in relevant part:

> 31. . . . Plaintiff is employed at Corning and earns $20,728.31 gross per month. After his deductions from income, Plaintiff has a net income of $12,458.76 per month.

The trial court did not make any findings regarding the parties' expenses, only providing:

> 44. That the [trial c]ourt consider[ed] the financial affidavits filed by the parties and finds that [D]efendant is a dependent spouse and [P]laintiff is the supporting spouse.

> 45. That Defendant is in need of support from [P]laintiff and that [P]laintiff is capable of providing the same.

In its alimony award, the trial court did not state an actual amount that was awarded, but instead left a blank space where the amount should have been filled in. Plaintiff filed a notice of appeal from the Original Order on 22 April 2024.[1]

Following entry of the Original Order, on 2 May 2024, Defendant filed a Rule 60(a) motion requesting the trial court to fill in the blank space for alimony. On 14 June 2024, the trial court granted Defendant's motion, entered the Rule 60 Order, and that same day entered the Amended Order, which was identical to the Original Order, except that the blank space had been filled with an award of alimony of $1,250.00 per month. Plaintiff timely appealed from both the Rule 60 Order and the Amended Order.

II. Jurisdiction

This Court has jurisdiction to review this appeal from final judgments of a district court, pursuant to N.C.G.S. § 7A-27(b) (2023).

III. Analysis

On appeal, Plaintiff argues the trial court erred in: (A) modifying the Original Order "under the guise of correcting a clerical error"; (B) ordering a distributive award; (C) awarding alimony, where the Amended Order incorrectly calculated Plaintiff's income and failed to include findings as to the parties' expenses; (D) calculating child support using incorrect income information; and (E) ordering Defendant's equitable distribution affidavit to be treated as the pretrial order, and "refusing to allow [Plaintiff] to present evidence." We address each argument, in turn.

A. Rule 60 Motion

[1] Plaintiff first argues the trial court erred in modifying the Original Order "under the guise of correcting a clerical error[.]" Specifically, Plaintiff argues the trial court erred by making a substantive change—an award of alimony of $1,250.00 per month—to the Original Order. We disagree.

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1. Defendant also filed a notice of appeal on 2 May 2024, but withdrew her notice of appeal on 20 June 2024.

"Rule 60 motions are addressed to the sound discretion of the trial court and will not be disturbed absent a finding of abuse of discretion." *Lumsden v. Lawing*, 117 N.C. App. 514, 518 (1995). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Hartsell v. Hartsell*, 189 N.C. App. 65, 68 (2008) (citation omitted).

Pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

N.C. R. Civ. P. 60(a). "Relief under Rule 60(a) is limited to the correction of clerical errors, and it does not permit the correction of serious or substantial errors." *Bossian v. Bossian*, 284 N.C. App. 208, 220 (2022) (citation omitted) (cleaned up); *see also In re D.D.J.*, 177 N.C. App. 441, 444 (2006) (providing that the trial court does "not have the power under Rule 60(a) to affect the substantive rights of the parties or to correct substantive errors in their decisions"). "A clerical error is 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." *In re D.D.J.*, 177 N.C. App. at 444 (citation omitted) (cleaned up).

"A trial court abuses its discretion and enters an order outside the scope of the Rule when it alters the effect of the original order." *In re Estate of Meetze*, 272 N.C. App. 475, 479 (2020) (citation omitted); *see also Food Servs. Specialists v. Atlas Rest. Mgmt., Inc.*, 111 N.C. App. 257, 259 (1993) ("We have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error." (citation omitted)). This Court, however, has consistently concluded that "[t]he amount of money involved is not what creates a substantive right. Instead, it is the source from which this money is derived that determines whether a change in the amount owed is substantive for the purposes of Rule 60(a)." *Robertson v. Steris Corp.*, 237 N.C. App. 263, 270–71 (2014) (quoting *Lee v. Lee*, 167 N.C. App. 250, 254 (2004)) (cleaned up); *see also Ice v. Ice*, 136 N.C. App. 787, 792 (2000).

Here, the trial court properly granted Defendant's Rule 60(a) motion to correct a clerical error. *See Bossian*, 284 N.C. App. at 220. The Original Order provided, in relevant part, the following:

> 26. Plaintiff shall pay Defendant forty-eight (48) monthly alimony payments of $_____ beginning April 15, 2024, and continuing thereafter on the 15th day of each month, with the final payment being April 15, 2028, by electronic transfer or any other method that the parties agree upon in writing. A text message shall constitute a sufficient writing.

The Amended Order was identical to the Original Order, except for the following change in language:

> 26. Plaintiff shall pay Defendant forty-eight (48) monthly alimony payments of $1,250.00 beginning April 15, 2024, and continuing thereafter on the 15th day of each month, with the final payment being April 15, 2028, by electronic transfer or any other method that the parties agree upon in writing. A text message shall constitute a sufficient writing.

Because the Original Order already provided that Plaintiff was required to pay Defendant an alimony award, the Amended Order—which still required Plaintiff to pay Defendant an alimony award—did not "alter[] the effect of the original order" or change the source from which the award was derived. *See In re Estate of Meetze*, 272 N.C. App. at 479; *Robertson*, 237 N.C. App. at 270–71. By filling in only the blank space to set the award of alimony in its Amended Order, the trial court made a change that, at most, affected only "the amount of money involved[,]" which does not affect a substantive right. *See Robertson*, 237 N.C. App. at 270–71; *In re D.D.J.*, 177 N.C. App. at 444. The error in the Original Order was, instead, the type of error that resulted "from a minor mistake or inadvertence," rather than from "judicial reasoning or determination." *See In re D.D.J.*, 177 N.C. App. at 444.

Accordingly, because the trial court, by entry of the Amended Order, did not alter "the effect of the [O]riginal [O]rder" and only altered the amount of money involved, the trial court did not abuse its discretion in granting Defendant's Rule 60(a) motion and in entering the Rule 60 Order and Amended Order. *See In re Estate of Meetze*, 272 N.C. App. at 479; *Robertson*, 237 N.C. App. at 270–71; *see also Lumsden*, 117 N.C. App. at 518. We therefore affirm the correction of the clerical error in the

Amended Order pursuant to Rule 60(a), but as we discuss below, vacate and remand the trial court's awards of alimony and child support.

B. Distributive Award

[2] Plaintiff next argues the trial court erred in ordering a distributive award "without finding that [Plaintiff] had liquid assets from which to pay the award." We disagree.

"Equitable distribution is governed by [N.C.G.S. § 50-20 (2023)], which requires the trial court to conduct a three-step process: (1) classify property as being marital, divisible, or separate property; (2) calculate the net value of the marital and divisible property; and (3) distribute equitably the marital and divisible property." *Brackney v. Brackney*, 199 N.C. App. 375, 381 (2009).

> A trial court's determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal if there is competent evidence to support the determination. Ultimately, the court's equitable distribution award is reviewed for an abuse of discretion and will be reversed only upon a showing that it is so arbitrary that it could not have been the result of a reasoned decision.

Id. at 381 (citations and internal quotation marks omitted).

Pursuant to N.C.G.S. § 50-20(e), "it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable." N.C.G.S. § 50-20(e). This presumption is rebuttable "by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind." N.C.G.S. § 50-20(e). The statute further provides that "[i]n any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties." N.C.G.S. § 50-20(e).

"The trial court is required to make findings as to whether the [party] has sufficient liquid assets from which he can make the distributive award payment." *Urciolo v. Urciolo*, 166 N.C. App. 504, 507 (2004). If, however, "a party's ability to pay an award with liquid assets can be ascertained from the record, then the distributive award must be affirmed." *Pellom v. Pellom*, 194 N.C. App. 57, 69 (2008). "[T]he money derived from refinancing the mortgage on the marital home is a source of liquid funds available to a defendant." *Peltzer v. Peltzer*, 222 N.C. App. 784, 791 (2012) (citation omitted) (cleaned up). Similarly, this Court has

provided that an inherited trust retirement account is a liquid asset where it "was available as a resource from which the trial court could order a distributive award." *Comstock v. Comstock*, 240 N.C. App. 304, 321 (2015).

Here, the unchallenged findings of fact demonstrate that Plaintiff was awarded: fifty percent of a "401(k) Investment Plan with Corning," which had a total value of $890,472.43; fifty percent of a "Pension Plan with Corning," which had a total value of $202,602.14; and a home valued at $255,706.77, excluding the value of the mortgage as of the date of separation, which was valued at $158,993.23. Plaintiff was ordered to pay a distributive award of $132,840.26 to Defendant. Given that Plaintiff was awarded the home, and given its value of $255,706.77 with a remaining mortgage of $158,993.23, Plaintiff could seek to refinance the mortgage in order to obtain "a source of liquid funds[.]" *See Peltzer*, 222 N.C. App. at 791. Further, given that the retirement accounts were valued at over $1,093,074, even though Plaintiff was awarded half of the value of these accounts, the remaining value of the accounts is "a resource from which the trial court could order a distributive award." *See Comstock*, 240 N.C. App. at 321.

Accordingly, because Plaintiff's "ability to pay an award with liquid assets can be ascertained from the record," the trial court did not abuse its discretion in awarding a distributive award. *See Pellom*, 194 N.C. App. at 69; *Brackney*, 199 N.C. App. at 381. We therefore affirm the trial court's distributive award.

C. Alimony

[3] Plaintiff next argues the trial court erred in awarding alimony where the Amended Order incorrectly calculated Plaintiff's income and failed to include findings as to the parties' expenses. We agree.

"In all non-jury trials, the trial court must specifically find those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Carpenter v. Carpenter*, 245 N.C. App. 1, 4 (2016) (internal quotation marks omitted). "A trial court's determination of whether a party is entitled to alimony is reviewable *de novo* on appeal." *Id.* at 4. "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *In re S.W.*, 914 S.E.2d 457, 461 (N.C. Ct. App. 2025) (citation omitted). "The amount of alimony is determined by the trial judge in the exercise of his sound discretion and is not reviewable on appeal in

the absence of an abuse of discretion." *Wise v. Wise*, 264 N.C. App. 735, 738 (2019) (citation omitted).

Whether a party is entitled to alimony is governed by N.C.G.S. § 50-16.3(A) (2023). According to the statute, "a party is entitled to alimony if three requirements are satisfied: (1) that party is a dependent spouse; (2) the other party is a supporting spouse; and (3) an award of alimony would be equitable under all the relevant factors." *Barrett v. Barrett*, 140 N.C. App. 369, 371 (2000); *see also* N.C.G.S. § 50-16.3(A)(a).

> A "dependent spouse" must be either actually substantially dependent upon the other spouse or substantially in need of maintenance and support from the other spouse. A party is "actually substantially dependent" upon her spouse if she is currently unable to meet her own maintenance and support. A party is "substantially in need of maintenance and support" if she will be unable to meet her needs in the future, even if she is currently meeting those needs.

Carpenter, 245 N.C. App. at 4 (citations omitted); *see also* N.C.G.S. § 50-16.1(A)(2) (2023). "To properly find a spouse dependent[,] the court need only find that the spouse's reasonable monthly expenses exceed her monthly income and that the party has no other means with which to meet those expenses." *Helms v. Helms*, 191 N.C. App. 19, 24 (2008) (citation omitted) (cleaned up). "It necessarily follows that the trial court must look at the parties' income and expenses in light of their accustomed standard of living." *Id.* at 24.

"[T]he trial court must base this determination [of dependency] on findings of fact sufficiently specific to indicate that the court considered the factors set out" in *Williams v. Williams*, 299 N.C. 174 (1980). *Hunt v. Hunt*, 112 N.C. App. 722, 726 (1993) (citation and internal quotation marks omitted). These factors include:

> (1) [T]he accustomed standard of living of the parties prior to the separation, (2) the income and expenses of each of the parties at the time of the trial, (3) the value of the estates, if any, of both spouses at the time of the hearing, and (4) the length of the marriage and the contribution each party has made to the financial status of the family over the years.

Id. at 726–27 (citing *Williams*, 299 N.C. at 183–85).

Once the trial court has determined that a dependent spouse is entitled to alimony, the trial court must "exercise its discretion in determining the amount, duration, and manner of payment of alimony." N.C.G.S. § 50-16.3(A)(b). To determine the amount, duration, and manner of payment of alimony, the trial court is required to consider the sixteen factors set forth in N.C.G.S. § 50-16.3(A)(b). *See* N.C.G.S. § 50-16.3(A)(b).

1. Plaintiff's Income

"Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order." *Works v. Works*, 217 N.C. App. 345, 347 (2011) (citation omitted). "To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith." *Id.* at 347 (citation omitted). This Court has concluded that the trial court did not abuse its discretion in using a party's income from years prior to those of the hearing where "the trial court expressed concerns about [the party's] reported income and found that [the party's] numbers were not credible." *Zurosky v. Shaffer*, 236 N.C. App. 219, 243 (2014).

In *Green v. Green*, the trial court made no findings of fact regarding the defendant's "current income at the time of the order" and based its decision on whether the defendant had the ability to pay alimony based "on an average of [the d]efendant's two prior years' income." 255 N.C. App. 719, 734 (2017). On appeal, this Court provided that "the trial court did not make findings of fact as to whether [the d]efendant's professed actual income at the time of the order was reliable or unreliable before basing its decision regarding [the d]efendant's ability to pay alimony on an average of prior years' income." *Id.* at 734. This Court concluded that the trial court "abused its discretion in basing its decision regarding [the d]efendant's ability to pay alimony on an average of [the d]efendant's monthly gross income from prior years without first determining [the d]efendant's current monthly income, and whether that reported current income was credible." *Id.* at 734–35. This Court further concluded that "[o]n remand, the trial court must make findings of fact regarding [the d]efendant's" current income, and "may only use prior years' incomes if the trial court finds as fact that [the d]efendant's actual income is not credible, or is otherwise suspect." *Id.* at 735.

Here, the matter came on for hearing in February 2024. In its award of alimony, the trial court found, in relevant part:

> 31. . . . Plaintiff is employed at Corning and earns $20,728.31 gross per month. After his deductions from income, Plaintiff has a net income of $12,458.76 per month.

During the hearing, however, Plaintiff testified that that he earned "$3,134.00 a month[,]" based on a paycheck from January 2024. Defense counsel, on cross-examination, introduced evidence of Plaintiff's income solely via a pay stub "for the period ending on . . . December 31st, 2023[,]" and via Plaintiff's 2023 W-2. Defense counsel then elicited from Plaintiff that his 2023 gross income was $248,739.71. Although the trial court's Finding of Fact 31, on its face, purports to demonstrate Plaintiff's current 2024 earnings, it actually demonstrates Plaintiff's 2023 income: dividing $248,739.71 annual income by twelve months yields the result of $20,728.31 per month, the gross monthly amount included in Finding of Fact 31. This result also contrasts with Plaintiff's financial affidavit, which demonstrates a gross monthly income of $15,298—significantly higher than Plaintiff's testimony as to his January 2024 paycheck of "$3,134.00"—an amount less than that included in Finding of Fact 31.

Similar to *Green*, where the trial court based its decision on whether the defendant had the ability to pay alimony based on "an average of [the d]efendant's two prior years' income" rather than on the defendant's current income, so here did the trial court base its decision on whether Plaintiff had the ability to pay alimony based on evidence of Plaintiff's 2023 income, rather than based on evidence of Plaintiff's "current income at the time of the order[.]" 255 N.C. App. at 734; *see also Works*, 217 N.C. App. at 347. While the trial court was permitted to consider Plaintiff's ability to pay based on evidence of his 2023 income, it was required to either make a finding as to Plaintiff's 2024 income, or make findings of fact that Plaintiff's "actual income [was] not credible, or [was] otherwise suspect" before making a finding as to Plaintiff's 2023 income, both of which the trial court failed to do in the case *sub judice*. *Green*, 255 N.C. App. at 735; *see also Works*, 217 N.C. App. at 347; *Zurosky*, 236 N.C. App. at 243.

Defendant argues this Court's holding in *Robinson v. Robinson* demonstrates that the trial court "was permitted to consider Plaintiff's yearly income" and could appropriately rely on evidence of Plaintiff's 2023 income in determining his current income. 210 N.C. App. 319, 329 (2011). Defendant's reliance on *Robinson*, however, is misplaced. In *Robinson*, the trial court determined that the plaintiff "consistently earned over $100,000 per year[.]" *Id.* at 327. The trial court made this determination by relying on the parties' tax returns from previous years. *Id.* at 327. On appeal, the plaintiff did not challenge the defendant's entitlement to alimony, but challenged only "the amount of alimony awarded." *Id.* at 326. This Court concluded that, in determining the "reasonable needs and expenses of the parties[,]" the trial court did not abuse its discretion "in

relying upon [the plaintiff's] previous year tax records, [the plaintiff's] testimony as to his expenses, and the [trial] court's 'own common sense and every-day experiences' in order to conclude that the alimony payment was affordable." *Id.* at 329 (citations omitted). This Court further provided that "[t]he trial court's inability to make more detailed findings of fact regarding [the plaintiff's] current actual ability to pay was due to his failure to attend and testify at the hearing or to submit more detailed financial information about his current expenses." *Id.* at 329.

Here, unlike in *Robinson*, Plaintiff has specifically challenged Defendant's entitlement to alimony, which warrants a de novo review, rather than solely a review based on the trial court's abuse of discretion. *See Carpenter*, 245 N.C. App. at 4; *Wise*, 264 N.C. App. at 738. Additionally, unlike in *Robinson*, where the plaintiff failed "to attend and testify at the hearing or to submit more detailed financial information[,]" here, Plaintiff: attended the hearing, testified as to his 2024 income, and had also provided a financial affidavit prior to the hearing. 210 N.C. App. at 329. The trial court, therefore, had the ability to make findings of fact about Plaintiff's 2024 income—as opposed to solely his 2023 income—and alternatively, had the ability to make findings of fact that Plaintiff's current income was "not credible, or [] otherwise suspect[,]" which would have permitted the trial court to use Plaintiff's 2023 income. *See Green*, 255 N.C. App. at 735; *Robinson*, 210 N.C. App. at 329. The trial court therefore erred in basing its award of alimony on Plaintiff's 2023 income without making the appropriate findings of fact. *See Green*, 255 N.C. App. at 734–35.

2. The Parties' Expenses

In addition to the lack of appropriate findings of fact as to Plaintiff's income, the trial court failed to make "findings of fact sufficiently specific to indicate that the court considered" the parties' expenses at the time of trial. *See Hunt*, 112 N.C. App. at 726–27 (citation and internal quotation marks omitted). The trial court made no findings of fact on the parties' expenses or as to their standard of living, only finding that the trial court "consider[ed] the financial affidavits filed by the parties" in determining that Defendant was the dependent spouse, and Plaintiff the supporting spouse, as set out in Findings of Fact 44 and 45. Because the trial court "must look at the parties' income and expenses in light of their accustomed standard of living[,]" in order to determine whether a spouse is a dependent spouse, and the trial court's order lacks any findings of fact as to their specific income or as to their standard of living, this Court cannot ascertain whether the trial court considered the *Williams* factors in making its award of alimony, and much less

ascertain whether it abused its discretion in the amount awarded. *See Helms*, 191 N.C. App. at 24; *Hunt*, 112 N.C. App. at 726–27; *see also Wise*, 264 N.C. App. at 739; N.C.G.S. § 50-16.3(A)(b).

Accordingly, we vacate the trial court's award of alimony, and remand for further findings of fact as to Plaintiff's current income at the time of the order, or as to Plaintiff's prior year's income, so long as the trial court makes the requisite findings of fact that demonstrate Plaintiff's current income was "not credible, or [] otherwise suspect." *See Green*, 255 N.C. App. at 735. We further remand for specific findings regarding the parties' expenses and accustomed standard of living. *See Hunt*, 112 N.C. App. at 726–27; *see also Wise*, 264 N.C. App. at 739.

D. Child Support

[4] Plaintiff next argues the trial court erred in calculating child support using incorrect income information. For the same reasons discussed previously, we agree.

"Upon appellate review, a trial court's determination of the proper child support payment will not be disturbed absent a clear abuse of discretion." *State v. Williams*, 163 N.C. App. 353, 356 (2004). "The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law." *Spicer v. Spicer*, 168 N.C. App. 283, 287 (2005).

Under N.C.G.S. § 50-13.4(c) (2023), the trial court "shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to" N.C.G.S. § 50-13.4(c)(1). N.C.G.S. § 50-13.4(c). The trial court may deviate from the guidelines if,

> after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate[.]

N.C.G.S. § 50-13.4(c). In doing so, "the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered." N.C.G.S. § 50-13.4(c).

"[A] party's ability to pay child support is ordinarily determined by his or her actual income at the time the award is made or modified." *Greer v. Greer*, 101 N.C. App. 351, 355 (1991); *see also Eidson*

v. Kakouras, 286 N.C. App. 388, 403 (2022) ("It is well established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." (citation omitted)). Similar to the income requirements for alimony, "[a] person's *capacity* to earn income may be made the basis of an award if there is a finding that the party deliberately depressed his or her income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child." *Greer*, 101 N.C. App. at 355–56.

Although this Court has provided that "a trial court may permissibly utilize a parent's income from prior years to calculate the parent's gross monthly income for child support purposes[,]" *see State ex rel. Midgett v. Midgett*, 199 N.C. App. 202, 208 (2009), when a trial court uses prior years' income, it must still make the appropriate findings of fact, *see Green*, 255 N.C. App. at 735; *see also Kaiser v. Kaiser*, 259 N.C. App. 499, 506 (2018) ("What matters in these circumstances is the reason *why* the trial court examines past income; the court's findings must show that the court used this evidence to accurately assess current monthly gross income.").

Here, for the same reasons discussed previously as to the trial court's award of alimony, we conclude the trial court erred in using Plaintiff's 2023 income to calculate Plaintiff's income for purposes of awarding child support without making the appropriate findings of fact. *See Green*, 255 N.C. App. at 735; *see also Greer*, 101 N.C. App. at 355. Accordingly, we vacate the trial court's order, and remand for additional findings of fact. We therefore do not reach the merits of Plaintiff's further argument regarding the child support guidelines.

E. Pretrial Order

[5] Plaintiff finally argues that the trial court erred in ordering Defendant's equitable distribution affidavit to be treated as the pretrial order, and "refusing to allow [Plaintiff] to present evidence." For the following reasons, Plaintiff's argument is not preserved for appellate review.

Pursuant to the North Carolina Rules of Appellate Procedure, an appellant's notice of appeal "shall designate the judgment or order from which appeal is taken[.]" N.C. R. App. P. 3(d). "An appellant's failure to designate a particular judgment or order in the notice of appeal generally divests this Court of jurisdiction to consider that order." *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 347 (2008). This Court, however, "has recognized that even if an appellant omits a certain order from the notice of appeal, our Court may still obtain jurisdiction to review the order pursuant to" N.C.G.S. § 1-278 (2023). *Id.* at 348; *see* N.C.G.S.

§ 1-278. "Review under N.C.G.S. § 1–278 is permissible if three conditions are met: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment." *Yorke*, 192 N.C. App. at 348 (citation and internal quotation marks omitted).

Here, Plaintiff has failed to meet the first requirement permitting review of the February 2024 Order. *See id.* at 348. In the trial court's order, the trial court found that: "[P]laintiff was not present, but was duly noticed[,]" and "[P]laintiff has failed to timely submit his equitable distribution affidavit pursuant to local rules[.]" As Plaintiff was not present at the hearing, and did not submit an equitable distribution affidavit prior to the hearing, Plaintiff did not raise a timely objection before the trial court and thus failed to preserve the issue for appellate review. *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."); *see*, *e.g.*, *Kaylor v. Kaylor*, 296 N.C. App. 80, 88 (2024) (concluding that the defendant failed to preserve his argument for appellate review where the defendant had "failed to attend" multiple case review hearings and the equitable distribution trial, and "failed to offer an equitable distribution inventory affidavit at any point").

Accordingly, because Plaintiff did not timely object to the trial court's order, Plaintiff did not meet the first requirement to have the trial court's order reviewed under N.C.G.S. § 1-278; as such, we dismiss Plaintiff's alleged error as to the February 2024 Order. *See Yorke*, 192 N.C. App. at 347–48.

IV. Conclusion

Upon review, we conclude: first, the trial court did not abuse its discretion in granting Defendant's Rule 60 motion because the Amended Order corrected only a clerical error in the Original Order; second, the trial court did not err in ordering a distributive award because Plaintiff's ability to pay the award can be ascertained from the Record; third, the trial court erred in awarding alimony where it failed to make findings of fact as to Plaintiff's income; fourth, the trial court erred in calculating child support where it failed to make findings of fact as to Plaintiff's income; and fifth, Plaintiff's argument concerning the pretrial order is not preserved for appellate review. We therefore affirm the Rule 60 Order, affirm the Amended Order in part, vacate and remand the

Amended Order as to alimony and child support, and dismiss Plaintiff's argument regarding the pretrial order.

AFFIRMED In Part, VACATED AND REMANDED In Part, and DISMISSED In Part.

Judges STADING and MURRY concur.

KAREN TYSON, AS ADMINISTRATOR OF THE ESTATE OF FRANKLIN SCOTT TYSON, PLAINTIFF
v.
ELG UTICA ALLOYS, INC., ELG UTICA ALLOYS HOLDING CORP., ELG UTICA ALLOYS (HARTFORD), INC., AND ELG UTICA ALLOYS (MONROE) LLC, D/B/A ABS ALLOYS & METALS USA, LLC, DEFENDANTS

No. COA24-740

Filed 18 June 2025

Workers' Compensation—exclusivity provision—Woodson claim—forecast of evidence insufficient—denial of summary judgment reversed

In a tort action brought on behalf of the estate of an employee who was killed by an explosive fire while operating a zirconium crusher at a metal recycling plant owned and operated by defendants (a parent company and its subsidiaries), the trial court erred in denying defendants' motion for summary judgment where plaintiff failed to forecast evidence that would establish a *Woodson* claim—an exception to the exclusivity provision of the Workers' Compensation Act permitting civil tort claims arising from work-related injuries resulting from conduct tantamount to an intentional tort. The exacting standard and high bar for a *Woodson* claim was not satisfied where no evidence showed that defendants—despite having knowledge of some possibility (or even probability) of injury or death—recognized the immediacy of the hazard facing the employee, and, thus, no evidence indicated defendants intended, or were manifestly indifferent to, the employee's injury and death. Accordingly, the trial court's denial of defendants' motion for summary judgment was reversed.

Appeal by defendants from order entered 23 April 2024 by Judge Jonathan Perry in Union County Superior Court. Heard in the Court of Appeals 18 March 2025.

Comerford Chilson & Moser, LLP, by John A. Chilson, The Law Offices of William K. Goldfarb, by William K. Goldfarb, and Love & Hutaff, PLLC, by Richard R. Hutaff, for plaintiff-appellee.

Raynor Law Firm, PLLC, by Kenneth R. Raynor, for defendants-appellants.

ZACHARY, Judge.

This case concerns the *Woodson* exception to the exclusivity provision of the North Carolina Workers' Compensation Act ("the Act"). *See* N.C. Gen. Stat. § 97-10.1 (2023); *Woodson v. Rowland*, 329 N.C. 330, 340–41, 407 S.E.2d 222, 228 (1991). As discussed in greater detail herein, a *Woodson* claim presents "an exception to the Act's exclusivity provision . . . for civil actions brought as a result of conduct that is tantamount to an intentional tort." *Hidalgo v. Erosion Control Servs., Inc.*, 272 N.C. App. 468, 471, 847 S.E.2d 53, 56 (2020) (cleaned up).

Plaintiff Karen Tyson, as the administratrix of the estate of her deceased brother, Franklin Scott Tyson ("Decedent"), asserted a *Woodson* claim against Defendants ELG Utica Alloys, Inc., ELG Utica Alloys Holding Corp., ELG Utica Alloys (Hartford), Inc., and ELG Utica Alloys (Monroe) LLC, d/b/a ABS Alloys & Metals USA, LLC.[1] Defendants appeal from the trial court's order denying their motion for summary judgment. We conclude that Plaintiff's forecast of evidence failed to establish a *Woodson* claim, and therefore, the trial court erred in denying Defendants' motion for summary judgment. Accordingly, we reverse and remand.

I. Background

On 7 April 2020, Decedent was killed by an explosive fire while operating the zirconium crusher at Defendants' metal processing plant in Monroe, North Carolina. Defendants' Monroe facility recycled metal used in the aerospace industry, including zirconium. Defendants processed zirconium turnings, which are spiral shavings of the metal, using a crusher.

1. In Plaintiff's amended complaint, she refers to Defendants collectively as "members of a conglomerate," including a parent company and subsidiaries. In that Defendants do not object to their treatment as a collective party, for the purposes of this appeal and for ease of reading, we refer to them collectively as "Defendants."

Prior to the fatal explosion, there had been a few inconsequential, slow-burning zirconium fires at the Monroe facility—including at least one that could not be put out by Class D fire extinguishers, which was resolved when Defendants' employees "pulled the materials involved in [the] fire outside the building to let it burn out."

Defendants had also previously received citations from federal and state authorities for various safety violations. Significantly, none of these citations specifically related to zirconium. The federal Occupational Safety and Health Administration ("OSHA") cited Defendants' facility in Hartford, Connecticut, regarding its handling of combustible titanium dust. The Occupational Safety and Health Division of the North Carolina Department of Labor ("NC OSHA") cited Defendants for multiple violations at the Monroe facility, including several related to the safe handling of hazardous materials. Following the fatal incident, NC OSHA issued several additional citations related to Defendants' handling of zirconium and the crusher.

Acting as the administratrix of Decedent's estate, on 4 March 2022, Plaintiff filed a complaint against Defendants in Union County Superior Court. Defendants filed a motion to dismiss and answer on 9 May 2022. On 7 September 2022, Plaintiff filed an amended complaint, asserting a *Woodson* claim as well as "all other available claims not barred/excluded under [the Act]." Defendants filed their motion to dismiss and answer on 31 October 2022.

After extensive discovery, Defendants filed a motion for summary judgment on 16 February 2024. On 27 February 2024, Plaintiff likewise filed a motion for summary judgment. Both motions came on for hearing in Union County Superior Court on 8 April 2024.

On 23 April 2024, the trial court entered a pair of orders denying the parties' respective motions for summary judgment. Defendants timely filed notice of appeal from the order denying their motion for summary judgment.

II. Appellate Jurisdiction

Defendants acknowledge the interlocutory nature of the order from which they appeal but nonetheless assert that this Court may properly exercise jurisdiction because the trial court's order affects a substantial right.

"Generally, a party has no right of appeal from an interlocutory order." *Edwards v. GE Lighting Sys., Inc.*, 193 N.C. App. 578, 581, 668 S.E.2d 114, 116 (2008). "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." *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218, 794 S.E.2d 497, 499 (2016) (citation omitted).

"An exception exists when the order will deprive the party of a substantial right absent an immediate appeal." *Edwards*, 193 N.C. App. at 581, 668 S.E.2d at 116; *see* N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3)(a). "As a general rule, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order does not affect a substantial right." *Bockweg v. Anderson*, 333 N.C. 486, 490, 428 S.E.2d 157, 160 (1993) (cleaned up).

However, as Defendants note, it is well established that the denial of a motion for summary judgment based upon the Act's exclusivity provision affects a substantial right. *See, e.g.*, *Hidalgo*, 272 N.C. App. at 470–71, 847 S.E.2d at 55 (exercising jurisdiction where the plaintiff appealed denial of a summary judgment motion pursuant to the exclusivity provision of the Act); *see also Edwards*, 193 N.C. App. at 581, 668 S.E.2d at 116. In that Defendants have sufficiently demonstrated that the trial court's interlocutory order denying their motion for summary judgment affects a substantial right, this appeal is properly before us.

III. Discussion

On appeal, Defendants argue that the trial court erred by denying their motion for summary judgment because "Plaintiff's evidence in this case fails to meet the conduct tantamount to an intentional tort required by *Woodson*." (Italics added). We agree.

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." *Hidalgo*, 272 N.C. App. at 471, 847 S.E.2d at 55 (citation omitted). When conducting de novo review, this Court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation omitted).

"There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim." *Edwards*, 193 N.C. App. at 582, 668 S.E.2d at 117 (cleaned up). "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Id.* (citation omitted).

B. The *Woodson* Exception

The Act is intended "to ensure that injured employees receive sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003), *reh'g denied*, 358 N.C. 159, 593 S.E.2d 591 (2004). "However, to balance competing interests between employees and employers, the Act includes an exclusivity provision, which 'limits the amount of recovery available for work-related injuries and removes the employee's right to pursue potentially larger damage awards in civil actions.' " *Hidalgo*, 272 N.C. App. at 471, 847 S.E.2d at 56 (quoting *Woodson*, 329 N.C. at 338, 407 S.E.2d at 227).

In *Woodson*, our Supreme Court recognized a limited exception to the Act's exclusivity provision:

> [W]hen an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

329 N.C. at 340–41, 407 S.E.2d at 228.

Woodson set forth "an exacting standard that plaintiffs must meet in order to escape the exclusivity provision" of the Act. *Hidalgo*, 272 N.C. App. at 471, 847 S.E.2d at 56. Since *Woodson*, our Supreme Court has clarified that plaintiffs must produce "uncontroverted evidence of the employer's intentional misconduct . . . where such misconduct is substantially certain to lead to the employee's serious injury or death." *Whitaker*, 357 N.C. at 557, 597 S.E.2d at 668. Thus, "[t]he *Woodson* exception represents a narrow holding in a fact-specific case, and its guidelines stand by themselves. This exception applies only in the most egregious cases of employer misconduct." *Id.*

C. Analysis

On appeal, Defendants argue that the trial court erred by denying their motion for summary judgment because Plaintiff failed to meet the exacting standard required by *Woodson*. Specifically, they contend that Plaintiff failed "to show that there was evidence that . . . [Defendants]

intended that [Decedent] would be injured from working on the crusher to process zirconium or that they were manifestly indifferent to the consequences of his doing so as required by the *Woodson* exception."

This case illustrates the high bar established by our Supreme Court in *Woodson* and reinforced by *Whitaker*. In fact, at the hearing below, Defendants noted that Plaintiff's interrogatory responses "summarize[d] a case for negligence, maybe willful and wanton negligence" against Defendants, but maintained that Plaintiff had not shown that any "misconduct [wa]s tantamount to an intentional tort" as required by *Woodson* and its progeny. *Woodson*, 329 N.C. at 341, 407 S.E.2d at 228; *see also*, *e.g.*, *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 239, 424 S.E.2d 391, 395 (1993) (recognizing that a *Woodson* claim requires "a higher degree of negligence than willful, wanton and reckless negligence").

Defendants rely on a series of cases from our appellate courts rejecting *Woodson* claims in which there was a "lack of evidence of the defendant[-]employer's recognition of the immediacy of the hazard the injured employee [wa]s faced with and thus there [wa]s no evidence that the employer intended the employee to be injured or that they were manifestly indifferent to the consequence." For example, in *Edwards*, this Court reversed the denial of a defendant-employer's motion for summary judgment—notwithstanding the plaintiff's presentation of "evidence relating to the results of investigations following the [fatal gas leak], including expert testimony regarding the likelihood of an accident"—where "there [wa]s no evidence that [the employer] knew, prior to [the] decedent's death, that a carbon monoxide leak was substantially certain to occur." 193 N.C. App. at 584, 668 S.E.2d at 118. Indeed, "although the evidence tended to show that [the employer] did not adequately maintain its equipment," this Court nonetheless explained that "even a knowing failure to provide adequate safety equipment in violation of [NC] OSHA regulations does not give rise to liability under *Woodson*." *Id.* (cleaned up).

As in *Edwards*, here, Plaintiff relies in part upon NC OSHA's subsequent investigation of the fatal fire and resulting citations for "Serious" and "Repeat Serious" violations arising from Defendants' alleged failure "to protect [Decedent] from recognized hazards likely to cause death or serious physical harm." However, in *Edwards*, although the "plaintiff presented evidence relating to the results of investigations following the accident, including expert testimony regarding the likelihood of an accident, there [wa]s no evidence that [the employer] knew, *prior* to [the] decedent's death, that [the accident] was *substantially certain* to occur." *Id.* (emphasis added). "As discussed in *Woodson*, simply

having knowledge of some possibility, or even probability, of injury or death is not the same as knowledge of a *substantial certainty* of injury or death." *Whitaker*, 357 N.C. at 558, 597 S.E.2d at 668–69 (emphasis added).

In addition, Plaintiff maintains that Defendants were "aware of, but repeatedly ignored, safety warnings associated with the grinding of zirconium." But as Defendants persuasively observe, the evidence shows that their employees "thought that any fires resulting from the processing of zirconium would be slow burning and easily capable of extinguishment." Plaintiff points to prior zirconium fires at the Monroe facility, one of which Defendants admitted could not be extinguished with a Class D fire extinguisher; however, even that fire was not remotely comparable to an explosion. Defendants' employees simply "pulled the materials involved in [the] fire outside the building to let it burn out." The record evidence suggests that, while zirconium fires were not unprecedented, Defendants had no "knowledge of a substantial certainty" of a sudden conflagration with the sustained force and intensity of the one that tragically killed Decedent in this case. *Id.* at 558, 597 S.E.2d at 669.

Plaintiff also repeatedly asserts that Defendants "purposefully placed [Decedent] in an unprotected location, without safety gear, directly above known sparks and fires emitting from an explosive metal being ground within a crusher." However, our Supreme Court in *Pendergrass* concluded that knowledge that "certain dangerous parts of [a] machine were unguarded when [the employer] instructed [the employee] to work at the machine" did not support "an inference that [the employer] intended that [the employee] be injured or that they were manifestly indifferent to the consequences of his doing so." 333 N.C. at 238, 424 S.E.2d at 394.

Defendants candidly acknowledge that, when viewed in the light most favorable to Plaintiff, there was evidence presented "from which a juror could find that the management of [Defendants] should have or could have recognized that their understanding of the risk of processing zirconium was flawed and that they should have taken some additional actions, much like those identified by . . . Plaintiff's experts." Yet as Defendants correctly note, although this evidence might support a claim for negligence, it does not amount to misconduct "tantamount to an intentional tort," as is required for a successful *Woodson* claim. *Woodson*, 329 N.C. at 341, 407 S.E.2d at 228.

Ultimately, our careful review of the record in the light most favorable to Plaintiff reveals that Defendants have "demonstrate[d] that [Plaintiff] cannot prove the existence of an essential element" of the

asserted *Woodson* claim. *Edwards*, 193 N.C. App. at 582, 668 S.E.2d at 117 (citation omitted). "Although we are sensitive to the facts of this case, we emphasize as did our Supreme Court in *Whitaker*, there must be 'uncontroverted evidence of the employer's intentional misconduct . . . where such misconduct is substantially certain to lead to the employee's serious injury or death.' " *Hidalgo*, 272 N.C. App. at 474, 847 S.E.2d at 57 (quoting *Whitaker*, 357 N.C. at 557, 597 S.E.2d at 668).

We conclude that "Plaintiff has not forecast evidence of intentional misconduct by Defendants substantially certain to lead to Decedent's death so as to create a genuine issue of material fact sufficient to survive summary judgment on Plaintiff's claims arising under *Woodson*." *Id.* Accordingly, the trial court erred by denying Defendants' motion for summary judgment.

IV. Conclusion

For the foregoing reasons, the trial court's order denying Defendants' motion for summary judgment is reversed, and this matter is remanded for entry of an order granting Defendants' motion for summary judgment. *See id.* at 474, 847 S.E.2d at 58.

REVERSED AND REMANDED.

Judges STROUD and COLLINS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 JUNE 2025)

BRINDLEY v. MOORE No. 24-724	Dare (17CVD000228)	Affirmed
BRYANT v. FIELDS No. 24-573	Wake (22CVS014854-910)	Affirmed
BRYANT v. FIELDS No. 24-610	Wake (22CVS014854)	Affirmed
DEMARIA BLDG. CO., INC. v. LAB'Y DESIGN, EQUIP. & INSTALLATIONS LLC No. 24-882	Wake (23CVS008595-910)	Affirmed
GRAHAM v. TAYLOR No. 24-904	Wake (23CVS023366-910)	Dismissed
IN RE W.G.T. No. 24-862	Henderson (23JT000010) (23JT000011)	Affirmed
IN RE WILL OF HOBGOOD No. 24-876	Durham (22E000983)	Affirmed
LINEBERGER v. GLENN WILLIAMS CONSTR. CO. No. 24-608	N.C. Industrial Commission (IC19-733745)	Affirmed in Part, Vacated in Part, and Remanded.
LONANO v. MURPHY No. 24-256	Guilford (23CVD520660)	Remanded
McMILLAN v. McMILLAN No. 24-850	Yancey (19CVD000113)	Affirmed
ROBESON CNTY. DEP'T OF SOC. SERVS. v. MOORE No. 24-709	Robeson (15CVD002684)	Vacated and Remanded
STATE v. BRASWELL No. 24-864	Pitt (22CRS052534)	No Error
STATE v. BRYANT No. 24-708	Caldwell (21CRS052409) (21CRS052410)	Vacated and Remanded
STATE v. CARDENAS No. 24-778	Alamance (20CRS052648)	No Error.

STATE v. COREY No. 24-512	Pitt (22CRS051777) (23CRS000190)	No Error
STATE v. GUZMAN-LOBO No. 24-589	Mecklenburg (17CRS246281) (17CRS246282) (17CRS246362) (17CRS246363) (17CRS246994) (17CRS246995) (17CRS246996) (17CRS246997) (18CRS201187) (18CRS201932) (18CRS201933)	No Error in part; Denied in part.
STATE v. JOHNSON No. 24-762	Guilford (22CRS028200) (22CRS067207)	Affirmed
STATE v. KELTON No. 24-513	Wake (20CR002127-910) (20CR215474-910) (20CR215486-910) (21CR001359-910) (21CR201282-910)	No Plain Error In Part, and Dismissed In Part.
STATE v. MARTINEZ No. 24-963	Brunswick (21CRS051816-19)	No Error
STATE v. MOSS No. 24-1024	Cabarrus (20CRS053990)	Affirmed
STATE v. SATAPATHY No. 24-359	New Hanover (21CRS53963)	No Error
STATE v. SPEAS No. 24-1001	Forsyth (22CRS000171) (22CRS054589)	No Error
STATE v. SUTTON No. 24-524	Swain (19CRS050255)	No Error
STATE v. WATSON No. 24-696	Macon (22CRS290151)	Affirmed
WOODRUFF v. MARTIN No. 24-1110	Halifax (24CVD000186)	Vacated

JON AND ALICIA BRADY, INDIVIDUALLY AND AS THE NATURAL PARENTS AND LEGAL GUARDIANS OF V.B., A MINOR, PLAINTIFFS

v.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAYSPANISH, LLC, RICARDO L. MATA, PEGGY H. HEY, IN HER INDIVIDUAL CAPACITY, PHILLIP GOODMAN, IN HIS INDIVIDUAL CAPACITY, AND CYNTHIA MARRERO, IN HER INDIVIDUAL CAPACITY, DEFENDANTS

No. COA24-603

Filed 2 July 2025

1. Appeal and Error—interlocutory appeal—governmental and public official immunity—denial of Civil Procedure Rule 12(b) motion—substantial right

In a tort action brought by the parents of a child who was sexually assaulted during a private after-school language program that used the facilities of a public school system to conduct its business, the interlocutory appeals of defendants (the school system and three of its employees) from the denials of their motions to dismiss the claims pursuant to Civil Procedure Rule 12(b)(2) and (b)(6) were properly before the appellate court because the motions asserted governmental and public official immunity. Those forms of immunity, which are not mere affirmative defenses to liability, but rather shield defendants entirely from having to answer for their conduct in a civil suit for damages, implicate personal jurisdiction and, thus, affect a substantial right.

2. Immunity—governmental—not applicable—allowing for-profit entity to operate after-school program on public school grounds—proprietary function

In a tort action against a public school system and other defendants, which was brought by the parents of a child who was sexually assaulted by an owner and operator of a private, for-profit, after-school language program that used the facilities of the public school system to conduct its business, the school system was not entitled to governmental immunity. In allowing the for-profit program to use school facilities for profit-making activities for a substantial fee but without a contract, the school system was engaged in a commercial activity, rather than the sort of activity traditionally provided by government entities. Governmental immunity does not extend to such a proprietary, as opposed to governmental, function.

3. Immunity—public official—not applicable—allowing for-profit entity to operate after-school program on public school grounds—public employees

In a tort action, brought by the parents of a child who was sexually assaulted by an owner and operator of a private, for-profit, after-school language program that used the facilities of a public school system to conduct its business against three employees of the public school system and other defendants, employee-defendants were not entitled to public official immunity because they were public employees, rather than public officials. Even if the employees' positions were created by statute (the Community Schools Use Act, N.C.G.S. §§ 115C-203 through 115C-209.1)—which was unclear—the legislation did not expressly delegate to the employees any power over the approval process for organizations and individuals wishing to use school facilities that was more than ministerial.

Appeal by Defendants from order entered 2 April 2024 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 February 2025.

Wallace Law Firm PLLC, by Terry L. Wallace, for Defendants-Appellants Charlotte-Mecklenburg Board of Education, Peggy H. Hey, Phillip Goodman, and Cynthia Marrero.

Susan L. Sowell for Defendant-Appellant Phillip Goodman.

No brief filed for Defendant PlaySpanish, LLC.

James, McElroy, & Diehl, P.A., by Preston O. Odom, III, J. Alexander Heroy, and Jennifer M. Houti, for Plaintiffs-Appellees.

GRIFFIN, Judge.

Defendant Charlotte-Mecklenburg Board of Education ("Defendant CMS") and Defendants Peggy Hey, Phillip Goodman, and Cynthia Marrero appeal from the trial court's order denying their motion to dismiss. Defendants claim they are immune from suit under the doctrines of governmental immunity and public official immunity. We hold they are not entitled to either defense and affirm the trial court's order.

I. Factual and Procedural Background

Because this appeal comes to us from the denial of a motion to dismiss based on Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure, the following facts are taken from Plaintiffs' amended complaint and treated as true. *Est. of Long by and through Long v. Fowler*, 378 N.C. 138, 140–41, 861 S.E.2d 686, 690 (2021).

Defendant PlaySpanish is a limited liability company that has provided after-school language programming to students in Mecklenburg County since 1997. Defendant PlaySpanish ostensibly used public school facilities to conduct its business through the Charlotte-Mecklenburg Community Use in Schools program ("CUS"); however, Defendant CMS did not adhere to the CUS regulations and policies governing the program when providing Defendant PlaySpanish access to its facilities. CUS allows community organizations not affiliated with Defendant CMS to use its facilities for various civic purposes. Defendants Marrero, Goodman, and Hey were Defendant CMS's manager of CUS, Director of Property Management within the Facility Planning and Management section of the Operations Department, and Executive Director of the Facility Planning, respectively. All served in their respective positions during at least 2016, 2017, and 2018.

Defendant Ricardo Mata and his wife are the sole owners and proprietors of Defendant PlaySpanish. In October 2013, Defendant CMS received a report of Defendant Mata sexually assaulting a child at an elementary school while he was operating Defendant PlaySpanish. Defendant CMS requested its police division conduct a criminal background check on Defendant Mata, which showed Defendant Mata had been accused of multiple other assaults on both children and adult women between 1993 and 2009. The background check also revealed Defendant Mata had previously been extradited to Georgia because of an investigation for allegedly sexually assaulting a child there.

Following the allegation in October 2013, Defendant Mata met with Defendant CMS's superintendent and denied the allegations via email. Defendant CMS then closed its investigation of Defendant Mata and failed to inform its principals and students' parents about the results of their investigation and background check.

During the 2016–2017 and 2017–2018 school years, Plaintiffs enrolled their daughter in Defendant PlaySpanish while she was a kindergarten and first grade student. Defendant Mata sexually assaulted her numerous times during "lock-down drills," which he was not authorized to perform.

On 4 May 2021, Plaintiffs filed a complaint against Defendant PlaySpanish, Defendant Mata, Defendant CMS, and Defendants Hey, Goodman, and Marrero bringing numerous claims stemming from the assault on their daughter. On 29 July 2021, Plaintiffs amended their complaint. In part, Plaintiffs alleged Defendant CMS and Defendants Hey, Goodman, and Marrero were liable for intentional or reckless infliction

of emotional distress, negligent infliction of emotional distress, and negligence or gross negligence.[1] Plaintiffs also brought a claim against Defendant CMS for premises liability and, in the alternative, under Article I, section 19 the North Carolina State Constitution.

Defendant CMS and Defendants Hey, Goodman, and Marrero moved to dismiss Plaintiffs' amended complaint on 8 September 2021 pursuant to Rules 12(b)(1), (2), and (6), claiming Defendant CMS is entitled to governmental immunity and Defendants Hey, Goodman, and Marrero are entitled to public official immunity. Defendants attached affidavits and evidentiary exhibits in support of their motion. Plaintiffs filed a memorandum of law opposing Defendants' motion and also submitted an affidavit and exhibits to the trial court.

On 23 June 2022, Defendants' motion came on for hearing in Mecklenburg County Superior Court. The trial court did not receive evidence during the hearing. On 2 April 2024, the trial court dismissed Plaintiffs' constitutional claim but denied Defendants' motion as to all other claims. Specifically, the trial court concluded Plaintiffs' allegations were sufficient to survive Defendants' motion to dismiss, and the issue of whether Defendants were entitled to the respective immunities they claimed required further factual development.

Defendants timely appeal.

II. Analysis

Defendants contend the trial court erred by denying their motion to dismiss on Plaintiffs' remaining claims. Specifically, Defendant CMS argues it is entitled to governmental immunity because it was engaged in a governmental function when allowing Defendant PlaySpanish to use its facilities and did not purchase liability insurance waiving immunity. Taking the facts alleged in the amended complaint as true, we hold Defendant CMS was engaged in a propriety function, thereby waiving governmental immunity. Therefore, we do not reach the question of whether the insurance policies at issue also had the same effect.

Defendants Hey, Goodman, and Marrero argue they enjoy public official immunity and are therefore also immune from liability. We similarly hold that Defendants Hey, Goodman, and Marrero were not acting as public officials and are therefore not entitled to its protections.

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1. As this appeal only addresses Defendant CMS and Defendants Hey, Goodman, and Marrero's motion to dismiss, we do not list or discuss the remaining claims against Defendant PlaySpanish and Defendant Mata.

A. Jurisdiction

[1] Defendants moved to dismiss Plaintiffs' claims under Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. Generally, a trial court's decision to deny a Rule 12 motion to dismiss is interlocutory and not immediately appealable. *Can Am S., LLC v. State*, 234 N.C. App. 119, 122, 759 S.E.2d 304, 307 (2014) (citing *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007)). However, an immediate right of appeal exists where the order affects a substantial right or is an adverse ruling on personal jurisdiction. *Can Am S.*, 234 N.C. App. at 122, 759 S.E.2d at 307.

Being so, an order denying a motion to dismiss made pursuant to Rule 12(b)(6) because of governmental immunity is immediately appealable as it affects a substantial right; governmental immunity "is an immunity from suit rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337–38, 678 S.E.2d 351, 354 (2009); *see also State ex rel. Stein v. Kinston Charter Acad.*, 379 N.C. 560, 571, 866 S.E.2d 647, 655 (2021) ("[A] municipal corporation may assert governmental immunity[] as a complete defense to a civil lawsuit at the pleading stage."); *Can Am*, 234 N.C. at 122, 759 S.E.2d at 307 ("Had defendants moved to dismiss based on the defense of sovereign immunity pursuant to Rule 12(b)(6), we would be bound by the longstanding rule that the denial of such a motion affects a substantial right and is immediately appealable under section 1-277(a)." (citations omitted)).

Similar to a Rule 12(b)(6) dismissal based on sovereign immunity, we have consistently held "denial of a Rule 12(b)(2) motion premised on sovereign immunity constitutes an adverse ruling on personal jurisdiction and is therefore immediately appealable under section 1-277(b)." *Green v. Howell*, 274 N.C. App. 158, 164, 851 S.E.2d 673, 678 (2020) (citation and internal marks omitted); *see also Torres v. City of Raleigh*, 288 N.C. App. 617, 620, 887 S.E.2d 429, 433 (2023) ("This Court has consistently stated that a denial of governmental immunity should be classified as an issue of personal jurisdiction under Rule 12(b)(2)."); *Can Am*, 234 N.C. App. at 123–24, 759 S.E.2d at 308 ("[T]his Court has consistently held that: (1) the defense of sovereign immunity presents a question of personal, not subject matter, jurisdiction, and (2) denial of Rule 12(b)(2) motions premised on sovereign immunity are sufficient to trigger immediate appeal under section 1-277(b).").

Like governmental and sovereign immunity, public official immunity "is more than a mere affirmative defense to liability—it shields a

defendant entirely from having to answer for its conduct in a civil suit for damages." *Est. of Graham v. Lambert*, 385 N.C. 644, 651, 898 S.E.2d 888, 895 (2024) (citations omitted). Because public official immunity provides a defendant a complete shield, a trial court's ruling denying a Rule 12(b)(6) motion to dismiss based upon public official immunity is also immediately appealable as affecting a substantial right because " 'it is effectively lost if a case is erroneously permitted to go to trial.' " *Craig*, 363 N.C. at 337–38, 678 S.E.2d at 354 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411, 425 (1985)); *see also Bartley v. City of High Point*, 381 N.C. 287, 293, 873 S.E.2d 525, 532 (2022) ("The denial of summary judgment on the ground of public official immunity is immediately appealable because it affects a substantial right.").

We will not, however, review whether the trial court properly denied Defendants' motion on the basis of Rule 12(b)(1) as "that motion does not support an interlocutory appeal." *Murray v. Univ. of N.C. at Chapel Hill*, 246 N.C. App. 86, 93, 782 S.E.2d 531, 536 (2016) (citation omitted); *Green v. Kearney*, 203 N.C. App. 260, 265–66, 690 S.E.2d 755, 760 (2010) ("Nevertheless, this Court has declined to address interlocutory appeals of a lower court's denial of a Rule 12(b)(1) motion to dismiss despite the movant's reliance upon the doctrine of sovereign immunity.").

In sum, the issues of whether the trial court properly denied Defendants' motion to dismiss because of governmental immunity and public official immunity are properly before this Court as an adverse ruling on personal jurisdiction and as affecting a substantial right.

B. Defendant CMS

[2] Defendant CMS contends the trial court erred by denying its motion to dismiss because it is protected by governmental immunity from lawsuits alleging tortious or negligent conduct. Plaintiffs argue Defendant CMS does not benefit from the protections provided by governmental immunity for two reasons: (1) Defendant CMS was engaging in a proprietary function when it allowed Defendant PlaySpanish to use its facilities; and (2) Defendant CMS waived governmental immunity by purchasing insurance which covers Plaintiffs' claims. Either ground provides an adequate basis for affirming the trial court's order because Defendant CMS is subject to the court's personal jurisdiction if not protected by governmental immunity. We agree with Plaintiffs that Defendant CMS was engaged in a proprietary function when allowing Defendant PlaySpanish on school property and therefore do not reach the issue of whether Defendant CMS waived governmental immunity through purchasing insurance.

"This Court has consistently stated that a denial of governmental immunity should be classified as an issue of personal jurisdiction under Rule 12(b)(2)." *Torres*, 288 N.C. App. at 620, 887 S.E.2d at 433 (2023). "The standard of review to be applied by a trial court in deciding a motion under Rule 12(b)(2) depends upon the procedural context confronting the court." *Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005). Three postures are typical: "(1) the defendant makes a motion to dismiss without submitting any opposing evidence; (2) the defendant supports its motion to dismiss with affidavits, but the plaintiff does not file any opposing evidence; or (3) both the defendant and the plaintiff submit affidavits addressing the personal jurisdiction issues." *Id.*; *Torres*, 288 N.C. App. at 620–21, 887 S.E.2d at 433 (stating the same).

In the third posture, such as here, "the court may hear the matter on affidavits presented by the respective parties, or the court may direct that the matter be heard wholly or partly on oral testimony or depositions." *Banc of Am. Sec.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (citation modified). Because the trial court here did not receive evidence at the hearing but decided the motion based upon the pleadings and affidavits alone, it acted much like a juror by " 'determin[ing] the weight and sufficiency of the evidence[.]' " *Id.* (quoting *Fungaroli v. Fungaroli*, 51 N.C. App. 363, 367, 276 S.E.2d 521, 524 (1981)). Our review in this context is to determine "only 'whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.' " *Banc of Am. Sec.*, 169 N.C. App. at 694, 611 S.E.2d at 183 (quoting *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140–41, 515 S.E.2d 46, 48 (1999)). But, a trial court "is not required to make specific findings of fact unless a party so requests." *McCullers v. Lewis*, 265 N.C. App. 216, 220, 828 S.E.2d 524, 530–31 (2019) (citations omitted). When the record does not indicate a party requested "the trial court make specific findings of fact, and the order appealed from contains no findings, we presume that the trial court made factual findings sufficient to support its ruling[,]" and we determine from a review of the record whether there is evidence "that would support the trial court's legal conclusions[,]" which are reviewed de novo. *Id.* (citations omitted).

Here, the trial court's order did not contain findings of fact, nor did either party request them, so we "presume that the trial court found facts sufficient to support its ruling, if such findings may be made from the record evidence." *Torres*, 288 N.C. App. at 622–23, 887 S.E.2d at 434 (citing *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 285, 350 S.E.2d

111, 114 (1986)). In sum, we review the record to determine whether there was adequate evidence to support the trial court's conclusions of law, which we then review de novo. *Id.*

Sovereign immunity is a common law doctrine which "bars suits against the State 'unless it has consented or waived its immunity.' " *Graham*, 385 N.C. at 651, 898 S.E.2d at 895 (quoting *Kinston Charter Acad.*, 379 N.C. at 570, 866 S.E.2d at 655 (internal marks omitted)). Constituent units of the State—cities, counties, and other localities such as school boards—are protected by governmental immunity, a "slice" of sovereign immunity which "shields units of local government from suit for acts committed in their *governmental* capacity." *Graham*, 385 N.C. at 651, 898 S.E.2d at 895–96 (quoting *Providence Volunteer Fire Dep't, Inc. v. Town of Weddington*, 382 N.C. 199, 211–12, 876 S.E.2d 453 (2022) (internal marks omitted) (emphasis added)); *see also Willet v. Chatham Cnty. Bd. of Educ.*, 176 N.C. App. 268, 269, 625 S.E.2d 900, 901 ("School boards enjoy the right of governmental immunity absent waiver or a statute to the contrary."); *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 437, 477 S.E.2d 179, 180 (1996) ("A local board of education is immune from suit and may not be liable in a tort action unless the Board has duly waived its governmental immunity.").

Two ways a school board may waive governmental immunity are by purchasing liability insurance, N.C. Gen. Stat. § 115C-42 (2023), or when engaging in a proprietary, as opposed to governmental, function, *Kinston Charter Acad.*, 379 N.C. at 571, 866 S.E.2d at 655; *see also Willett*, 176 N.C. App. at 270, 625 S.E.2d at 902 ("Governmental immunity shields a state entity in the performance of governmental functions, but not proprietary functions." (citing *Hickman v. Fuqua*, 108 N.C. App. 80, 82–83, 422 S.E.2d 449, 451 (1992)).

Our Supreme Court has explained the difference between governmental and proprietary acts undertaken by localities as one in which the locality's motivation, and characteristics of the acts, are determinative:

> [a]ny activity of a municipality which is discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

Bynum v. Wilson Cnty., 367 N.C. 355, 358, 758 S.E.2d 643, 646 (2014) (quoting *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289,

293 (1952)). Stated differently, the protections of governmental immunity end where a unit of local government " 'undertakes functions beyond its governmental and police powers and engages in business in order to render a public service for the benefit of the community for a profit, it [then] becomes subject to liability for contract and in tort as in [the] case of private corporations.' " *Providence*, 382 N.C. at 212, 876 S.E.2d at 462 (quoting *Kinston Charter Acad.*, 379 N.C. at 571, 866 S.E.2d at 655).

Our Supreme Court has "adopted a three-step method of analysis for use in determining whether a [local unit of government's] action was governmental or proprietary in nature." *Providence*, 382 N.C. at 212–13, 876 S.E.2d at 462 (citing *Est. of Williams ex rel. Overton v. Pasoquotank Cnty. Parks & Recreation Dept.*, 366 N.C. 195, 200, 732 S.E.2d 137, 141 (2014)). The first step, and threshold inquiry, requires us to consider "whether, and to what degree, the legislature has addressed the issue." *Williams*, 366 N.C. at 200, 732 S.E.2d at 141–42.

If the legislature has not designated a function as governmental, we then ascertain whether the act is one that "can only be provided by a governmental agency or instrumentality[,]" because, if it is, then the act is necessarily a governmental function. *Bynum*, 367 N.C. at 358–59, 758 S.E.2d at 646. This factor "has limitations in our changing world [because] many services once thought to be the sole purview of the public sector have been privatized in full or in part. Consequently, it is increasingly difficult to identify services that can only be rendered by a governmental entity." *Providence*, 382 N.C. at 213, 876 S.E.2d at 462 (quoting *Williams*, 366 N.C. at 202–03, 732 S.E.2d at 137 (citation modified)).

In light of this increasingly difficult reality, if neither of the first two inquiries is dispositive, we then look to "a number of additional factors, of which no single factor is dispositive." *Williams*, 366 N.C. at 202, 732 S.E.2d at 143. Those factors include "whether the service is traditionally a service provided by a governmental entity, whether a substantial fee is charged for the service provided, and whether the fee does more than simply cover the operating costs of the service provider." *Id.* at 202–03, 732 S.E.2d at 143 (citation omitted). When analyzing these factors, we focus on "the governmental act or service that was allegedly done in a negligent manner." *Bynum*, 367 N.C. at 359, 758 S.E.2d at 646 (citing *Williams*, 366 N.C. at 199, 732 S.E.2d at 141). Moreover, "the distinctions between proprietary and governmental functions are fluid" and our Supreme Court has cautioned "against overreliance on" the factors. *Providence*, 382 N.C. at 213, 876 S.E.2d at 462–63 (quoting *Williams*, 366 N.C. at 202–03, 732 S.E.2d at 143)).

At bottom, this analysis "is a fact intensive inquiry, turning on the facts alleged in the complaint, and may differ from case to case." *Williams*, 366 N.C. at 203, 732 S.E.2d at 143.

Here, Defendant CMS contends the trial court erred by failing to address this factor in its order dismissing their 12(b)(2) motion. Regardless, Defendant CMS argues the first factor of *Williams* is dispositive because the Community Schools Act authorized Defendant CMS to provide for-profit businesses use of school facilities and therefore the General Assembly has designated that a governmental function. Specifically, Defendant cites to *Bynum v. Wilson County* and *Bellows v. Asheville City Board of Education* as analogs in favor of their argument.

In *Bynum*, the plaintiff sued Wilson County for various tort claims after he fell down the steps of a building housing the county government's offices. 367 N.C. at 359–60, 758 S.E.2d at 646. In determining whether maintenance of the building was a proprietary or governmental function, our Supreme Court relied on section 153A-169, which stated "[t]he board of commissioners shall supervise the maintenance, repair, and use of all county property." *Id.* at 360, 758 S.E.2d at 646–47. Specifically, the Court held that because the General Assembly "specifically assigned to the county government the responsibilities of locating, supervising, and maintaining" the building where the plaintiff fell, and because the building housed the offices for the county's "discretionary, legislative, and public functions[,]" which could only be provided by the government, the General Assembly had designated maintenance of the building as governmental. *Id.* at 360–61, 758 S.E.2d at 646–47.

In *Bellows*, the plaintiff and her husband brought claims against the Asheville City Board of Education for negligence after the plaintiff fell out of her wheelchair and sustained injuries while at Asheville High School. 243 N.C. App. 229, 230, 777 S.E.2d 522, 523 (2015). Relying on *Bynum*, we held sections 115C-40 and 115C-521(c), which both directed that school boards shall maintain and repair their property, indicated the "General Assembly's assignment" of these responsibilities was dispositive to the question of whether property maintenance was a governmental or proprietary function. *Id.* at 232, 777 S.E.2d at 524.

Because the test for whether a function is governmental or proprietary requires a fact-intensive inquiry, we do not find these cases persuasive here for the reasons below. Additionally, it is a well settled principle of law " 'that where the language of a statute is clear and unambiguous, there is no room for judicial construction and [we] must construe the statute using its plain meaning.' " *Kinston Charter Acad.*, 379 N.C. at

572, 866 S.E.2d at 656 (quoting *In re Est. of Lunsford*, 359 N.C. 382, 391-92, 610 S.E.2d 366 (2005)).

Here, the Community Schools Use Act ("The Act") encourages "greater community involvement in the public schools and greater community use of public school facilities" and requires school boards to "[d]evelop programs and plans for increased use of public school facilities based upon policies and guidelines adopted by the State Board of Education." N.C. Gen. Stat. §§ 115C-204; -207(2) (2023). The Act also requires school boards to "[e]stablish rules governing the implementation of such programs and plans in its public schools and submit these rules along with adopted programs and plans to the State Board of Education for approval" by the same. N.C. Gen. Stat. § 115C-207(3). Notably, the Act includes allowing use of school facilities for programs "including tutoring[.]" N.C. Gen. Stat. § 115C-206(2) (2023).

Per record evidence, Defendant CMS, pursuant to this authority, adopted regulations providing for "Commercial Group[s]" to use CMS facilities "to engage in a profit-making enterprise[.]" The regulations also provided that non-profit organizations would be preferred over for-profit organizations during the approval process, and the fee chart required higher payments by for-profit groups as well. Additionally, Defendant CMS discouraged the use of school facilities by for-profit groups.

This being the statutory and subsequent regulatory context, we do not agree the General Assembly has addressed whether a school board's renting of school properties to for-profit businesses is a governmental or proprietary function. The Act is a broad grant of authority and empowers school boards to allow community organizations within their schools. However, the Act is silent about the use of school facilities by for-profit businesses. In contrast, in both *Bynum* and *Bellows*, the statutory mandates relied upon directly addressed the function at issue: maintenance of government property. Moreover, we read the Act's explicit authorization for "[t]he use of public school facilities by governmental, charitable, or civic organizations" to be consistent with Defendant CMS's own policy of preferring non-profit organizations to use school facilities over for-profit organizations. This weighs against characterizing the use of school facilities by for-profit businesses as a governmental function because that section seemingly promotes use by non-profit organizations.

The Act does indicate that it is a policy of the State "[t]o assure maximum use of public school facilities by the citizens of each community in this State[,]" which is indicative of it being a governmental function for a school board to allow all kinds of outside organizations to use

school facilities. *See Williams*, 366 N.C. at 200, 732 S.E.2d at 141 (holding the following emphasized statutory language, "providing of safe and sanitary dwelling accommodations for persons of low income are *public uses and purposes for which public money may be spent* and private property acquired" to be a "significant statutory indication" of a government function) (citation modified)). Additionally, the Act requires that local school boards "[d]evelop policies and/or procedures for approving the use of volunteer organizations and for approving the use of individual volunteers[;]" and "[d]evelop programs and plans for increased community use of public school facilities based upon policies and guidelines adopted by the State Board of Education[;]" and "[e]stablish rules governing the implementation of such programs and plans in its public schools[.]" N.C. Gen. Stat. § 115C-207(1)–(3).

But, based on the record developed to this point, it is unclear whether Defendant Mata was acting in the capacity of a volunteer under this authorization. Our standard of review directs us to presume the trial court found sufficient facts to support the conclusion that he was, and therefore Defendant CMS was negligent in allowing him access to its facilities and young children. Regardless, these statutes seemingly provide for the general conduct at issue and are indicative of a governmental function—allowing outside organizations to operate in public school facilities—but even if "the legislature has designated a general activity to be 'a governmental function by statute, the question remains whether the specific activity at issue, in this case and under these circumstances, is a governmental function." *Meinck v. City of Gastonia*, 371 N.C. 497, 513–14, 819 S.E.2d 353, 364 (2018) (quoting *Williams*, 366 N.C. at 201, 732 S.E.2d at 142). But we reiterate, in contrast to *Bynum* and *Bellows*, these mandates do not directly address or require school boards to engage in the specific activity and function at issue: allowing for-profit businesses to use its facilities for profit making activities.

Defendant CMS also directs us to section 115C-524 of the North Carolina General Statutes in support of its contention that the General Assembly has resolved the question of whether allowing for-profit groups to use school facilities is a governmental or proprietary function. Section 115C-524, "Repair of school property; use of buildings for other than school purposes[,]" allows local school boards to enter into agreements "permitting non-school groups to use school real and personal property [] for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property." N.C. Gen. Stat. § 115C-524(c) (2023). The statute then goes on to say, and Defendant emphasizes, "[n]o liability shall attach to any board of education or to any individual board member for personal

injury suffered by reason of the use of such school property pursuant to such agreements." *Id.*

We do not read that language to be a legislative insulation of liability from injury suffered by all uses of school facilities. Rather, reading the statute in totality, the plain language of the statute refers to injuries caused by *use of property*; not injuries caused by a business proprietor conducting their business *on the property*. *See Henderson v. Charlotte-Mecklenburg Bd. of Educ.*, 253 N.C. App. 416, 421, 801 S.E.2d 145, 149 (2017) (holding the defendant maintained statutory immunity pursuant to section 115C-524(c) where an individual fell down because of a property defect while present on the property pursuant to an agreement made under the statute).

Additionally, section 115C-524(c) provides for school boards to enter into agreements with businesses, and thus represents a legislative intent to have an executed contract on file prior to facility use. This cuts against Defendant CMS's argument in that Defendant CMS did not require an executed contract before allowing Defendant PlaySpanish to use school facilities. Moreover, had the General Assembly intended what Defendant CMS argues, it would have an included a section to such effect in the Act pursuant to which Defendant PlaySpanish operated under. Instead, the Act seemingly contemplates lawsuits of this kind. Specifically, in the section discussing the maintenance of volunteer records, meaning "[a]n individual who provides services to a local board of education without expectation of compensation and with the understanding that the local board of education is under no obligation to continue accepting those services or to compensate the volunteer for them[,]" the Act states volunteer records should be kept confidential except for inspection by "[a] party to a lawsuit, by authority of a subpoena or proper court order[.]" N.C. Gen. Stat. § 115C-209.1(e)(1), (a)(5) (2023). This language, in contrast to that above, is indicative of the General Assembly's intent that activities provided under the Act would not benefit from governmental immunity.

So, the General Assembly "has not directly resolved whether" the activity here is a governmental function and we proceed to the second factor of the analysis. *Williams*, 366 N.C. at 202, 732 S.E.2d at 142.

The second factor requires determination of whether the activity "is necessarily governmental in nature [because] it can only be provided by a governmental agency or instrumentality." *Id.* "[T]his principle has limitations" because many services that were traditionally provided by the government have been privatized and can now be offered by commercial businesses. *Id.* at 202, 732 S.E.2d at 143. This being the case, if

a "particular service can be performed both privately and publicly, the inquiry involves consideration" of additional factors, none of which are dispositive. *Id.*

Defendant contends the activity here is governmental in nature because only the government can make school property available for public use. We disagree with this characterization and hold that, in this context, public school facilities are a subset of government owned real property placed into the commercial market by Defendant CMS allowing businesses to use them for profit making activities.

In *Kiddie Korner*, the owners and operators of day care centers in Charlotte filed suit bringing numerous claims against the Charlotte-Mecklenburg School Board after the school board adopted a proposal made by its superintendent for an after-school program at Dilworth Elementary School. 55 N.C. App. 134, 135–36, 285 S.E.2d 110, 112 (1981). There, the school board established a committee comprised of "a representative from the Dilworth staff, parents, and the Dilworth Ministerial Association," which then implemented the proposal and administered the program. *Id.* at 136, 285 S.E.2d at 112. We did not address the issue of governmental immunity but characterized the program "in terms of an educational service *operated by a school sponsored committee*." *Id.* at 137, 285 S.E.2d at 113 (emphasis added).

In *Schmidt*, we relied upon *Kiddie Korner* in adjudicating a dispute where the plaintiffs' minor son suffered a head injury while attending an "after-school enrichment program operated and controlled by Charlotte-Mecklenburg Board of Education at the Idlewild Elementary School." 134 N.C. App. 248, 250, 517 S.E.2d 171, 173 (1999) (citation modified). Plaintiffs claimed the school board was negligent in its operation of the after-school program and waived governmental immunity, in part, by engaging in a proprietary function. *Id.* at 250–51, 517 S.E.2d at 173. We determined the program in *Kiddie Korner* was indistinguishable from the program there and held the Idlewild program was "an undertaking traditionally provided by the local governmental units . . . and correctly classified as a supplemental educational experience." *Id.* at 254, 517 S.E.2d at 175 (citation modified).

Unlike the programs offered in *Kiddie Korner* and *Schmidt*, here record evidence shows the educational service was operated by a private, for-profit corporation—not by the school board or a constituent committee. This distinction necessarily leads us to the conclusion that this "particular service[, providing facilities to a for-profit tutoring business,] can be performed both privately and publicly." *Williams*, 366 N.C. at 202, 732 S.E.2d at 143. Because of this, we proceed to analyze the

remaining factors of whether: (1) "the service is traditionally a service provided by a governmental entity[;]" (2) "a substantial fee is charged for the service provided[;]" and (3) "the fee does more than simply cover the operating costs of the service provider." *Id.* at 202–03, 732 S.E.2d at 143. But, we remain cognizant that our Supreme Court has cautioned against overreliance on these factors because the distinction "between proprietary and governmental functions [is] fluid" and we remain "advertent to changes in practice." *Id.* at 203, 732 S.E.2d at 143. Additionally, our Supreme Court has emphasized the following two principles important here:

> First, although an activity may be classified in general as a governmental function, liability in tort may exist as to certain of its phases; and conversely, although classified in general as proprietary, certain phases may be considered exempt from liability. Second, it does not follow that a particular activity will be denoted a governmental function even though previous cases have held the identical activity to be of such a public necessity that the expenditure of funds in connection with it was for a public purpose.

Id. (quoting *Sides v. Cabarrus Mem'l Hosp., Inc.*, 287 N.C. 14, 21–22, 213 S.E.2d 297, 302 (1975)).

Here, providing educational opportunities has traditionally been a service provided by local government entities. *Schmidt*, 134 N.C. App. at 250, 517 S.E.2d at 173. However, in compliance with our duty to heed changes in practice, we also recognize Defendant CMS still allows use of its properties for programs similar to those at issue in *Schmidt* and *Kiddie Korner* through its After-School Enrichment Program. *See* Before and After School Programs, https://www.cmsk12.org/asep (last visited 8 May 2025); *see also Williams*, 366 N.C. at 203, 732 S.E.2d at 143 ("First, although an activity may be classified in general as a governmental function, liability in tort may exist as to certain of its phases[.]" (citation omitted)). The record indicates Defendant PlaySpanish did not operate pursuant to such. Because of this reality, the characterization we made over twenty years ago in *Kiddie Korner* holds significantly less, if any, weight here.

Moreover, record evidence received by the trial court indicates Defendant CMS generally charged higher fees when allowing for-profit entities to use its facilities. Defendant CMS's policies state that the reason it charges for-profit applicants higher fees is to "avoid unfair competition with other commercial enterprises." Thus, by its own characterization, Defendant CMS's activity here was in the commercial, not

governmental, sphere because it was providing a service which could compete with other commercial enterprises. *See Britt*, 236 N.C. 446, 451, 73 S.E.2d at 293 (describing a proprietary function as one that "any corporation, individual, or group of individuals could do"). As such, Defendant CMS essentially stepped into the shoes of a landlord renting property to a company when it allowed Defendant PlaySpanish to operate its business on school property.

While Defendant CMS, as the Plaintiffs allege and the record indicates, waived fees in excess of $35,000 for Defendant PlaySpanish during multiple years that Defendant PlaySpanish operated on their property, this was because Defendant CMS violated its own policies. This fact, and the argument Defendant CMS makes upon it, misses the forest for the trees. Specifically, emails from Defendant Marrero reflect Defendant CMS allowed Defendant PlaySpanish and other organizations to operate within its facilities without a contract for years and, after the Community Use of Schools Committee discovered this discrepancy, waived fees for subsequent years until changes in their policies were approved.

Essentially, Defendant PlaySpanish should not have been allowed to operate in the facilities during those years without a contract had Defendant CMS adhered to its own policies. Like a business that offers a refund to a customer after making an error, the fee waiver came about from Defendant CMS's own erroneous conduct. Moreover, Defendant CMS planned on requiring Defendant PlaySpanish to obtain approval and begin paying the fees moving forward despite Defendant PlaySpanish not costing the district any additional expense. *See Evans v. Housing Authority of City of Raleigh*, 359 N.C. 50, 54, 602 S.E.2d 668, 671 ("A fee suggests that an activity is proprietary, particularly if a profit results." (citation modified)). Had Defendant CMS abided by its own policies, Defendant PlaySpanish would have been paying fees for years despite Defendant CMS incurring no expense, thus making a profit. In consequence, we do not consider the absence of profit here to be of significance.

We do note, however, the fact that Defendant CMS was not motivated by making a profit, even though it would have had it abided by its policies, favors characterizing the activity as a governmental function. *See Meinck*, 371 N.C. at 515, 819 S.E.2d at 365 (acknowledging the City of Gastonia did not seek to make a profit when analyzing this factor).

In totality, Defendant CMS would have charged Defendant PlaySpanish a substantial fee in relation to its expense had it not strayed from its own policies. Moreover, the contrast between the programs operating pursuant to the After-School Enrichment Program, which fit

squarely within the holdings of *Schmidt* and *Kiddie Korner*, and the program here operating for a profit without an executed contract also show this was not the kind of activity that has been traditionally provided by government entities. We hold Defendant CMS, based upon the facts developed and evidence received upon Defendants' 12(b) motions, was engaged in a proprietary function when it allowed a for-profit tutoring company to use its facilities when conducting its business.

In this context, the protections provided by governmental immunity do not deprive the trial court of personal jurisdiction over Defendant CMS. *See Providence*, 382 N.C. at 231, 876 S.E.2d at 474 ("When a governmental entity exercises proprietary functions without the requisite integrity, shielding it in immunity produces a serious injustice." (Barringer, J., concurring in part and dissenting in part)). Accordingly, we affirm the trial court's order denying Defendant CMS's 12(b)(2) motion to dismiss. Because Defendant CMS waiving the protections of governmental immunity through engaging in a proprietary function is sufficient to uphold the trial court's order on Defendants' 12(b) motion, we do not reach the question of whether governmental immunity was also waived through the purchasing of insurance.

C. Defendants Hey, Goodman, and Marrero

[3] Defendants Hey, Goodman, and Marrero contend the trial court erred by failing to grant their motion to dismiss because they are public officials immune from liability for acts of negligence. Plaintiffs argue Defendants Hey, Goodman, and Marrero are merely public employees and therefore not entitled to immunity. We agree with Plaintiffs and affirm the trial court's order denying Defendant Hey, Goodman, and Marrero's 12(b)(6) motion to dismiss.

We review a trial court's decision on a Rule 12(b)(6) motion de novo to determine "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Kinston Charter Acad.*, 379 N.C. at 572, 866 S.E.2d at 656 (citation and internal marks omitted). " 'Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.' " *Id.* (quoting *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 203–04 (2005)). Public official immunity is one such insurmountable bar because "it shields a defendant entirely from having to answer for its conduct in a civil suit for damages." *Est. of Graham*, 385 N.C. at 651, 898 S.E.2d at 895 (citations omitted). Pursuant to de novo review, we "consider the matter anew and freely substitute

our judgment for that of the trial court." *Matter of K.S.*, 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (citation modified).

Plaintiffs sued Defendants Goodman, Hey, and Marrero in their individual capacity because the complaint names them in their individual capacity and Plaintiffs are seeking a monetary remedy. *See Fowler*, 378 N.C. at 144–45, 861 S.E.2d at 692 (explaining the implication of these two factors when determining whether a person has been sued in their individual or official capacity). Being so, Defendants Hey, Goodman, and Marrero do not enjoy the protection of governmental immunity. *Graham*, 385 N.C. at 654, 898 S.E.2d at 897. But, defendants sued in their individual capacity "are not left unshielded—they may assert 'personal immunity defenses.' " *Id.* (quoting *Moore v. City of Greensboro*, 345 N.C. 356, 368, 481 S.E.2d 14, 22 (1997)).

Public official "immunity is one such personal defense." *Id.* Public official immunity is a judicially created doctrine which "shields public officials from personal liability for claims arising from discretionary acts or acts constituting mere negligence, by virtue of their office, and within the scope of their governmental duties." *Bartley*, 381 N.C. at 294, 873 S.E.2d at 533. This immunity is founded upon two societal concerns: first, it allows for "fearless, vigorous, and effective administration of government policies[,]" and second, it encourages competent individuals to assume the responsibilities of public office without fear of incurring liability for actions taken when executing those duties. *Id.* (citations and internal marks omitted). This doctrine does not, however, "immunize conduct at odds with the protections afforded by it and that underlie its utility." *Graham*, 385 N.C. at 654, 898 S.E.2d at 897–98 (citation modified). To this end, public officials are not immune from liability if their "action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt." *Bartley*, at 294, 873 S.E.2d at 533 (citation and internal marks omitted). But, we presume a public official discharges their duties in good faith. *Id.* at 295, 873 S.E.2d at 533 (citation omitted).

In contrast to public officials, public employees may be held liable for negligence. *Meyer v. Walls*, 347 N.C. 97, 112, 489 S.E.2d 880, 887 (1997). Our State recognizes three "basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999).

"A position is considered created by statute when the officer's position has a clear statutory basis or the officer has been delegated

a statutory duty by a person or organization created by statute or the Constitution." *Baker v. Smith*, 224 N.C. App. 423, 428, 737 S.E.2d 144, 148 (2012) (citation modified). "[W]here a statute expressly creates the authority to delegate a duty, a person or organization who is delegated and performs the duty on behalf of the person or organization in whom the statute vest the authority to delegate passes the first *Isenhour* factor." *McCullers*, 265 N.C. App. at 223, 828 S.E.2d at 532 (citing *Baker*, 224 N.C. App. at 428–30, 737 S.E.2d at 148–49). But, the delegation must be of "some portion of the sovereign power to the position holder." *Hwang v. Cairns*, 387 N.C. 448, 455, 915 S.E.2d 425, 430 (2025).

Ministerial duties "are absolute and involve merely the execution of a specific duty arising from fixed and designated facts[,]" while discretionary duties "are those requiring personal deliberation, decision and judgment." *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127 (citation modified). "Courts applying this framework have recently held that a defendant seeking to establish public official immunity must demonstrate that all three of the *Isenhour* factors are present." *McCullers*, 265 N.C. App. at 222–23, 828 S.E.2d at 532 (citing *Leonard v. Bell*, 254 N.C. App. 694, 705, 803 S.E.2d 445, 453 (2017)).

Defendants Hey, Goodman, and Marrero contend they are entitled to public official immunity because their positions have "a clear statutory basis." They cite to the Act in support of their argument that they are "Community Schools Coordinators."

The Act defines a "Community Schools Coordinator" as "an employee of a local board of education whose responsibility it is to promote and direct maximum use of the public schools and public school facilities as centers for community development[,]" and states that local school boards "may provide for the . . . employment of one or more [C]ommunity [S]chools [C]oordinators." N.C. Gen. Stat. § 115C-205(2); -207 (2023). The Act also provides the duties of Community Schools Coordinators:

> Every local board of education may employ one or more [C]ommunity [S]chools [C]oordinators and shall establish the terms and conditions of their employment. Community [S]chools [C]oordinators shall be responsible for:
>
> (1) Providing support to the [C]ommunity [S]chools [A]dvisory [C]ouncils and public school officials.
>
> (2) Fostering cooperation between the local board of education and appropriate community agencies.
>
> (3) Encouraging maximum use of community volunteers in the public schools.

> (4) Performing any other duties as may be assigned by the local superintendent and the local board of education, consistent with the purposes of this Article.

N.C. Gen. Stat. § 115C-209 (2023).

Here, whether Defendants Hey, Goodman, and Marrero were Community Schools Coordinators as contemplated by the Act in their respective positions as manager of Defendant CMS's CUS program, Director of Property Management within the Facility Planning and Management section of Defendant CMS's Operations Department, and Executive Director of the Facility Planning and Management section of Defendant CMS's Operations Department is unclear. *See McCullers*, 265 N.C. App. at 223, 828 S.E.2d at 532 ("Defendants argue that their positions are 'created by' [statute], but point to no language in our Constitution or any statute expressly creating their positions."). Their positions are not provided for within the Act and the only references to their respective involvement with CUS are the following allegations from Plaintiffs' amended complaint:

> 31. From at least 2011 through 2017, [Defendant] Marrero was the manager of [Defendant] CMS's CUS program. Upon information and belief, [Defendant] Marrero's duties as an employee of CMS were to follow [Defendant] CMS policies, regulations, and procedures for the review and approval of applications from CUS participants, including [Defendant] PlaySpanish. [Defendant] Marrero did not have discretion to vary from those policies, regulations, and procedures.
>
> 32. Upon information and belief, in at least 2016, 2017, and 2018, [Defendant] Goodman was the Director of Property Management within the Facility Planning and Management section of [Defendant] CMS's Operations Department, and [Defendant] Marrero's direct boss. Upon further information and belief, [Defendant] Goodman provided oversight for the CUS program, but did not have discretion to vary from [Defendant] CMS's policies, regulations, and procedures for the review and approval of applications from CUS participants.
>
> 33. Upon information and belief, in at least 2016, 2017, and 2018, [Defendant] Hey was the Executive Director of the Facility Planning and Management section of [Defendant] CMS's Operations Department, and [Defendant]

> Goodman's direct boss. Upon further information and belief, [Defendant] Hey was ultimately responsible for the CUS program, but did not have discretion to vary from [Defendant] CMS's policies, regulations, and procedures for the review and approval of applications from CUS participants.

We cannot hold upon the record developed to this point that Defendants Hey, Goodman, and Marrero are entitled to public official immunity solely because their positions were created by statute. Even if their positions were created by statute, the Act does not expressly provide for delegating power of the approval process to Community Schools Coordinators. It does require school boards to develop policies for approving organizations and volunteers, but then allows Community Schools Advisory Councils—"a committee of citizens organized to advise community school coordinators, administrators, and local boards of education in the involvement of citizens in the educational process and in the use of public school facilities"— to assist in the implementation of those procedures. N.C. Gen. Stat. §§ 115C-205(1); -207–08 (2023). Community Schools Coordinators may provide support to Community Schools Advisory Councils pursuant to section 115C-209(1), but it is unclear whether that includes creating approval processes.

Regardless, based on our reading, the Act delegates to school boards and Community Schools Advisory Councils the power to develop and implement an approval process for outside organizations; it does not "expressly create[] the authority to delegate [the] duty" to Defendants Hey, Goodman, or Marrero as needed to satisfy the first *Isenhour* factor. *McCullers*, 265 N.C. App. at 223, 828 S.E.2d at 532. Even if Defendants Hey, Goodman, and Marrero's positions were created by statute, or if they were entitled to exercise a portion of the sovereign power through delegation, they have failed to show their duties are anything more than ministerial.

Plaintiffs adequately pled that Defendants Hey, Goodman, and Marrero are not entitled "to vary from [Defendant] CMS's policies, regulations, and procedures for the review and approval of applications from CUS participants." Defendants have failed to rebut this through the evidence they provided. Specifically, Defendant CMS's regulations for the approval process provide that the Community Use Assistant may deny an application for reasons such as: (1) being incomplete or inaccurate; (2) failing to send an accompanying contract; (3) failing to provide a certificate of insurance if needed; (4) prior violation of rules; (5) unavailability of the requested facilities; or (6) the requested activity, in

the opinion of school officials, could cause damage to the facility. We consider these ministerial acts as they are primarily binary decisions based upon the presence of a necessary condition. Thus, we cannot say Defendants Goodman, Hey, and Marrero were required to exercise their "personal deliberation, decision and judgment" in approving CUS applications. *Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127.

Accordingly, because the record reflects that Defendants Hey, Goodman, and Marrero are public employees and not public officers, they are not entitled to public official immunity. Therefore, we hold the trial court properly denied their 12(b)(6) motion to dismiss Plaintiffs' amended complaint.

III. Conclusion

For the aforementioned reasons, we affirm the trial court's order denying Defendant CMS's Rule 12(b)(2) motion to dismiss because of governmental immunity and Defendants Hey, Goodman, and Marrero's 12(b)(6) motion to dismiss because of public official immunity.

AFFIRMED.

Judges STROUD and FLOOD concur.

CHESAPEAKE DIAGNOSTIC IMAGING CTRS., LLC v. N.C. DEP'T OF HEALTH & HUM. SERVS.

[299 N.C. App. 582 (2025)]

CHESAPEAKE DIAGNOSTIC IMAGING CENTERS, LLC, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF HEALTH SERVICE REGULATION, HEALTH CARE PLANNING & CERTIFICATE OF NEED, RESPONDENT, AND SENTARA ADVANCED IMAGING SOLUTIONS, LLC, RESPONDENT-INTERVENOR

No. COA24-1106

Filed 2 July 2025

1. Hospitals and Other Medical Facilities—certificate of need—competitive review—denial—no substantial prejudice

The decision of the Department of Health and Human Services denying petitioner's application for a certificate of need (CON) to build a fixed MRI scanner—and instead awarding the CON to a second applicant—did not constitute substantial prejudice as a matter of law and was therefore properly upheld by an administrative law judge. Petitioner failed to show that the agency's decision was erroneous or improper where the agency had no statutory obligation to favor one applicant over another and was not required to weigh market competition in the same city over other relevant factors. Further, although petitioner argued that the denial of its application resulted in a loss of forecasted revenue, its projections were merely hypothetical, particularly where those projections were based on presumptions that residents would shift from two existing MRI units to petitioner's newly-built one, if it were granted the CON.

2. Hospitals and Other Medical Facilities—certificate of need—competitive review—property interest asserted—no due process implications

The decision of the Department of Health and Human Services denying petitioner's application for a certificate of need (CON) to build a fixed MRI scanner—and instead awarding the CON to a second applicant—did not constitute a deprivation of a property interest implicating due process rights and, thus, there was no requirement for the reviewing administrative law judge to make findings regarding petitioner's putative property interest. Petitioner had no legitimate claim of entitlement to an approved CON application in a competitive review, in which the agency had the statutory authority to compare multiple applicants and to either approve, approve with conditions, or deny any application.

3. Hospitals and Other Medical Facilities—certificate of need—competitive review—market access—as-applied constitutionality

The decision of the Department of Health and Human Services denying petitioner's application for a certificate of need (CON) to build a fixed MRI scanner—and instead awarding the CON to a second applicant—was not unconstitutional as applied to petitioner where, despite petitioner's argument, the agency was not required to weigh market competition over other factors in its review process, or to solely consider whether its decision would allow a monopoly of certain services to form. Here, the agency found the competitor's application to be superior to petitioner's application in three out of five factors; therefore, the administrative law judge properly affirmed the agency's decision.

Appeal by petitioner and cross-appeal by respondent-intervenor from a final decision entered 26 August 2024 by Administrative Law Judge Michael C. Byrne in the Office of Administrative Hearings. Heard in the Court of Appeals 11 June 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Derek L. Hunter, for the respondent-appellee.

Nelson Mullins Riley & Scarborough LLP, by Lorin J. Lapidus, Candace S. Friel, Noah H. Huffstetler, and Nathaniel J. Pencook, for the petitioner-appellant.

Williams Mullen, by Joy Heath, and Alexander M. Gormley, for the intervenor-appellee.

TYSON, Judge.

Chesapeake Diagnostic Imaging Centers, LLC ("Petitioner") appeals from a Final Decision by an Administrative Law Judge ("ALJ") affirming the decision of the North Carolina Department of Health and Human Services, Division of Health Service Regulations, Healthcare Planning and Certificate of Need Section ("DHHS"). DHHS approved Sentara Advanced Imaging Solutions, LLC's ("Respondent-Intervenor") application for a certificate of need ("CON") for a magnetic resonance imaging ("MRI") machine.

Petitioner appealed DHHS' decision to the Office of Administrative Hearings ("OAH"). The ALJ affirmed DHHS' decision and entered a Final

Decision for Respondent-Intervenor on 26 August 2024. Petitioner appeals. Respondent-Intervenor cross-appeals.

I. Background

The 2022 State Medical Facilities Plan ("2022 SMFP") identified a need for an additional fixed MRI scanner in the northeastern service area of Pasquotank, Camden, Currituck, and Perquimans counties. Respondent-Intervenor operates a fixed hospital-based MRI scanner located at its Sentara Albemarle Medical Center in Elizabeth City, and a mobile MRI which has not moved from the Medical Center since 2017.

Petitioner filed a CON application to build a fixed MRI scanner at a new free-standing diagnostic imaging facility, to be known as Chesapeake Regional Imaging Centers-Elizabeth City. Respondent-Intervenor also filed a CON application to build a new fixed MRI scanner at a new free-standing diagnostic imaging facility, to be known as Sentara Advanced Imaging Solutions-Moyock, in the Town of Moyock located in Currituck County. Respondent-Intervenor also proposed to terminate use of its mobile scanner if its application was approved.

DHHS determined qualified applicants had submitted the two completed applications, and DHHS began its review on or about 1 October 2022. DHHS determined the approval of one application under the 2022 SMFP would result in the denial of the other application. *See* N.C. Gen. Stat. § 131E-183(a)(1) (2023) ("The proposed project shall be consistent with applicable policies and need determinations in the State Medical Facilities Plan, the need determination of which constitutes a determinative limitation on the provision of any health service, health service facility, health service facility beds, dialysis stations, operating rooms, or home health offices that may be approved.").

DHHS issued its decision approving Respondent-Intervenor's application, which rejected Petitioner's application on 27 February 2023. DHHS articulated Petitioner's application was deemed superior on two factors while Respondent-Intervenor's application was superior on three factors during the competitive review. Petitioner's application was deemed superior on the grounds of Competition (Access to new or alternate provider) and Average Operating Expense per MRI procedure. Respondent-Intervenor's application was deemed superior on the grounds of Geographic Accessibility, Access by Medicare Patients, and Access by Medicaid Patients.

Petitioner filed a petition for Contested Case Hearing in the OAH to seek administrative review of the 27 February 2023 decision on

28 March 2023. The ALJ entered a Final Decision and affirmed DHHS' decision to award Respondent-Intervenor a CON to develop its proposed project. Petitioner appeals. Respondent-Intervenor cross-appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 131E-188(b) and 7A-29(a) (2023).

III. Issues

Petitioner argues: (1) it was substantially prejudiced by the ALJ's Final Decision; (2) it was deprived of a property interest in the CON; and, (3) the ALJ's Final Decision was unconstitutional.

Respondent-Intervenor's cross-appeal argues Petitioner lacks the statutory authority to apply for and receive a CON in North Carolina, and the ALJ's findings of Petitioner's financial harm as a result of the CON denial are unsupported by record evidence.

IV. Standard of Review

This Court applies a *de novo* standard of review if a party argues DHHS' "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 DHHS' 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). A petitioner's status as a denied applicant does not alone constitute substantial prejudice. *CaroMont Health, Inc. v. N.C. HHS Div. of Health Serv. Regul.*, 231 N.C. App. 1, 5, 751 S.E.2d 244, 248 (2013) (citation omitted); *Parkway Urology, P.A. v. N.C. HHS*, 205 N.C. App. 529, 536-37, 696 S.E.2d 187, 193 (2010).

V. Petitioner's Appeal

A. Substantial Prejudice

[1] Petitioner argues the ALJ erred in determining it did not demonstrate substantial prejudice as a matter of law. Petitioner asserts DHHS' denial of its approvable application, which prevents it from adding competition to a particular service area, was sufficient to establish

substantial prejudice. Petitioner further argues its appeal brings issues of first impression before this Court by raising the issue of whether limiting competition by denying a competitive applicant's CON is an error of law which warrants reversal.

The Administrative Procedure Act, N.C. Gen. Stat. § 150B-23(a), requires the ALJ to determine whether a petitioner has met its burden by showing the agency substantially prejudiced the petitioner's rights, *and* the agency also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule. *Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Human Servs.*, 235 N.C. App. 620, 628, 762 S.E.2d 468, 473 (2014); N.C. Gen. Stat. § 150B-23(a) (2023). "These are discrete requirements and proof of one does not automatically establish the other." *Surgical Care Affiliates, LLC*, 235 N.C. App. at 629-30, 762 S.E.2d at 474. Additionally, a party's status as a denied qualified applicant with a conforming application does not, alone, establish substantial prejudice. *Id.* at 624, 762 S.E.2d at 471.

This Court has examined the issue of competition in the context of substantial prejudice in previous non-competitive CON cases. *See Parkway Urology*, 205 N.C. App. at 539, 696 S.E.2d at 195. In *Parkway Urology*, this Court held treating increased market competition as the basis for a substantial prejudice determination would "eviscerate" the statutory intent of the requirements. *Id.* In order to establish substantial prejudice, the petitioner would have to provide specific evidence of harm, which goes beyond any harm resulting from increased competition. *Id.*

This appeal presents the factual inverse of *Parkway Urology*. Here, Petitioner argues its CON being denied created substantial prejudice because it prevented Petitioner from inserting competition into a previously monopolized market. While precedents treat provider monopolies or near-monopolies as salient, monopoly is not a "magic word" without which the ALJ's otherwise sound reasoning becomes prejudicial to reverse the agency and ALJ. *Fletcher Hosp., Inc. v. N.C. Dep't of Health & Hum. Servs.*, 295 N.C. App. 82, 97, 906 S.E.2d 19, 30 (2024). An Agency decision denying a CON application's approval does not establish substantial prejudice just because the applicant of a restricted activity is unable to "conduct business as it chooses" and desires to. *See Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Health & Human Servs.*, 282 N.C. App. 413, 417, 871 S.E.2d 555, 559 (2022). The binary "yes" or "no" approval of one application for the additional MRI

in the service area under the 2022 SMFP results in the denial of the other application. N.C. Gen. Stat. § 131E-183(a)(1) (2023).

Petitioner's substantial prejudice argument centers around two key factors: (1) its inability to construct its proposed imaging center in a market currently served by Sentara; and, (2) its loss of forecasted revenue from that inability. The harm required to establish substantial prejudice must be concrete, particularized, and actual or imminent. *Bio-Medical Applications*, 282 N.C. App. at 417, 871 S.E.2d at 559. The argument for projected loss of revenue is legally insufficient, as it points to notions, which are both conjectural and hypothetical. *Id.*

Petitioner's financial-harm allegations center around projected financial earnings from a proposed fixed MRI center in a market it currently does not serve and where two existing MRI units are already sited. Petitioner's financial projection models rest upon the presumption North Carolina residents would shift to Petitioner's new fixed MRI center for their imaging needs based on the patients' travel times. With two existing MRI units already sited in Elizabeth City, such factors do not establish financial harm for Petitioner's CON application denial given their hypothetical and unsubstantiated nature.

Respondent-Intervenor's approval for a new MRI unit being sited in Currituck County would not necessarily create market competition in Elizabeth City. This fact, standing alone, is insufficient to establish substantial prejudice for Petitioner. Respondent-Intervenor agreed to give up its mobile MRI unit currently in Elizabeth City. The CON service area is a large 4-county rural area of Pasquotank, Camden, Currituck, and Perquimans counties. Having a permanent unit located in another county within the service area and outside of the more-urban Elizabeth City is, as DHHS found, a benefit to outlying residents.

DHHS deciding a CON application between two applicants in a manner, which fails to increase competition in one city, is not an unauthorized, erroneous, arbitrary or capricious action, was not made from improper procedure, or is inapposite to rule or law. *Id.* For Petitioner to meet its burden, it must show an erroneous or improper action by the Agency during evaluation of the applications, which *in turn resulted* in substantial prejudice. DHHS has no statutory obligation to favor one CON applicant over another, simply because granting one would allow a new provider to enter the same city in the service market.

While precedents show new market activity is a positive factor to consider during a CON application review, it is illogical to demand for

DHHS to favor an applicant, who would provide competition to the market if their application was comparatively less favorable to another on the basis of well-established criteria. DHHS possesses authority to prescribe and weigh the multiple factors analyzed during competitive review. *Id.* DHHS was not required to weigh market competition in the same city over other standard factors it has used during previous MRI CON cases. We affirm the ALJ's finding Petitioner was not substantially prejudiced by the denial of its CON application. *Id.*

B. Property Interest

[2] Petitioner further argues, regardless of the substantial prejudice issue, the ALJ erroneously failed to analyze and rule whether DHHS' decision deprived Petitioner of property. Petitioner claims the ALJ's omission of any finding of fact regarding the putative property interest Petitioner had to an approved CON application took away its right to due process on the issue.

When analyzing a due process claim, the first step is to determine whether a "constitutionally protected property interest exists." *Tully v. City of Wilmington*, 370 N.C. 527, 538, 810 S.E.2d 208, 217 (2018). "To demonstrate a [sufficient] property interest…a party must show more than a mere expectation; he must have a legitimate claim of entitlement." *Id.* (citation omitted). Procedural due process safeguards the security of property interests a person has already acquired. *See DeBruhl v. Mecklenburg County Sheriff's Office*, 259 N.C. App. 50, 56, 815 S.E.2d 1, 5 (2018). To have a property interest in a particular benefit as opposed to a mere expectancy, "a person clearly must have more than an abstract need or desire for it . . . he must, instead, have a legitimate claim of entitlement to it." *Id.* at 56, 815 S.E.2d at 5-6 (citation omitted).

After CON applications are submitted to DHHS, the department has the statutory authority to "approve," "approve with conditions," or "deny" any application based upon criteria within DHHS' established purview. N.C. Gen. Stat. § 131E-186(a) (2023).

"In a competitive review, where the Agency finds more than one applicant conforming to the applicable review criteria, it may conduct a comparison of the conforming applications to determine which applicant should be awarded the CON." *Craven Reg'l Med. Auth. v. N.C. Dep't of Health and Hum. Servs.*, 176 N.C. App. 46, 58, 625 S.E.2d 837, 845 (2006). Comparative review allows DHHS a binary "yes" or "no" decision to find one applicant preferable over another so as to deny the less desirable applicant the CON. *See id.*

Petitioner's application was competitively reviewed against Respondent-Intervenor's application for the same MRI CON. Both applications were deemed complete and approvable under the CON criteria. Neither applicant was guaranteed approval simply based upon this fact. Both Petitioner and Respondent-Intervenor had equal expectations of approval. DHHS has the statutory authority to "approve," "approve with conditions," or "deny" any application based upon DHHS' established purview. N.C. Gen. Stat. § 131E-186(a) (2023).

Given this circumstantial equality, Petitioner's claim of a recognized property interest in CON application approval is unsupported. Petitioner had no legitimate claim of entitlement to an approved CON application from the competitive review. Petitioner's status as a qualified applicant with an approvable application allowed them to enter the competition. Neither factor guarantees Petitioner would win it. It has shown no reversible error in the process, evaluation, review, or in the ALJ's review. Petitioner's claim its application's approval was a legitimate property interest, protected by due process, is without merit and overruled. *Id.*

C. As-Applied Challenge

[3] The stated legislative purpose of North Carolina's CON law is to "protect the health and welfare" of citizens "by providing affordable access" to health care. *Hope-A Women's Cancer Ctr., P.A. v. State*, 203 N.C. App. 593, 603, 693 S.E.2d, 673, 680 (2010). The North Carolina Constitution does not permit the General Assembly to authorize state agencies or commissions to forbid hospitals to construct facilities and provide services merely because doing so would subject other competing hospitals to a competitive market. *See In re Certificate of Need for Aston Park Hosp., Inc.*, 282 N.C. 542, 549, 193 S.E.2d 729, 734 (1973).

DHHS possesses the statutory authority to select review criteria for competitive CON applications, and the agency's fact finding and review are binding so long as the agency did not "act [] outside its authority, act[] arbitrarily or capriciously, use[] improper procedure, or fail[] to act as required by rule or law." *Parkway Urology, P.A.*, 205 N.C. App. at 536, 696 S.E.2d at 193.

The applicant carries the burden and must "demonstrate the expected effects of the proposed services on competition in the proposed service area, including how any enhanced competition will have a positive impact upon the cost effectiveness, quality, and access to the services proposed[.]" N.C. Gen. Stat. § 131E-183(a)(18a)(2023). The

need determination for covered medical services occurs in the 2022 SMFP to initiate the applications and review criteria. *See* N.C. Gen. Stat. § 131E-177 (2023).

This Court has previously held no binding law requires an administrative review agency to examine the effects of a new facility on specific competitors as part of a broader inquiry concerning impact of competition. *See Fletcher Hosp., Inc.*, 295 N.C. App. at 97, 906 S.E.2d at 30. In *Fletcher*, this Court affirmed the ALJ's decision in all respects despite the petitioners' allegations the ALJ had erred by not making a specific analysis of the proposed facilities' effect on the petitioner's ability to do business in the market. *Id.*

Petitioner's argument for unconstitutionality of the ALJ's decision hinges on the allegation DHHS' granting Respondent's CON application prevents it from entering the market and restricts its "ability to do business" within the service area. The ALJ was under no obligation to consider the effects of Petitioner's denial on its ability to compete with Respondent within Elizabeth City specifically or in the greater prescribed 4-county area. While DHHS' CON authority does not permit decisions to perpetuate or develop a monopoly, its authority allows CON applications where monopolies might exist as a byproduct of the determined medical need.

Monopolistic enterprises are frequently considered as one portion of the CON review process, but it is not the sole deciding factor. As noted above, market competition is also not required to be weighted heavier than other review criteria. Petitioner's application was found to be comparatively less desirable than Respondent's application in three out of five areas, including geographical reach. Petitioner's argument is overruled.

VI. Respondent-Intervenor's Cross Appeal

Respondent-Intervenor cross appeals and argues Petitioner lacks the statutory authority to apply for and receive a CON in North Carolina and the ALJ's findings of Petitioner's financial harm as a result of the CON denial are unsupported by evidence in the record. Petitioner has filed a motion to dismiss Respondent-Intervenor's cross appeal.

In light of our holding above to affirm the final decision of the ALJ, we need not reach Respondent-Intervenor's arguments and cross appeal. We dismiss Respondent-Intervenor's cross appeal and Petitioner's motion to dismiss as moot.

VII. Conclusion

The ALJ reviewed DHHS' evidence and findings and heard arguments from Petitioner, Respondent-Intervenor, and DHHS. Petitioner has not demonstrated the ALJ's decision is affected by error or how it was substantially prejudiced. The ALJ's final decision to affirm DHHS' decision to award the CON to Respondent-Intervenor is affirmed. Respondent-Intervenor's cross appeal is dismissed as moot. *It is so ordered.*

AFFIRMED.

Judges STROUD and COLLINS concur.

LANCE FENDERSON, INDIVIDUALLY, CHRISTINE FENDERSON, INDIVIDUALLY, AND TROY FENDERSON, INDIVIDUALLY, PLAINTIFFS
v.
DAVIDSON DAY SCHOOL, KYLE K. MCLAUGHLIN, ROB JOHNSON, ASHEVILLE SCHOOL, INCORPORATED, AND OLIVER A. FERENBACH, DEFENDANTS

No. COA24-809

Filed 2 July 2025

1. Negligence—standard of care—violation not shown—collisions between players inherent to lacrosse—summary judgment

In a tort proceeding brought by a high school lacrosse player and his parents against another high school lacrosse player, as well as defendant player's coach and school—arising from a collision between the two players during a game that resulted in serious injuries to plaintiff player—the trial court properly granted summary judgment in favor of defendant player because none of the evidence forecast showed that defendant player acted willfully or wantonly to injure plaintiff player, given the inherent nature of high-speed, high-impact body collisions in lacrosse. Specifically, all three officials who refereed the game agreed that defendant player did not intentionally make head-to-head (and, thus, illegal) contact, and two of the three officials believed that plaintiff player engaged in a potentially illegal, head-down block during the collision. Accordingly, defendants' related argument—that the trial court should have ruled that plaintiff player was contributorily negligent—and arguments from both parties regarding the trial court's

judgment on the pleadings (which preceded the summary judgment ruling) were moot.

2. Negligence—failure to train a minor to comply with rules of a sporting event—tort not recognized—dismissal proper

In a tort proceeding brought by a high school lacrosse player and his parents against another high school lacrosse player and defendant player's school—arising from a collision between the two players during a game that resulted in serious injuries to plaintiff player—the trial court properly dismissed plaintiffs' negligence and negligent infliction of emotional distress claims against defendant school because neither North Carolina statutes nor case law establishes a cause of action for the failure of a school or coach to train a minor in the rules of a sporting event.

Judge FREEMAN concurring in part and dissenting in part.

Appeal by Plaintiffs from orders entered 14 July 2021 and 4 May 2022 by Judge Robert C. Ervin in Mecklenburg County Superior Court. Heard in the Court of Appeals 3 April 2025 in session at Elon University School of Law in the City of Greensboro pursuant to N.C. Gen. Stat. § 7A-19(a)(2023).

Allen, Chesson & Grimes, PLLC, by Anna C. Majestro, David N. Allen and Benjamin S. Chesson, for the Plaintiffs-Appellants.

Waldrep Wall Babcock & Bailey PLLC, by Joseph T. Carruthers and J. Dennis Bailey, for the Defendants-Appellees.

Ball, Barden & Cury, P.A., by Ervin L. Ball, Jr., for the Defendant-Appellee Oliver A. Ferenbach.

WOOD, Judge.

Plaintiffs appeal from a 14 July 2021 order partially granting Defendant Oliver Ferenbach's Motion for Judgment on the Pleadings and a 4 May 2022 order granting Summary Judgment in favor of Defendants Asheville School, Inc. and Ferenbach.[1]

1. All claims and counterclaims between Defendants Davidson Day School, Kyle K. McLaughlin and Ron Johnson ("the DDS Defendants") and the Plaintiffs were dismissed with prejudice 29 December 2023.

I. Factual and Procedural History

On 10 May 2019, Davidson Day School ("Davidson") and Asheville School ("Asheville") engaged in a high school lacrosse game. Lance Fenderson ("Plaintiff Lance") was a junior on Davidson's team, while Oliver Ferenbach ("Defendant Ferenbach") was a senior on Asheville's team. Both boys had played lacrosse for several years, including for multiple years on their respective school teams. During the game, both boys wore standard lacrosse gear including helmets, face masks, and pads.

According to a post-game report by the officiating crew, it was a game with "routine" fouls and no significant incidents prior to the fourth quarter. During the second minute of the fourth quarter, Defendant Ferenbach scooped up the ball near the right sideline, approximately halfway down Davidson's defensive field and charged through the open field towards Davidson's right goal post. Plaintiff Lance, in a defensive maneuver, ran back and to the right to place himself between Defendant Ferenbach and the goal. Prior to contact, Plaintiff Lance dropped both his body and head, leaning towards Defendant Ferenbach. Defendant Ferenbach also lowered his left shoulder and head, while shifting his stick inside away from Plaintiff Lance, and continued through the contact while taking a shot to score a goal. Plaintiff Lance was knocked to the ground in the collision and did not attempt to rise. A penalty flag was thrown, and play was suspended while Plaintiff Lance received medical care.

While play was suspended the officials discussed the penalty and the appropriate response to the situation. The officials gave Defendant Ferenbach a penalty for a personal foul, a head-to-head hit, and ejected him from the game. Play never resumed, however, as the coaches jointly decided to end the game.

On 13 February 2020, Lance Fenderson, Christine Fenderson, and Troy Fenderson (jointly "the Plaintiffs") filed a complaint asserting claims against Defendant Ferenbach for injuring Plaintiff Lance, as well as claims against Asheville for failure to properly train Defendant Ferenbach and for vicarious liability for Defendant Ferenbach's actions. Plaintiffs also sued Davidson Day School and employees Kyle K. McLaughlin and Ron Johnson ("the DDS Defendants") for failure to properly train Plaintiff Lance and for not providing him with proper safety equipment. Christine and Troy Fenderson also asserted claims for negligent infliction of emotional distress ("NIED").

On 4 June 2020, Defendants filed their response including affirmative defenses of waiver and contributory negligence, as well as a motion to dismiss.

On 7 April 2021, Defendant Ferenbach moved for judgment on the pleadings. The trial court heard the motion on 15 June 2021. On 6 July 2021, the trial court partially granted Defendant Ferenbach's motion, dismissing Plaintiff's negligence and NIED claims, reasoning a heightened standard of care applied to the claims against Defendant Ferenbach. The trial court did not dismiss Plaintiff Lance's claim against Defendant Ferenbach for willful and wanton conduct based on his actions during the collision with Plaintiff Lance.

On 8 March 2022, Asheville filed a motion for summary judgment, and Defendant Ferenbach filed a motion for summary judgment on 10 March 2022. Plaintiffs opposed the motions arguing, irrespective of the standard of care, Plaintiff Lance's claims against Defendant Ferenbach should proceed because evidence exists tending to show Defendant Ferenbach had acted intentionally to injure Plaintiff Lance. After a full briefing and a hearing on 7 April 2022, the trial court entered an order on 4 May 2022 granting both summary judgment motions. While the trial court did "not conclude [Plaintiff Lance] caused or legally contributed to his own injuries" it did tax Defendants' costs to Plaintiffs. The case proceeded against the DDS Defendants.

On 26 January 2023, the trial court dismissed Plaintiff's ordinary negligence claims against the DDS Defendants based on the pre-injury release Plaintiffs Christine and Troy signed. Plaintiffs and DDS Defendants resolved their remaining claims, and on 29 December 2023 at the joint request of the parties, the trial court entered a final consent order of dismissal for all claims between Plaintiffs and DDS Defendants.

On 26 January 2024, Plaintiffs filed and served a Notice of Appeal of the 14 July 2021 Motion for Judgment on the Pleadings, as well as the 4 May 2022 Order for Summary Judgment.

II. Analysis

Plaintiffs raise three issues on appeal: (1) the trial court erred in departing from the ordinary standard of care for Plaintiffs' negligence-based claims against Defendant Ferenbach; (2) the trial court erred in finding no genuine issue of material fact for the jury at summary judgment on whether Defendant Ferenbach violated whatever standard he owed to Plaintiff Lance in light of evidence Defendant Ferenbach had acted intentionally or recklessly to injure Plaintiff Lance; and, (3) the trial court erred in dismissing claims against Asheville notwithstanding the outcome of Plaintiff Lance's claim against Defendant Ferenbach.

Defendants contend the trial court did not err in granting summary judgment to both Defendant Ferenbach and Asheville and raise

two additional issues on appeal: (1) the trial court should have granted Defendant Ferenbach's Motion for Judgment on the Pleadings in its entirety; and, (2) the trial court should have ruled that Plaintiff Lance's actions causing or contributing to his own injuries were another reason to grant summary judgment.

A. Motion for Summary Judgment

1. Standard of Review

An order allowing summary judgment is reviewed *de novo*. *James H.Q. Davis Tr. v. JHD Props., LLC*, 387 N.C. 19, 23, 910 S.E.2d 652, 657 (2025). "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." *Id.* (quoting N.C.G.S. § 1A-1, Rule 56(c) (2023)). "A genuine issue is an issue that is 'supported by substantial evidence, and an issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action.' " *Id.* Initially, the party seeking summary judgment bears the burden of demonstrating the absence of a "genuine issue of material fact." However, "[o]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations. . . ." *Id.* "Its response must set forth specific facts showing that there is a genuine issue for trial." *Id.* (cleaned up).

2. Presence of a Jury Issue

[1] Plaintiffs contend the trial court erred by finding no genuine issue of material fact exists at summary judgment. Specifically, Plaintiffs contend whether Defendant Ferenbach violated whatever standard he owed to Plaintiff Lance, in light of evidence tending to show Defendant Ferenbach had acted willfully or wantonly to injure, Plaintiff Lance was a material fact in dispute. We disagree. The record evidence simply does not support findings or conclusions from which any type of tort liability could be found.

While this Court has previously warned summary judgment "is rarely an appropriate remedy in cases of negligence or contributory negligence, we have clarified summary judgment is appropriate in a cause of action for negligence where the plaintiff's forecast of evidence fails to show negligence on the defendant's part . . . ." *Proffitt v. Gosnell*, 257 N.C. App. 148, 151, 809 S.E.2d 200, 204 (2017) (cleaned up).

In any ordinary negligence action, "plaintiffs must offer evidence of the essential elements of negligence: duty, breach of duty, proximate cause, and damages." *Elm St. Gallery, Inc. v. Williams*, 191 N.C. App. 760, 767, 663 S.E.2d 874, 878 (2008) (cleaned up). Additionally, this Court has determined that willful and wanton negligence is gross negligence.

> An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others. An act is willful when there exists a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, a duty assumed by contract or imposed by law.

McCauley v. Thomas ex rel. Progressive Universal Ins. Co., 242 N.C. App. 82, 89–90, 774 S.E.2d 421, 426 (2015) (cleaned up).

Both parties agree, and this Court concurs, neither our General Assembly nor our case law has established a separate duty or standard of care for contact sports in North Carolina. While future cases may require consideration of whether such a duty should apply, this case does not warrant such action. Based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, we conclude no facts support negligence under the reasonable and prudent person standard. "Actionable negligence occurs when a defendant owing a duty fails to exercise the degree of care that a reasonable and prudent person would exercise under similar conditions." *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002).

In the current case, Defendant Ferenbach and Plaintiff Lance were opposing high school lacrosse players engaged in a competitive post-season playoff game. The play at issue lasted five seconds from the time Defendant Ferenbach picked up the ball until he took his shot on goal after colliding with Plaintiff Lance.

Plaintiffs' lacrosse experts testified boys high school lacrosse is a contact sport in which high-impact player collisions are an inherent part of the game. In addition, the high school lacrosse rules entered into evidence clearly state, "Officials shall . . . remain aware of the inherent risk of injury that competition poses to student-athletes."

A video of the game was entered into evidence as Exhibit 1 and both parties testified to the accuracy of the video. The video clearly depicts Defendant Ferenbach acquiring the ball at the right sideline in the fourth quarter with 10:03 remaining on the game clock. Defendant Ferenbach then runs in a straight line from the right sideline to the right goal post without slowing or changing direction. Plaintiff Lance advances and

steps into Defendant Ferenbach's line to the goal at 10:00, leaning down, head down, and bracing for impact. Defendant Ferenbach continues forward dropping his head and shoulder maneuvering through Plaintiff Lance and taking a shot on goal at 9:58. No evidence tends to show Defendant Ferenbach went out of his way to hit Plaintiff Lance, and the clear evidence indicates he had two seconds or less to react or respond to Plaintiff Lance stepping into his line to the goal.

Plaintiffs' medical expert testified but for Plaintiff Lance's choice to lower his head, he would not have sustained the blow to the top of his head which caused the neck fractures. Additionally, one of Plaintiff's lacrosse experts testified "it was Lance's movements that allowed for there to be a collision" and both boys had a responsibility for keeping their bodies under control.

Coaches for both teams and all three officials involved in the game gave depositions. There was consistent agreement among the coaches and officials the game was not "chippy," it had been a normal game up until the collision at issue without excessive fouls or aggressive play. In fact, the head official stated that by half time the game was no longer close in score and the teams were "not playing with any high level of physicality."

When asked about the collision at issue, all three officials agreed Defendant Ferenbach had been flagged for initiating a head-to-head collision. However, the "bull dodge" maneuver he was attempting to utilize was a permitted body check by an offensive player attacking the goal as long as the hit occurred in a legal area from the defender's shoulders to his waist. The only reason this particular play became illegal was because the hit ended up being a blow to the head, which is never allowed. None of the officials believed Defendant Ferenbach was targeting Plaintiff Lance and during testimony the head official explicitly refused to state the player's head-to-head contact was intentional.

The evidence tended to show game officials flagged Defendant Ferenbach because the legal bull dodge offensive maneuver resulted in an unintentional illegal hit. Further, the decision to eject Defendant Ferenbach from the game stemmed from game officials reasoning if Plaintiff Lance was not going to be able to return to the game, then Defendant Ferenbach should not return either. After reviewing the game footage during their depositions, two of the three officials, including the head official, indicated Plaintiff Lance's decision to engage in a defensive block with his head down and with the crown of the helmet initiating could have been a defensive personal foul, but it had not been noticed during active play because of the officials' angles of view of the collision.

Based on this evidence, nothing supports Plaintiffs' contention Defendant Ferenbach failed to display the degree of care a reasonable and prudent high school lacrosse player would exercise during a five second play in a high-speed game in which high-impact body to body collisions are not only allowed, but which are an inherent part of the game.

Although North Carolina case law concerning duty to and liability of players in contact sports is limited, our Courts have considered duties owed to spectators. There is a long-standing "baseball rule" in North Carolina jurisprudence. Our Supreme Court has stated, "where a spectator, with ordinary knowledge of the game of baseball . . . proceeds to sit in an unscreened stand . . . he thereby *accepts the common hazards incident to the game . . . .*" *Erickson v. Lexington Baseball Club, Inc.*, 233 N.C. 627, 629, 65 S.E.2d 140, 141 (1951) (cleaned up) (emphasis added). This Court addressed a similar concept analogizing the soccer game at issue to previous baseball cases,

> In baseball, . . . the patron participates in the sport as a spectator and in so doing *subjects himself to certain risks necessarily and usually incident to and inherent in the game*; risks that are obvious and should be observed in the exercise of reasonable care. This does not mean that he assumes the risk of being injured by the proprietor's negligence but that by voluntarily entering into the sport as a spectator *he knowingly accepts the reasonable risks and hazards inherent in and incident to the game.*

Allred v. Capital Area Soccer League, Inc., 194 N.C. App. 280, 285, 669 S.E.2d 777, 780 (2008) (cleaned up) (emphasis added). This Court most recently reaffirmed the "baseball rule" in 2020. *Mills for DeBlasio v. Durham Bulls Baseball Club, Inc.*, 275 N.C. App. 618, 625, 854 S.E.2d 126, 132 (2020).

Not unlike baseballs flying at high rates of speed into the stands, high speed, high-impact body-to-body collisions are an inherent part of lacrosse and incident to the game. Both Plaintiff Lance and Defendant Ferenbach were seasoned lacrosse players with more than "ordinary knowledge" of the game. Each player voluntarily chose to participate and during the course of play chose to embark on the course of action precipitating the collision. While we empathize with Plaintiffs amid the life-changing circumstances following the collision, no evidence shows, and we cannot conclude Defendant Ferenbach acted with negligence or willful or wanton behavior. Therefore, we affirm the trial court's granting of summary judgment.

3. Dismissing Claims Against Asheville

[2] Next, Plaintiff argues the trial court erred in dismissing Plaintiffs' negligence and negligent infliction of emotional distress claims against Asheville for failure to properly train Defendant Ferenbach to comply with the rules regardless of the outcome of Plaintiff Lance's claim against Defendant Ferenbach.

North Carolina does not recognize a tort claim for the failure of a school or coach to train a minor to comply with the rules in a sporting event, and a thorough review of other states' legislation and case law reveals scant additional support for this assertion. Plaintiffs assert the harm was "a direct and proximate result" of Asheville's failure to train Defendant Ferenbach thereby increasing the risk of the sport. In support of their proposition, Plaintiffs cite to a California Supreme Court case which states "the host school and its agents owe a duty to home and visiting players alike to, at minimum, *not increase the risks inherent in the sport*." *Avila v. Citrus Cmty. Coll. Dist.*, 38 Cal. 4th 148, 162, 131 P.3d 383, 392 (2006) (emphasis added). However, *Avila* addresses a college baseball player being hit by a pitch in a preseason game. The case does not address failure to coach a minor and the court ultimately determined that allowing or coaching a pitcher to hit a batter was a "fundamental part and inherent risk of the sport of baseball." *Id.* at 165, 131 P.3d at 394. We find *Avila* easily distinguishable and are unpersuaded by Plaintiffs' arguments otherwise.

Neither North Carolina statutes nor case law establishes a cause of action for failure of a school or coach to train a minor in the rules of a sporting event. "This Court is an error-correcting court, not a law-making court. We are not in the position to expand the law. Rather, such considerations must be presented to our Supreme Court or our Legislature . . . ." *Williams v. N.C. Dep't of Justice, Criminal Standards Div.*, 273 N.C. App. 209, 217, 848 S.E.2d 231, 238 (2020) (cleaned up). Because Plaintiffs fail to state a claim for which relief may be granted under current North Carolina law, we affirm the trial court's dismissal of the claims against Asheville.

4. Contributory Negligence

Defendants argue the trial court should have ruled that Plaintiff Lance's actions causing or contributing to his own injuries were an additional factor supporting summary judgment.

> Contributory negligence is negligence on the part of the plaintiff which joins . . . with the negligence of the

> defendant alleged in the complaint to produce the injury of which the plaintiff complains. Contributory negligence is a bar to recovery if a plaintiff has contributed to their injury in any way. In order to prove contributory negligence on the part of a plaintiff, the defendant must demonstrate: (1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury.

Archie v. Durham Pub. Schs. Bd. of Educ., 283 N.C. App. 472, 474-75, 874 S.E.2d 616, 620 (2022) (cleaned up).

As discussed above, no facts support a finding of negligence, therefore the issue of contributory negligence is moot. The record tends to show both players displayed the degree of care a reasonable and prudent high school lacrosse player would exercise under the facts of this case. We affirm the trial court's order declining to find Plaintiff Lance contributorily negligent.

B. Judgment on the Pleadings

Both Plaintiffs and Defendants raised issues with the trial court's Judgment on the Pleadings preceding summary judgment. Plaintiffs claim the trial court erred by utilizing a higher standard to dismiss their negligence and NIED claims while Defendants contend the trial court should have granted Defendant Ferenbach's motion for judgment on the pleadings in its entirety.

As addressed above, we concluded no facts support negligence under the reasonable and prudent person standard. This is true even upon review of only the pleadings, as required in considering a Rule 12(c) motion for judgment on the pleadings. *Davis v. Durham Mental Health/Dev. Disabilities Area Auth.*, 165 N.C. App. 100, 104, 598 S.E.2d 237, 240 (2004). Plaintiffs' pleading concedes that "[l]across, by its nature, is a sport that is likely to involve physical contact between players and it is readily foreseeable that such physical contact, unless protected against, can cause injury." Although Plaintiffs contend Defendant Ferenbach broke a rule of the game and caused an injury, Plaintiffs acknowledge Plaintiff Lance failed to keep his arms out and head up as players are taught, and instead, lowered his head and braced for the collision when he moved into Defendant Ferenbach's path to the goal. In their answer Defendants contend the Rules speak for themselves. The Rules state, in pertinent part, "Officials shall . . . remain aware of the inherent risk of injury that competition poses to student-athletes." Whether or not a rule was broken during the play at issue, no North Carolina court has

ever held breaking a rule of a high-school sporting event equates to negligence *per se* as Plaintiffs contend, nor have the courts ever found that a player who is involved in active play in a high-speed contact sport violated the reasonable duty of care in attempting an offensive play on goal. There cannot be a duty to avoid a collision in a high-speed, full contact-sport when players have mere milliseconds to respond to their opponents' movements and the rules of the game state there is an inherent risk of injury. Such a requirement would lead to absurd results and change the play of all contact sports.

Presuming the trial court erred in holding a higher standard of negligence applied when dismissing Plaintiff's negligence and NIED claims, "a trial court's ruling must be upheld if it is correct upon any theory of law, and thus it should not be set aside merely because the court gives a wrong or insufficient reason for it." *Templeton v. Town of Boone*, 208 N.C. App. 50, 54, 701 S.E.2d 709, 712 (2010) (cleaned up). Therefore, as no facts support negligence or NIED claims even on the pleadings, the trial court was correct in dismissing the claims. We affirm the order.

Finally, we need not consider Defendant's final argument as this matter is now moot. "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *TAC Stafford, LLC v. Town of Mooresville*, 282 N.C. App. 686, 699, 872 S.E.2d 95, 104 (2022) (citation omitted), *disc. review denied*, 282 N.C. 686, 880 S.E.2d 695 (2022). Additionally, our holding affirming the trial court's granting of summary judgment provides all necessary relief for Defendant. Consequently, any further determination relative to concerns with the judgment on the pleadings "cannot have any practical effect on the existing controversy." *Id.* at 699, 872 S.E.2d at 104-05.

Accordingly, we affirm the trial court's order dismissing Plaintiffs' negligence and NIED claims and we do not reach Defendant's assertions concerning the judgment on the pleadings, as they are rendered moot by our disposition of Plaintiffs' appeal of the Summary Judgment order.

III. Conclusion

For the foregoing reasons, we conclude no facts exist *sub judice* to support a finding of any tort claim, including negligence, NIED or willful and wanton behavior. We affirm the trial court's order for judgment on the pleadings dismissing the issues of negligence and NIED and we affirm the trial court's order for summary judgment on the issues of willful and wanton negligence and contributory negligence. Because North

Carolina does not recognize a tort for a coach's failure to train a minor in the rules in a sport, we affirm the trial court's dismissal of that claim at summary judgment. Finally, all other issues asserted as to the judgment on the pleadings are moot. The trial court's orders for judgment on the pleadings and summary judgment are affirmed.

AFFIRMED.

Judge TYSON concurring.

Judge FREEMAN concurring in part, dissenting in part by separate opinion.

FREEMAN, Judge, concurring in part and dissenting in part.

I concur with the majority's affirmance of the trial court's dismissal of plaintiffs' claims against defendant Asheville School for the reasoning provided therein. However, because the trial court erred in applying unknown and legally baseless higher standards of care to plaintiffs' claims against defendant Oliver, this Court should vacate the trial court's order granting Oliver's motion for judgment on the pleadings, vacate in part the trial court's order granting summary judgment, and remand for application of the correct legal standards. Instead of exercising judicial restraint and following this course of action, the majority—with a procedurally confused and legally flawed opinion—denies plaintiffs their day in court. I respectfully dissent.

I. Background

At its base, this case involves simple, though tragic, facts. As alleged in plaintiffs' complaint, plaintiff Lance and defendant Oliver were opposing high school lacrosse players participating in a match hosted at Asheville School's campus. Oliver, who was an Asheville School student, gained possession of the ball late in the game and ran towards the opposing goal. Lance, who was a Davidson Day School ("DDS") student, "attempted to place himself in a defensive position to block [Oliver]'s path to goal" and "lowered his head in anticipation of the collision" with Oliver. Oliver "lowered his shoulder, accelerated, and plowed through Lance, hitting Lance in his improperly lowered head with his shoulder, driving Lance's head into the base of his neck, breaking Lance's neck at vertebrae's C5, C6 and C7." As a result of this collision, "Lance is permanently paralyzed from the chest down and will spend the rest of his life confined to a wheelchair, requiring total care and support."

Lance and his parents sued Oliver, DDS, a DDS coach, a DDS athletic director, Asheville School, and an Asheville School trainer. As is relevant here, plaintiffs asserted claims of negligence, negligent infliction of emotional distress ("NIED"), and vicarious liability against Asheville School and claims of negligence, NIED, and willful and wanton conduct against Oliver.[1] Oliver moved for judgment on the pleadings and the trial court granted this motion as to plaintiffs' negligence and NIED claims but denied it as to plaintiffs' willful and wanton claim. Later, both Oliver and Asheville School moved for summary judgment and the trial court granted these motions as to plaintiffs' willful and wanton claim against Oliver and all of plaintiffs' claims against Asheville School. Plaintiffs appealed, arguing the trial court erred in: (1) departing from the ordinary standard of care when determining their negligence-based claims against Oliver; (2) concluding no jury issue existed regarding their willful and wanton claim against Oliver; and (3) dismissing their claims against Asheville School.

In addressing plaintiffs' appeal, the majority confuses these issues. Though it acknowledges the trial court's legal error in failing to apply the appropriate standard of care to plaintiffs' claims against Oliver, it places itself in the jury box and affirms the trial court's summary judgment order—which did not address plaintiffs' negligence or NIED claims—because "no facts support negligence under the reasonable and prudent person standard." The majority then employs this flawed analysis of the summary judgment order to conclude it need not reach the trial court's order granting judgment on the pleadings, even though that order: (1) was entered prior to the summary judgment order, (2) is subject to a meaningfully different legal standard, and (3) actually addressed plaintiffs' ordinary negligence-based claims.

Regardless of a favorable or unfavorable outcome, litigants in this State deserve effective appellate review of their matters in this Court. Such review necessarily requires delineation of the separate claims and trial court orders on appeal.

II. Judgment on the Pleadings

"We review a trial court's ruling granting or denying a motion for judgment on the pleadings using a de novo standard of review." *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 382 N.C. 1, 12 (2022).

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1. Plaintiffs' claims against the DDS defendants and the Asheville School trainer were either dismissed by consent or voluntarily dismissed.

> The purpose of a motion for judgment on the pleadings . . . is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit, with the entry of judgment on the pleadings being appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain. In deciding whether to grant or deny a motion for judgment on the pleadings, the trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party, with all well pleaded factual allegations in the nonmoving party's pleadings being taken as true and all contravening assertions in the movant's pleadings being taken as false. A party seeking judgment on the pleadings must show that the complaint fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar thereto.

Id. at 11–12 (cleaned up).

"The common law claim of negligence has three elements: (1) a legal duty owed by the defendant to the plaintiff, (2) a breach of that legal duty, and (3) injury proximately caused by the breach." *Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 450 (2022). To adequately state "a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress, and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Newman v. Stepp*, 376 N.C. 300, 304 (2020) (cleaned up).

> The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence. The duty of ordinary care is no more than a duty to act reasonably. The duty does not require perfect prescience, but instead extends only to causes of injury that were reasonably foreseeable and avoidable through the exercise of due care. Thus, it is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his conduct or that the consequences of a generally injurious nature might have been expected. Usually the question of foreseeability is one for the jury.

Fussell v. N.C. Farm Bureau Mut. Ins. Co., 364 N.C. 222, 226 (2010) (cleaned up).

Here, the trial court determined that a higher standard of care above and beyond ordinary care applied to plaintiffs' negligence and NIED claims but failed to articulate what standard, if any, guided its decision to grant Oliver's motion for judgment on the pleadings for these claims. As judgment on the pleadings is appropriate when "only questions of law remain," *id.* at 12, and as the majority and I agree that the trial court erred as a matter of law by imposing a higher, unknown standard, this Court should restrain itself to simply vacating the trial court's erroneous order and remanding for application of the correct standard.

However, if I, like the majority, were to go further, I would conclude that the factual allegations in plaintiffs' complaint are sufficient to withstand judgment on the pleadings. When viewed in the light most favorable to plaintiffs, *see Anderson Creek Partners*, 382 N.C. at 12, plaintiffs' complaint adequately alleged: (1) Oliver owed a duty to exercise reasonable care under those circumstances; (2) Oliver breached that duty by not avoiding the collision and instead lowering his shoulder to make contact with Lance's head; and (3) Oliver's breach of duty was the actual and proximate cause of Lance's injuries, as the contact broke Lance's neck and caused him to be paralyzed from the chest down. These factual allegations state a cause of action for negligence sufficient to survive Oliver's motion for judgment on the pleadings.

In the same vein, plaintiffs' complaint adequately stated a claim for NIED. Viewed in the light most favorable to plaintiffs, the complaint alleged: (1) Oliver engaged in negligent conduct; (2) it was reasonably foreseeable that negligently injuring Lance while Lance's parents were watching would cause them severe emotional distress; and (3) Oliver's conduct actually caused them severe emotional distress. Accordingly, plaintiffs' claim for NIED alleged facts sufficient to survive a motion for judgment on the pleadings.

This is not to say that Oliver was in fact negligent or negligently inflicted severe emotional distress. That is not the question to resolve when reviewing the granting of a judgment on the pleadings. Rather, we must determine if the facts alleged, taken in the light most favorable to the plaintiff, fail to state a cause of action. Because plaintiffs' complaint alleged facts sufficient to state causes of action for negligence and NIED, I would reverse the trial court's order granting in part Oliver's motion for judgment on the pleadings.

III. Summary Judgment

"The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524 (2007). "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.' " *Id.* at 523–24 (quoting N.C. R. Civ. P. 56(c)). "The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Id.* at 524. "Moreover, 'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.' " *Id.* (quoting *Caldwell v. Deese*, 288 N.C. 375, 378 (1975)).

"Gross negligence is willful and wanton negligence." *McCauley v. Thomas ex rel. Progressive Universal Ins. Co.*, 242 N.C. App. 82, 89 (2015). "The concept of willful and wanton negligence encompasses conduct which lies somewhere between ordinary negligence and intentional conduct." *Id.* (cleaned up). Our Supreme Court "has sometimes found it difficult to distinguish between negligence and gross negligence in practice." *Cullen v. Logan Devs., Inc.*, 386 N.C. 373, 382 (2024) (citation omitted). "Whereas ordinary negligence involves inadvertence or carelessness, we have used the term gross negligence in the sense of wanton conduct." *Id.* (cleaned up). "An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Id.* (quoting *Foster v. Hyman*, 197 N.C. 189, 191 (1929)).

Here, the trial court again failed to articulate what standard of care it employed in determining that Oliver was entitled to summary judgment on plaintiffs' willful and wanton claim. Based upon the trial court's statements in the transcript and its erroneous imposition of some higher standard for plaintiffs' negligence claims against Oliver, I would vacate in part the trial court's order granting summary judgment and remand for application of the correct standard.

IV. Judgment on the Pleadings v. Summary Judgment

As illustrated above, the legal standards and tests governing resolution of motions for judgment on the pleadings and motions for summary judgment differ significantly. When addressing a motion for summary judgment, a trial court may refer to evidence and information outside the pleadings, such as "depositions, answers to interrogatories, . . . admissions on file, . . . [and] affidavits[.]" N.C. R. Civ. P. 56(c). In contrast, when addressing a motion for judgment on the pleadings, "[t]he trial court

may consider only the pleadings and exhibits which are attached and incorporated into the pleadings[.]" *Davis v. Durham Mental Health/Dev. Disabilities Area Auth.*, 165 N.C. App. 100, 103 (2004).

Rather than review these two orders on appeal under the appropriate respective standards, the majority improperly conflates them. On one hand, plaintiffs' negligence and NIED claims against Oliver were dismissed by the trial court's order partially granting Oliver's judgment on the pleadings. Therefore, in reviewing this order this Court may "consider *only* the pleadings and exhibits which are attached and incorporated into the pleadings[.]" *Id.* (emphasis added). On the other hand, plaintiffs' willful and wanton conduct, or gross negligence, claim against Oliver was dismissed by the trial court's order granting Oliver's motion for summary judgment. Therefore, this Court may look outside the pleadings to depositions, answers to interrogatories, etc., in reviewing this order.

Instead of properly reviewing the *pleadings* to determine whether the trial court erred in dismissing plaintiffs' negligence and NIED claims, the majority examines evidence outside the pleadings because it purports to review the trial court's summary judgment order in addressing these claims. The majority's logic appears to be that because the evidence outside the pleadings fails to establish negligence, summary judgment was proper for plaintiffs' willful and wanton claim. And because summary judgment was proper for plaintiffs' willful and wanton claim, judgment on the pleadings was therefore proper for plaintiffs' negligence and NIED claims. This reasoning is erroneous for at least two reasons.

First, as gross negligence "encompasses conduct which lies somewhere between ordinary negligence and intentional conduct," *McCauley*, 242 N.C. App. at 89, even *if* plaintiffs' gross negligence claim was properly dismissed at summary judgment, that would have no bearing on plaintiffs' negligence and NIED claims. Negligence is necessary to establish gross negligence. Gross negligence is not necessary to establish negligence.

Second, it is wholly inappropriate for the majority to reference evidence outside the pleadings in determining whether plaintiffs established a claim for negligence. Because plaintiffs' negligence and NIED claims against Oliver were dismissed by the trial court's order partially granting judgment on the pleadings, our review must be limited to that which was properly before the trial court: "the pleadings and exhibits which are attached and incorporated into the pleadings[.]" *Davis*, 165 N.C. App. at 103.

The majority's characterization of the judgment on the pleadings issues as "moot" is unconvincing to say the least. The judgment on the pleadings issues—i.e., whether plaintiffs adequately pled claims for negligence and NIED against Oliver—are only "moot" because the majority addressed them via review of a summary judgment order that did not address those claims.

V. Conclusion

Because the majority opinion fails to adequately address the issues on appeal, and because the trial court undoubtedly erred in applying a heightened standard of care, I dissent and would at minimum vacate and remand the trial court's orders granting judgment on the pleadings and summary judgment.

TRACY LYNN GREEN, Plaintiff
v.
ROBERT LYNN GREEN, Defendant

No. COA24-930

Filed 2 July 2025

Divorce—division of military pension—calculation—coverture fraction properly applied

In a matter involving the division of military pension benefits, the trial court properly granted plaintiff twenty-one percent of her ex-husband's disposable military retired pay and, in a declaratory judgment, properly interpreted the parties' previous separation and property settlement agreement to require use of a coverture fraction rather than a "Frozen Benefit Rule" to calculate plaintiff's portion of defendant's pension benefits. The clear and unambiguous language in the agreement—that plaintiff was entitled to fifty percent of defendant's benefits "accumulated during the course of the marriage"—was to implement the standard method of calculation in place at the time the parties signed the agreement, which was to multiply the coverture fraction by the disposable retired pay that defendant was to receive upon his retirement. Despite defendant's attempt to invoke the Frozen Benefit Rule (so that plaintiff's share was "frozen" as of the date of the agreement), that rule was not codified until nearly seven years after the parties entered into their agreement.

Appeal by Defendant from order entered 24 May 2024 and judgment entered 18 June 2024 by Judge Edgar F. Bogle in Gaston County District Court. Heard in the Court of Appeals 9 April 2025.

King Law Offices, by Claudette B. Ericson and Patrick K. Bryan, for Defendant-Appellant.

No brief for Plaintiff-Appellee.

COLLINS, Judge.

This case arises from a dispute between former spouses, Robert Lynn Green ("Defendant" or "Husband") and Tracy Lynn Green ("Plaintiff" or "Wife"), over the division of Defendant's military pension in accordance with their Separation and Property Settlement Agreement. Defendant appeals from the trial court's Military Pension Division Order and subsequent Declaratory Judgment. We affirm both.

I. Background

Plaintiff and Defendant were married on 29 July 1995 and separated about thirteen-and-a-half years later, on 29 December 2008. During their marriage, Defendant spent at least ten years on active duty with the United States Military. The parties executed a Separation and Property Settlement Agreement on 30 January 2009 resolving all issues of property division. The Agreement provided for a division of Defendant's military pension and retirement benefits and a court order to effectuate that division. The Agreement further provided that it shall be construed in accordance with North Carolina law:

> PROPERTY SETTLEMENT
>
> . . . .
>
> 5. HUSBAND'S RETIREMENT BENEFITS: Military Retirement: The parties acknowledge that Husband is entitled to Pension and Retirement benefits as a result of his service in the military. The parties also acknowledge and agree that Wife is entitled to 50% of Husband's benefits accumulated during the course of the marriage. Said benefits shall be payable to Wife upon Husband's retirement. Wife shall be responsible for preparing the appropriate paperwork to secure the transfer of military pension and retirement benefits.

. . . .

OTHER PROVISIONS

. . . .

> 4. GOVERNING LAW. This Agreement shall be construed in accordance with and governed by the laws of the State of North Carolina, entirely independent of the forum where the parties now reside or where it may come up for construction or enforcement.

The parties divorced on 22 February 2010. At some point thereafter, Defendant retired from the military and became entitled to receive his military benefits. Plaintiff filed a Complaint for Entry of Military Pension Division Order on 3 February 2023, asking the court to enter a Military Pension Division Order dividing Defendant's pension and retirement benefits in conformity with the Agreement.

Defendant filed an Answer and Counterclaim on 30 May 2023. In this filing, Defendant: 1) moved pursuant to Rule 12(b)(6) to dismiss Plaintiff's Complaint because it "seeks specific performance of distribution" and "[s]pecific performance is not an adequate remedy to effectuate the claim asserted"; 2) "specifically denied that Plaintiff is entitled to retirement benefits"; and 3) moved for declaratory judgment, requesting the court to interpret the "patent ambiguities" in the Agreement "in favor of the Defendant to define the amount, if any, that the Plaintiff shall be entitled to recover."

Plaintiff's Complaint for Entry of Military Pension Division came on for hearing on 14 June 2023. On that date, the parties entered into a Memorandum of Judgment/Order wherein they agreed to exchange certain information including each party's "proposed calculation in conformity with the parties' Separation Agreement" and "any documentation necessary to understand said calculation." Upon this exchange, either party could notice the matter back on for hearing. On 20 July 2023, Plaintiff calendared her Complaint for Entry of Military Pension Division back on for hearing on 24 August 2023.

Defendant filed a Motion for Summary Judgment on 14 August 2023, alleging that the Agreement was "*void ab initio*" because it "was not certified by both parties before a certifying officer" and asking the Court to "summarily deny Plaintiff's claim for entry of a division order by entering summary judgment in favor of Defendant." Defendant also filed an Amended Counterclaim on that date, requesting that the court "enter a declaratory judgment fixing the amount of any pension benefits

to which [Plaintiff] may be entitled – any such benefit specifically being limited to any benefits Defendant accumulated during the parties' marriage." Also on 14 August 2023, Defendant calendared his Motion for Declaratory Judgment and Motion for Summary Judgment for hearing.

Defendant withdrew his Motion for Summary Judgment four days later, on 18 August 2023. The record is silent as to what took place between 18 August 2023 and 17 April 2024.

On 17 April 2024, Plaintiff filed a request for a hearing on her Complaint for Entry of Military Pension Order. After a hearing on 24 May 2024, the trial court entered a Military Pension Division Order. The trial court awarded Plaintiff twenty-one percent of Defendant's disposable military retired pay and ordered Defendant to promptly provide Plaintiff with any information she needed to ensure direct payment to her of those military pension benefits.

On 18 June 2024, the trial court entered a Declaratory Judgment declaring the meaning of paragraph 5 of the Agreement and the method used to divide Defendant's military retirement. The trial court found, in part, as follows:

> 11. Defendant (Husband) contends that the Agreement fixes the amount of any pension benefits to which Plaintiff may be entitled to only any such benefit the Defendant accumulated during the parties' marriage, and that anything more unduly accounts for his post marriage service.
>
> 12. Plaintiff (Wife) contends that she is entitled to twenty-one percent (21%) of the member's disposable military retired pay - a figure calculated by using a coverture fraction that includes the following variables:
>
> a. total military retirement points earned by Defendant;
>
> b. Defendant's present disposable military retirement pay; and
>
> c. the amount of military retirement points Defendant earned during the course of the marriage.
>
> 13. Plaintiff argued such a coverture fraction was appropriate because the "Frozen Benefit Rule" did not apply at the time the parties were divorced.

14. Defendant argued the prior state of Equitable Distribution law is inapplicable in this case because the case at hand is a contract analysis case.

Upon its findings and conclusions, the trial court decreed as follows:

1. Because the Agreement between the parties was entered into prior to December 23, 2016, the clear and unambiguous meaning of paragraph five (5) of the Agreement indicates that the Plaintiff is entitled to a calculation of a percentage of the Defendant's retirement pension pursuant to a coverture fraction using as its variables: Defendant's present disposable military retirement pay; Defendant's total military retirement points; and those military retirement points Defendant accumulated during the course of the parties' marriage.

2. Plaintiff, pursuant to the Agreement, is entitled to twenty-one percent (21%) of the Defendant's disposable military retired pay.

Husband appealed both the Military Pension Division Order and the Declaratory Judgment on 20 June 2024.

II. Discussion

The essence of Defendant's arguments is that the trial court erred in its calculation of Plaintiff's portion of Defendant's military pension and retirement benefits.

Parties to a divorce may provide for the division of retirement benefits as part of a separation agreement. *See* N.C. Gen. Stat. § 50-20(d) (2009). A separation agreement that has not been incorporated into a divorce judgment is "governed by general contract principles" and is "enforceable and modifiable only under such principles." *Long v. Long*, 160 N.C. App. 664, 668 (2003) (citation omitted). "Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution." *Lane v. Scarborough*, 284 N.C. 407, 409-10 (1973) (citations omitted). "The most common rule of construction used by the courts is to gather the intention of the parties from the four corners of the instrument." *Hamby v. Hamby*, 143 N.C. App. 635, 646 (2001) (quotation marks and citations omitted). "Where a contract is unambiguous, its construction is a matter of law for the court to determine." *Gilmore v. Garner*, 157 N.C. App. 664, 666-67 (2003) (citations omitted). Our review of the trial court's

order and judgment is de novo. *See Jackson v. Jackson*, 280 N.C. App. 325, 335 (2021).

At issue here is the meaning of the following portion of paragraph five of the Agreement:

> The parties acknowledge that Husband is entitled to Pension and Retirement benefits as a result of his service in the military. The parties also acknowledge and agree that Wife is entitled to 50% of Husband's benefits accumulated during the course of the marriage. Said benefits shall be payable to Wife upon Husband's retirement.

There is no dispute between the parties as to the following: 1) Plaintiff is entitled to receive 50% of Defendant's military Pension and Retirement benefits accumulated during the course of the marriage. 2) Plaintiff is entitled to receive 21% of Defendant's military Pension and Retirement benefits. 3) Defendant became entitled to receive his military Pension and Retirement benefits only upon his retirement and, accordingly, these benefits were payable to Plaintiff only upon Defendant's retirement.

Defendant argues that the Agreement's provision that "Wife is entitled to 50% of Husband's benefits *accumulated during the course of the marriage*" plainly and unambiguously indicates that the amount of Defendant's benefits to which Plaintiff is entitled to share was "frozen" on the date they entered into the Agreement. Thus, Defendant argues, Plaintiff is only entitled to receive 21% of what his hypothetical retirement pay would have been had he retired on the date the parties entered into the Agreement. Defendant's proposed reading of the plain language is untenable as it undervalues the "benefits accumulated during the course of the marriage" and fails to construe the Agreement "in accordance with . . . the laws of the State of North Carolina" applicable at the time the parties entered the Agreement.

Plaintiff's *percentage* of Defendant's benefits is calculated by dividing the number of years Defendant served in the military while the parties were married by the number of total years Defendant served in the military to determine the coverture fraction, and then multiplying the coverture fraction by 50% (per the Agreement). Thus, every month Defendant served in the military after the parties entered into the Agreement reduced the coverture fraction and diluted Plaintiff's percentage of benefits. If the amount of Defendant's retirement benefits to which Plaintiff is entitled to share was "frozen" at the time they entered into the Agreement, but her percentage of benefits is calculated based

on the total number of years Defendant served in the military, the benefits she would receive would be far less than the benefits "accumulated during the course of the marriage."

Additionally, freezing the amount of Defendant's military retired pay to which Plaintiff is entitled to share at the amount attributable to his rank and years of military service at the time the parties entered into the Agreement disregards that Defendant's final retired pay is based on the foundation of marital effort. Again, under Defendant's reading, the benefits Plaintiff would receive would be far less than the benefits "accumulated during the course of the marriage."

Additionally, Defendant was entitled to receive his Pension and Retirement benefits only upon his retirement and, accordingly, these benefits were payable to Plaintiff only upon Defendant's retirement. Under Defendant's approach, the value of his benefits accumulated during the course of the marriage could grow in value until his retirement while Plaintiff's portion of those benefits would not grow, notwithstanding her inability to access her portion. Yet again, under Defendant's reading, the benefits Plaintiff would receive would be far less than the benefits "accumulated during the course of the marriage."

The Agreement's provision that "Wife is entitled to 50% of Husband's benefits *accumulated during the course of the marriage*" plainly and unambiguously indicates that Wife is entitled to receive 21% of Husband's actual disposable military retirement pay he receives upon his retirement. This reading is supported by construing the agreement in accordance with the standard method of dividing military pensions in North Carolina in effect at the time the parties entered into the Agreement.

Before 1981, military pensions were not subject to division by state courts in marital dissolution proceedings. Congress enacted the Uniformed Services Former Spouses Protection Act ("USFSPA") to provide that, for pay periods after 25 July 1981, "disposable retired pay" of military personal is subject to division by a state court in a divorce proceeding. 10 U.S.C. § 1408(c)(1) (2009). USFSPA defined "disposable retired pay" as "the total monthly retired pay to which a member is entitled less [certain specified] amounts." 10 U.S.C. § 1408(a)(4)(A) (2009).

In North Carolina, the amount of an "award of nonvested pension, retirement, or other deferred compensation benefits" in equitable distribution was determined by applying a coverture fraction – "the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested

and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment" – to the value of "the vested and nonvested accrued benefit . . . ." N.C. Gen. Stat. § 50-20.1(b), (d) (2009); *see Cunningham v. Cunningham*, 171 N.C. App. 550 (2005); *Seifert v. Seifert*, 82 N.C. App. 329 (1986). Thus, the coverture fraction was multiplied by a servicemember's disposable retired pay to determine the value of a military pension.

On 23 December 2016, new rules for the division of military retired pay took effect for servicemembers who were not yet receiving retired pay on a divorce date after 23 December 2016. The "Frozen Benefit Rule," prescribed in Section 641 of the National Defense Authorization Act ("NDAA") for 2017 and clarified at Section 624 of the NDAA for 2018, limits the "disposable retired pay" which can be divided to a hypothetical amount of retired pay, calculated as if the servicemember had retired on the date of the decree of divorce, dissolution, annulment, or legal separation. *See* 10 U.S.C. § 1408(a)(4)(B) (2018).

Here, the parties entered into the Agreement on 30 January 2009. At that time, the standard in North Carolina to determine the value of a military pension was to multiply the coverture fraction (marital service divided by total service) by the disposable retired pay as of retirement. It was not until almost seven years later that the Frozen Benefit Rule came into effect.

Husband argues that his intent when he signed the Agreement "merely forecasted the Frozen Benefit Rule." However, the clear and unambiguous language of paragraph five does not implement the Frozen Benefit Rule codified in 2016. Instead, the clear and unambiguous language implements the standard in place at the time the parties entered into the Agreement in 2009, and, as the trial court concluded,

> indicates that the Plaintiff is entitled to a calculation of a percentage of the Defendant's retirement pension pursuant to a coverture fraction using as its variables: Defendant's present disposable military retirement pay; Defendant's total military retirement points; and those military retirement points Defendant accumulated during the course of the parties' marriage.

Accordingly, we conclude, as did the trial court, that "Plaintiff, pursuant to the Agreement, is entitled to twenty-one percent (21%) of the Defendant's disposable military retired pay."

III. Conclusion

For the reasons stated above, the trial court's Military Pension Division Order and the Declaratory Judgment are affirmed.

AFFIRMED.

Judges HAMPSON and CARPENTER concur.

IN THE MATTER OF A.J.J.

No. COA25-28

Filed 2 July 2025

1. Child Abuse, Dependency, and Neglect—permanency planning—custody to non-parents—verification—understanding of legal significance

In a neglect and dependency matter, the trial court properly awarded custody of the minor child to paternal relatives ("custodians," with whom the juvenile had been placed for over seven months) where there was sufficient evidence that the custodians understood the legal significance of obtaining custody as required by N.C.G.S. § 7B-906.1(j), including testimony from a department of social services (DSS) social worker, testimony from one of the custodians, and reports from DSS and the guardian ad litem. The evidence demonstrated that both custodians understood the recommendations from DSS, wanted to receive custody of the child, had been providing for the various needs of the child since his placement with them, and were willing to continue to meet those needs going forward.

2. Child Abuse, Dependency, and Neglect—permanency planning—custody to non-parents—verification—adequacy of resources

In a neglect and dependency matter, the trial court properly awarded custody of the minor child to paternal relatives ("custodians") where there was sufficient evidence that the custodians had adequate resources to provide for the child's needs as required by N.C.G.S. § 7B-906.1(j). Although there was no evidence of either custodian's employment or income, section 7B-906.1(j) provides that greater than six consecutive months of placement with a

prospective custodian is evidence of adequate resources; here, the child had resided with the custodians for more than six months, and, further, evidence was presented that the child had his own room, storage space, TV, Internet, and phone, and that his needs were being met.

3. Child Abuse, Dependency, and Neglect—permanency planning—custody to non-parents—delegation of visitation rights—abuse of discretion

In a neglect and dependency matter in which the trial court awarded custody of the minor child to paternal relatives ("custodians") and then entered an order transferring the Chapter 7B juvenile proceeding to a Chapter 50 civil custody proceeding, the trial court abused its discretion by authorizing the custodians to modify or cease the mother's visitation, including to change visitation from supervised to unsupervised. The visitation provision containing the impermissible delegation of authority in the Chapter 50 order was vacated and the matter was remanded for further proceedings.

4. Appeal and Error—child visitation—disability accommodation for mother—failure to raise issue in trial court—waiver

In a neglect and dependency matter in which the trial court awarded custody of the minor child to paternal relatives, where the mother argued for the first time on appeal that the trial court failed to adequately accommodate her disability as required by the Americans with Disabilities Act (with regard to the location of her visits with the child), the issue was waived for not having been raised at the trial level.

5. Child Abuse, Dependency, and Neglect—transfer to Chapter 50 proceeding—statutory findings

In a neglect and dependency proceeding in which the trial court awarded custody of the minor child to paternal relatives ("custodians") and then entered an order transferring the Chapter 7B juvenile proceeding to a Chapter 50 civil custody proceeding, the trial court made the necessary findings of fact pursuant to N.C.G.S. §§ 7B-911(c)(1)-(2) and 50-13.2(a). The court's findings were supported by the evidence, including the finding that the child was happy in his placement and that his needs were being met. The trial court's findings regarding other relevant factors, such as the mother's lack of progress in her case plan and the custodians' willingness and ability to provide for the child, supported its conclusion that the custody award was in the child's best interest. Finally, the court's ultimate finding that continued state intervention was no

longer necessary was supported by evidence in the record, including: statements by the custodians and the child's mother about plans to carry out visitation; a report by the department of social services (DSS) recommending that DSS, counsel, and the guardian ad litem should be released; and testimony from a DSS social worker that there was no reason for the court to stay involved in the child's life after three years.

Appeal by Respondent from orders entered 25 September 2024 by Judge Pell C. Cooper in Wilson County District Court. Heard in the Court of Appeals 11 June 2025.

Beaman & Bennington, PLLC, by Attorney Jennifer K. Bennington, for petitioner-appellee Wilson County Department of Social Services.

Parent Defender Wendy C. Sotolongo, by Sr. Assistant Parent Defender, J. Lee Gilliam, for respondent-appellant mother.

Manning, Fulton & Skinner, P.A., by Attorney Michael S. Harrell, for petitioner-appellee Guardian ad Litem.

STADING, Judge.

Respondent-Mother ("Mother") appeals from orders awarding physical and legal custody of her minor child, A.J.J. ("Adam"),[1] to Cliff Padilla and Dorothy Council. On appeal, Mother argues the trial court erred in awarding custody to a non-parent, abused its discretion in imposing visitation provisions, and erred in transferring the Chapter 7B juvenile proceeding to a Chapter 50 civil custody proceeding. For the reasons below, we affirm in part, vacate in part, and remand for further proceedings.

I. Background

In early August 2021, the Wilson County Department of Social Services ("DSS") received a "child protective services report regarding issues of neglect due to improper care and improper supervision involving [Adam] . . . ."[2] The report stated Mother "had kicked [Adam] out

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

2. Adam was eleven years old at the time of the child protective services report.

of the house and he was found walking down a highway." In response, DSS "met with [Adam] and . . . [M]other at the police department where [Mother] decided to send [Adam] to stay with his father in Pitt County."[3] Adam displayed concerning behaviors while living with his father thereafter, including "running away, breaking a window, hitting [a] refrigerator, and bec[oming] physical with his father and grandmother." As a result, an additional child protective services report was filed in Pitt County.

On 2 September 2021, DSS filed a juvenile petition alleging Adam was neglected and dependent. DSS obtained nonsecure custody of Adam shortly thereafter on 8 September 2021. The petition asserted Adam "does not receive proper care, supervision, or discipline"; Adam "is not provided necessary remedial care"; Adam "lives in an environment injurious to [his] welfare"; Mother "is unable to provide for [Adam's] care or supervision"; and Mother "lacks an appropriate alternative childcare arrangement." After a hearing, the trial court adjudicated Adam to be neglected and dependent on 30 March 2022. The trial court found: (1) Mother "ha[s] some physical limitations due to injuries from a car accident"; (2) Mother "reported that she cannot physically take care of [Adam] with his behavioral issues"; (3) Mother "failed to follow up with mental health services" to address Adam's behavioral concerns; (4) Mother failed to attend the parenting classes referred to her by DSS; and (5) Mother failed "to maintain a clean and safe living environment for [Adam]." The trial court ordered Mother to comply with the following in-home service plan at this time:

> a. Engage with medical and mental health treatment to include completing an updated mental health assessment or psychological evaluation if deemed necessary, follow all recommendations of that mental health provider(s), report any treatment changes, and sign any necessary consent forms for the Department to speak with the medical and mental health providers.
>
> b. Maintain regular contact with the Department including but not limited to scheduled home visits.
>
> c. Participate in and complete parenting classes and demonstrate learned skills during scheduled future visitations.
>
> d. Create a support system committed in support and safety of the child and parent.

3. Adam's biological father is not a party to or the subject of this appeal.

From July 2022 through September 2024, the trial court conducted eight permanency planning hearings. The orders entered as a result of those proceedings reflect that Mother failed to make progress towards her service plan during this time. In the third permanency planning order, entered on 1 March 2023, the trial court ordered custody as the primary plan, ordered guardianship as the secondary plan, and "relieved [DSS] of reasonable efforts towards reunification with . . . [Mother]." Before the fifth permanency hearing commenced on 6 November 2023, DSS submitted a report, noting that Adam's paternal uncle, Cliff Padilla, and his girlfriend, Dorothy Council, "communicated their desire to be assessed for placement and support." In the November 2023 permanency planning order, the trial court adopted DSS's placement recommendations, ordering the primary plan as "custody with . . . Cliff Padilla and Dorothy [ ] Council" and the secondary plan as "Guardianship with . . . Cliff Padilla and Dorothy [ ] Council." Adam was ultimately placed with Cliff Padilla and Dorothy Council ("Custodians") on 2 February 2024.

At subsequent permanency planning hearings held on 21 February 2024 and 1 May 2024, the trial court's permanent and secondary plans for Adam remained intact—custody or guardianship with the Custodians. And at the eighth and final permanency planning hearing ("Final PPR Hearing") held on 18 September 2024, the trial court granted legal and physical custody of Adam to the Custodians. The trial court entered its order ("PPR Order") on 25 September 2024, concluding: "The juvenile case shall be closed, and the jurisdiction of the Juvenile Court terminated, and a separate Chapter 50 order should be entered." That same day, the trial court entered a Chapter 50 custody order ("Chapter 50 Order") and made the following findings:

> 2. The caretakers of [Adam] are Cliff Padilla and Dorothy Council.
>
> 3. A Court for Wilson County, North Carolina, obtained jurisdiction over [Adam] and the Court has determined that custody of said Juvenile should be awarded as set forth herein . . . .
>
> . . . .
>
> 6. The Court finds the following facts in support of the entry of the custody order entered hereafter under Chapter 50:
>
> [Adam] is 14 years old, and he has been residing with his paternal relatives, Cliff Padilla and Dorothy Council, since on or about February 2, 2024. Mr. Padilla and Ms. Council have been meeting [Adam's] daily and well-being

> needs since he has come to reside with them, and they are ready, willing, and able to continue to do so. [Adam] reports being happy in this placement, and his needs are being met. [Adam] should continue to remain in this placement at this time.
>
> Mother . . . has a history of mental health illness, which she has not consistently addressed over the past three years. She is currently residing in Rocky Mount, NC at a hotel. [Mother] does not have suitable housing for [Adam], and she has not demonstrated on a consistent basis her ability to provide a safe living environment for [Adam]. For the past three years, [Mother] has not been cooperative in working towards reunification with [Adam], and she has only minimally engaged in visitation with [Adam].
>
> . . . .
>
> [Mother's] behaviors and failure to address the concerns that led to [Adam's] remov[al], demonstrate that her conduct is inconsistent with a parent's constitutionally protected status, and she is unfit to parent [Adam] currently. . . .

The Chapter 50 Order also set out the following visitation provisions for Mother:

> [Mother] . . . shall have unsupervised, once per week, audio and video contact with [Adam]. [Mother] can have a minimum of once per month, monitored family time in an agreed location but not limited to the Rocky Mount and Greenville community. [Mother] is responsible for reaching out to the [Custodians] to coordinate family time the fifth of every month. The [Custodians] will have the discretion to transition family time between [Adam] and [M]other to unsupervised. If during monitored or future unsupervised family time or contact between the parent or juvenile, begins to trigger regressive behaviors of [Adam] or cause discord between the [Custodians] that may lead to possible placement disruption, and cannot be redirected, visits/contact may be ceased, and a Motion for Review may be filed with the Court.

Mother timely entered her written notice of appeal from the PPR Order and the Chapter 50 Order on 24 October 2024.

II. Jurisdiction

This Court has jurisdiction to entertain Mother's appeal under N.C. Gen. Stat. §§ 7A-27(b)(2) ("From any final judgment of a district court in a civil action."), and 7B-1001(a)(4) (2023) ("Any order, other than a nonsecure custody order, that changes legal custody of a juvenile.").

III. Analysis

Mother submits three issues for our consideration: (1) whether the trial court erred in awarding permanent custody to non-parents without adequate verification of resources or understanding the placement; (2) whether the trial court abused its discretion regarding visitation provisions; and (3) whether the trial court erred in transferring the Chapter 7B juvenile proceeding without making proper findings.

A. Subsection 7B-906.1(j) Verifications

Mother asserts the trial court erroneously awarded permanent custody to a non-parent since it failed to make the requisite verifications under N.C. Gen. Stat. § 7B-906.1(j) (2023). Mother maintains the trial court failed to verify that the custodians: (1) understood the legal significance of the placement; and (2) had adequate resources to care appropriately for Adam.

"Our review of a permanency planning order 'is limited to whether there is competent evidence in the record to support the findings [of fact] and whether the findings support the conclusions of law.' The trial court's findings of fact are conclusive on appeal if supported by any competent evidence." *In re L.R.L.B.*, 377 N.C. 311, 315, 857 S.E.2d 105, 111 (2021) (citations omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *In re J.M.*, 384 N.C. 584, 591, 887 S.E.2d 823, 828 (2023) (citation omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re P.O.*, 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (citation omitted). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re E.E.*, 294 N.C. App. 133, 136, 902 S.E.2d 299, 302 (2024) (citations omitted).

N.C. Gen. Stat. § 7B-906.1 provides the procedure a trial court must adhere to when conducting a permanency planning hearing. Relevant here, subsection 7B-906.1(j) states a trial court must make two verifications when awarding custody to somebody other than a parent:

> If the court determines that the juvenile shall be placed in the custody of an individual other than a parent . . . , the court shall verify that the person receiving custody . . .

> of the juvenile understands the legal significance of the placement . . . and will have adequate resources to care appropriately for the juvenile. The fact that the prospective custodian . . . has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources.

Id. § 7B-906.1(j). Thus, where a court awards custody of a juvenile to a non-parent, it must verify the person receiving custody: (1) "understands the legal significance of the placement or appointment"; and (2) "will have adequate resources to care appropriately for the juvenile." *Id.* "A permanent plan of custody order which does not contain the required verification must be vacated and remanded." *In re J.C.-B.*, 276 N.C. App. 180, 187, 856 S.E.2d 883, 889 (2021).

Subsection 7B-906.1(j) "does not require the trial court to 'make any specific findings in order to make the verification.' However, [ ] the record must show the trial court received and considered reliable evidence that the guardian or custodian had adequate resources and understood the legal significance of custody or guardianship." *In re J.D.M.-J.*, 260 N.C. App. at 65, 817 S.E.2d at 761 (internal citation omitted); *see also In re P.A.*, 241 N.C. App. 53, 61, 772 S.E.2d 240, 246 (2015) ("[T]he trial court need not make detailed findings of evidentiary facts or extensive findings regarding the [custodian's] situation and resources, nor does the law require any specific form of investigation of the potential [custodian]."); *see also In re K.P.*, 383 N.C. 292, 306, 306, 881 S.E.2d 250, 259, 259 (2022) ("While this Court has never addressed the minimum evidentiary requirements which are sufficient to support a trial court's verification . . . the Court of Appeals provided instructive guidance on the matter in the opinion which it rendered in *In re J.D.M.-J* . . . ."); *see also In re J.H.*, 244 N.C. App. 255, 270–71, 780 S.E.2d 228, 240 (2015) ("[T]he record must contain competent evidence of the [custodians'] financial resources and their awareness of their legal obligations.").

"At a permanency planning hearing '[t]he court may consider any evidence, including hearsay evidence . . . that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition.' " *In re J.R.*, 279 N.C. App. 352, 361, 866 S.E.2d 1, 7 (2021) (quoting N.C. Gen. Stat. § 7B-906.1(c)). Such "evidence may include reports and home studies conducted by the guardian ad litem or department of social services." *Id.*

"The fact that the prospective custodian . . . has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources." N.C. Gen. Stat. § 7B-906.1(j);

see also In re K.P., 383 N.C. at 308, 881 S.E.2d at 260; *see also In re A.N.T.*, 272 N.C. App. 19, 23, 845 S.E.2d 176, 179 (2020) (citation omitted) ("[T]he court may consider the guardian to have 'adequate resources' when the guardian has 'provided a stable placement for the juvenile for at least six consecutive months.' "). Although " 'placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources,' . . . such evidence does not *per se* compel a conclusion that the 'person receiving custody . . . understands the legal significance of the placement.' " *In re J.C.-B.*, 276 N.C. App. at 188, 856 S.E.2d at 889 (citation omitted) (second ellipses in original). Evidence that a custodian understands the legal significance of the placement may consist of "testimony from the potential [custodian] of a desire to take [custody] of the child . . . and testimony from a social worker that the potential [custodian] was willing to assume legal [custody]." *In re E.M.*, 249 N.C. App. 44, 54, 790 S.E.2d 863, 872 (2016).

1. Legal Significance

[1] Mother first contends the trial court failed to verify whether the custodians understood the legal significance of the placement. Mother maintains the trial court's verification is inadequate since Ms. Council—the other Custodian—did not testify to understanding the legal significance of obtaining custody of Adam. *See In re L.M.*, 238 N.C. App. 345, 348–49, 767 S.E.2d 430, 433 (2014) ("Although there was sufficient evidence to verify [the juvenile's] foster father as a suitable guardian, we hold there was insufficient evidence that [the juvenile's] foster mother understood and accepted the responsibilities of guardianship. As DSS concedes, the foster mother did not testify and did not sign a guardianship form."); *see also In re E.M.*, 249 N.C. App. at 55, 790 S.E.2d at 872 ("Here, the husband in the custodial couple did not testify, and there is no evidence to indicate that he understood the legal significance of taking custody of [the juvenile]. Further, although his wife testified at the hearing, she never testified regarding her understanding of the legal relationship, and the court never examined her to determine whether she understands the legal significance of the relationship."). However, a more recent decision from our Supreme Court demonstrates when awarding custody of a juvenile to a custodial couple, the testimony of one of the custodians—without the testimony of the other—is sufficient where the testifying custodian expresses the custodial couple understands the legal significance of the placement.[4] *See In re K.P.*, 383 N.C. at 308, 881 S.E.2d at 260.

4. The Court of Appeals opinion, which our Supreme Court reversed on the issue of verification, notes that the custodial wife "did not testify at the final permanency planning

In *In re K.P.*, the respondent-mother appealed from an order awarding physical and legal custody of her minor child to a custodial couple. *Id.* at 298, 881 S.E.2d at 254. The respondent-mother asserted the trial court failed to verify whether the custodial couple understood the legal significance of the minor child's placement and possessed adequate resources under N.C. Gen. Stat. § 7B-906.1(j). *Id.* at 299, 881 S.E.2d at 254. The Court of Appeals agreed, concluding:

> the evidence that (1) [the custodial couple] did an excellent job taking care of [the minor child] as the juvenile's court-appointed caretakers; (2) the [custodial] couple were willing to serve as a permanent placement for the child; and (3) the household could financially support [the minor child] without substantial outside assistance *was insufficient to "show the trial court received and considered reliable evidence that the guardian or custodian had adequate resources and understood the legal significance of custody or guardianship*."

Id. at 299–300, 881 S.E.2d at 255 (emphasis added). Upon review thereafter, our Supreme Court reversed the Court of Appeals decision, "reject[ing] the majority's conclusion regarding verification." *Id.* at 308, 881 S.E.2d at 260. The Court reasoned:

> Despite the lack of any specific findings which are expressly identified in N.C. [Gen. Stat.] § 7B-906.1(j) as being required to authorize a trial court to properly establish verification, we can determine from the record of the 3 June 2020 permanency planning review hearing that the trial court sufficiently verified that the [custodial couple] . . . , in receiving legal and physical custody of the juvenile [ ], understood the legal significance of the placement and had adequate resources to care appropriately for the child. *The combined testimony rendered by the DSS social worker and [the custodial husband] amply support this determination.*

Id. at 308, 881 S.E.2d at 260 (emphasis added). Although the custodial wife did not testify, the Court determined the social worker's testimony, coupled with the custodial husband's testimony, satisfied the verification requirements under N.C. Gen. Stat. § 7B-906.1(j). *Id.*

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hearing . . . ." *In re K.P.*, 278 N.C. App. 42, 50, 861 S.E.2d 754, 759 (2021). The Court cited both *In re L.M.* and *In re E.M.* to support the proposition that *both custodians* must testify to understanding the legal significance of the placement. *Id.* at 51, 861 S.E.2d at 760.

Here, the record contains sufficient evidence showing the Custodians understood the legal significance of obtaining custody over Adam. See *In re J.D.M.-J.*, 260 N.C. App. at 65, 817 S.E.2d at 761. Indeed, a DSS social worker recommended that physical and legal custody be awarded to the Custodians. The social worker testified to "discussing with the [Custodians] what the Department's recommendations are" prior to the Final PPR hearing, which the Custodians agreed to. *See In re E.M.*, 249 N.C. App. at 54, 790 S.E.2d at 872 (Evidence showing that a custodian understands the legal significance of the placement may consist of "testimony from a social worker that the potential [custodian] was willing to assume legal [custody]."). Moreover, after the trial court ordered reunification efforts by DSS to cease, the Custodians contacted DSS and "communicated their desire to be assessed for placement of [Adam]."

In addition, and similar to *In re K.P.*, Mr. Padilla—one of the Custodians—testified that he and Ms. Council: could continue to meet Adam's needs on a long term basis; understood the recommendation by DSS; understood that they would receive custody of Adam; wanted to receive custody of Adam; were willing to continue Adam's counseling sessions moving forward; and were working with Adam on progressing in school, which was a priority to them. *See In re E.M.*, 249 N.C. App. at 54, 790 S.E.2d at 872 (Evidence showing that a custodian understands the legal significance of the placement may consist of "testimony from the potential [custodian] of a desire to take [custody] of the child . . . ."). Mr. Padilla also testified that he and Ms. Council were "willing and able to meet [Adam's] needs going forward for as long as necessary[.]" Finally, the GAL report, prepared in advance of the Final PPR Hearing, notes that the Custodians had been taking care of Adam's medical and dental needs, including: "establish[ing] [Adam] with a [medical] provider in Greenville"; scheduling a follow up appointment in April 2024; and taking Adam to "a dentist in . . . April 2024 for a routine cleaning and exam."

In sum, the combined testimony rendered by the DSS social worker and Mr. Padilla, as well as the GAL and DSS reports, shows the Custodians understood the legal significance of being awarded custody of Adam. *See In re K.P.*, 383 N.C. at 308, 881 S.E.2d at 260; *see also* N.C. Gen. Stat. § 7B-906.1(j). Mother's assignment of error is overruled.

2. Adequate Resources

[2] Mother next maintains there is insufficient evidence demonstrating the Custodians possessed adequate resources since there was no evidence of the Custodians' employment and approximate income. Mother also asserts that a juvenile residing with a custodial family for greater than six months, without more evidence, is insufficient to show

a custodial couple possesses adequate resources.

Mother argues precedent demonstrates there must be evidence of the Custodians' income or employment to verify adequate resources under subsubsection 7B-906.1(j). *See In re P.A.*, 241 N.C. App. at 65, 772 S.E.2d at 248; *see also In re K.B.*, 249 N.C. App. 263, 267, 803 S.E.2d 628, 631 (2016); *see also In re S.B.*, 268 N.C. App. 78, 89, 834 S.E.2d 683, 691 (2019); *see also In re J.D.M.-J.*, 260 N.C. App. at 66, 817 S.E.2d at 762; *see also In re K.P.*, 383 N.C. at 306, 881 S.E.2d at 259.

For example, in *In re J.D.M.-J.*, the trial court awarded custody of the respondent's children to the maternal aunt and uncle. 260 N.C. App. at 58, 817 S.E.2d at 758. On appeal, the respondent argued the trial court failed to verify whether "the couple had adequate resources to care for the children [ ] and [ ] understood the legal significance of the placement." *Id.* at 64, 817 S.E.2d at 760. Our Court agreed the record did not contain sufficient evidence of the adequacy of the custodial couple's financial resources. *Id.* at 66, 817 S.E.2d at 762. Although the trial court received a financial affidavit into evidence, and a social worker testified there were no "concerns" with the custodians' financial resources, the Court noted:

> While this testimony constituted evidence that the [custodians] did possess *some* income, it did not state the amount of that income or demonstrate that it was sufficient to provide necessary care for the juveniles. Moreover, the social worker's statement that there were no concerns with the [custodians'] financial affidavit is too vague to constitute adequate evidence that they did, in fact, possess adequate resources to care for the juveniles.

Id. at 67, 817 S.E.2d at 762. The Court thus "vacate[d] the trial court's award of custody . . . and remand[ed] for further proceedings." *Id.* at 68, 817 S.E.2d at 763.

We note most of the cases cited by Mother, including *In re J.D.M.-J.*, occurred *before* N.C. Gen. Stat. § 7B-906.1(j) was amended to add:

> The fact that the prospective custodian or guardian has provided a stable placement for the juvenile for at least six consecutive months is evidence that the person has adequate resources.

Prior to its effective date, 1 October 2019, subsection 7B-906.1(j) did not include this six-month provision as "evidence that the person has adequate resources."

We remain cognizant of a similar matter decided by our Court in *In re E.M.*—a case decided before the amendment to N.C. Gen. Stat. § 7B-906.1(j). In that case, the respondent appealed from an order awarding legal custody of the minor child to the paternal cousin and his wife. *In re E.M.*, 249 N.C. App. at 44–45, 790 S.E.2d at 866. The respondent asserted, "the district court erred by granting custody to a non-parent without verifying that the person receiving custody understood the legal significance of the placement and will have adequate resources to care appropriately for the juvenile as required by N.C. Gen. Stat. § 7B-906.1(j)." *In re E.M.*, 249 N.C. App. at 44–45, 790 S.E.2d at 866. Our Court disagreed with respect to the adequate resources prong, holding, "direct, specific evidence supports the court's finding that the paternal cousins have adequate resources to care appropriately for [the minor child]." *Id.* at 54, 790 S.E.2d at 872. The Court determined the following record evidence supported the trial court's verification: the custodians owned their home; the juvenile resided with the custodians for sixteen months before the hearing; the juvenile had his own bedroom, play area, and toys; the custodians provided all of the juvenile's medical, dental, vision, and developmental needs; the custodial husband maintained employment with three employers; the custodial wife worked on the weekends and cared for the juvenile during the week; the mother-in-law cared for the juvenile on the weekends; the custodians had taken the juvenile on several vacations; and the custodians held a birthday party for the juvenile's first birthday. *Id.* Notably, the *In re E.M.* Court did not receive any evidence revealing the amount of income either custodian earned; notwithstanding, the Court held, "[t]his evidence is sufficient to support the district court's determination that the paternal cousins have adequate resources to care for Eddie." *Id.*

Here, although the record in this case does not contain evidence as to either of the Custodians' income or employment, we hold the trial court received sufficient evidence to verify the adequacy of their resources. *Compare In re E.M.*, 249 N.C. App. at 54, 790 S.E.2d at 872; *with In re J.D.M.-J.*, 260 N.C. App. at 65–67, 817 S.E.2d at 761–62. The trial court's Finding of Fact No. 20 notes Adam had been living with the Custodians more than six months:

> [Adam] has resided with [the Custodians] since or about February 2, 2024, and they have been listed as part of the permanency plan for [Adam]. [The Custodians] have been providing [Adam] with a safe and stable home for about six months. [The Custodians] are ready, willing, and able to continue to provide a safe and stable home and meet [Adam's] needs as long as necessary.

See In re A.N.T., 272 N.C. App. at 23, 845 S.E.2d at 179 (citation omitted). Subsection 7B-906.1(j) expressly states such evidence "is evidence that the person has adequate resources." N.C. Gen. Stat. § 7B-906.1(j). In addition, Mr. Padilla testified his household was "financially able to meet [Adam's] needs" at the hearing, noting Adam "ha[s] his own room, his own bed, TV, Internet, [and] phone." *See In re E.M.*, 249 N.C. App. at 54, 790 S.E.2d at 872. Moreover, Mr. Padilla's testimony was corroborated by the social worker's testimony as follows:

> [DSS ATTORNEY]: Have you had an opportunity to observe [Adam] in that placement?
>
> [SOCIAL WORKER]: Yes.
>
> [DSS ATTORNEY]: And describe for the Court what you've seen.
>
> [SOCIAL WORKER]: Overall, the [Custodians] are very committed to [Adam]. [Adam] appears to feel comfortable and safe in that environment. He has his own sleeping space, plenty of storage space, plenty of food, clean environment, very warm and open.

Mr. Padilla also testified that he and Ms. Council were willing to continue Adam's counseling sessions and were "ready, willing, and able to meet [Adam's] needs going forward for as long as necessary." Finally, the GAL report notes the Custodians "established [Adam] with a [medical] provider in Greenville," scheduled a follow up appointment in April 2024, and took Adam to see "a dentist in . . . April 2024 for a routine cleaning and exam."

As with *In re E.M.*, the evidence in the instant case supports the conclusion that the trial court verified the adequacy of the Custodians' resources. Although the *E.M.* decision did not have the benefit of our general assembly's amendment to N.C. Gen. Stat. § 7B-901.6(j), it similarly determined that greater than six months of placement with a prospective custodian is evidence of adequate resources. *Id.* at 54, 790 S.E.2d at 872. The trial court did not commit error in finding the Custodians possessed adequate resources to care for Adam.

B. Visitation Provisions

Mother next asserts the trial court abused its discretion by imposing the visitation provision in its orders. Mother contends the trial court may not grant the Custodians discretion to cease visits, and the visitation provision does not accommodate Mother's physical disability under the Americans with Disabilities Act.

"A trial court's order regarding visitation rights is reviewed for an abuse of discretion." *In re R.J.P.*, 284 N.C. App. 53, 60, 875 S.E.2d 1, 6 (2022). "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." *In re A.L.S.*, 374 N.C. 515, 517, 843 S.E.2d 89, 91 (2020) (citation omitted).

1. Delegation of Visitation Authority to Custodians

[3] Mother maintains the trial court abused its discretion by granting the Custodians the authority to modify or cease her visitation under *In re C.S.L.B.*, 254 N.C. App. 395, 400, 829 S.E.2d 492, 495 (2017). Although we ultimately agree with Mother on this issue, we note N.C. Gen. Stat. § 7B-905.1 does not apply since the trial court "properly terminated jurisdiction in the abuse, neglect, and dependency proceeding at the disposition phase by opening a new Chapter 50 civil custody case under N.C. Gen. Stat. § 7B-911 . . . ." *In re Matter of S.G.*, 288 N.C. App. 489, 885 S.E.2d 143 (Apr. 18, 2023) (unpublished) ("The trial court properly terminated jurisdiction in the abuse, neglect, and dependency proceeding at the disposition phase by opening a new Chapter 50 civil custody case under N.C. Gen. Stat. § 7B-911, thus N.C. Gen. Stat. § 7B-905.1 regarding visitation rights was not applicable."). In any event, Mother's contention is correct with respect to the Chapter 50 Order since it impermissibly delegates visitation authority to the Custodians. *In re Custody of Stancil*, 10 N.C. App. 545, 550, 179 S.E.2d 844, 848 (1971).

"[T]he feasible exercise of a parent's right of visitation should be safeguarded by a definite provision in the order or decree of the court awarding the custody of the child to another person." *Id.* at 550, 179 S.E.2d at 848 (citation omitted). However,

> [t]he order should not make the right of visitation contingent upon an invitation from the party having the custody of the child, or require the consent of one parent for the other to visit the child, or provide that the parent shall have the right of visitation only at such times as may be convenient to the party having the custody of the child, thereby leaving the privilege of visitation entirely to the discretion of the party having the child in custody.

Id. (citation omitted). "When the custody of a child is awarded by the court, it is the exercise of a judicial function. In like manner, when visitation rights are awarded, it is the exercise of a judicial function." *Id.* at 552, 179 S.E.2d at 849 (internal citation omitted). A trial court may not delegate this judicial function to a custodian since:

> 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.

Id.[5]

Here, the trial court's orders contain the following visitation provision:

> [Mother] . . . shall have unsupervised, once per week, audio and video contact with [Adam]. [Mother] can have a minimum of once per month, monitored family time in an agreed location but not limited to the Rocky Mount and Greenville community. [Mother] is responsible for reaching out to the [Custodians] to coordinate family time the fifth of every month. *The [Custodians] will have the discretion* to transition family time between [Adam] and [M]other *to unsupervised*. If during monitored or future unsupervised family time or contact between the parent or juvenile, begins to trigger regressive behaviors of [Adam] or cause discord between the [Custodians] that may lead to possible placement disruption, and cannot be redirected, *visits/contact may be ceased*, and a Motion for Review may be filed with the Court.

(emphasis added). In current form, the Chapter 50 Order's visitation provision impermissibly allows the Custodians to modify Mother's visitation from supervised to unsupervised. *See id.* Furthermore, the Chapter

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5. The trial court entered the same visitation procedures in the Chapters 7B and 50 orders. *In re C.S.L.B.* addresses visitation entered under Chapter 7B and holds a trial court "may not delegate its judicial function of awarding visitation." 254 N.C. App. at 399, 829 S.E.2d at 495. *In re Custody of Stancil*, involves an action initiated under Chapter 50 and draws the same conclusion with respect to the trial court's improper delegation of authority to award visitation of a minor child. 10 N.C. App. at 552, 179 S.E.2d at 849 ("[W]hen visitation rights are awarded, it is the exercise of a judicial function. We do not think that the exercise of this judicial function may be properly delegated by the court to the custodian of the child . . . . 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.").

50 Order appears to improperly delegate authority to the Custodians to cease visitation and thus requires clarification. *See id.*

We therefore vacate the trial court's visitation provision in the Chapter 50 Order and remand for further proceedings consistent with this opinion. *See id.* at 553, 179 S.E.2d at 850. As explained below in section C, since we affirm the Chapter 50 Order, we need not vacate the PPR Order. *See In re S.M.L.*, 272 N.C. App. 499, 519, 846 S.E.2d 790, 803 (2020); *see also In re Matter of S.G.*, 288 N.C. App. 489, 885 S.E.2d 143 (unpublished).

2. Disability Accommodation

[4] Mother next asserts the trial court abused its discretion by failing to "adequately consider [her] disability and provide appropriate accommodation." Mother contends she is physically disabled, and the Americans with Disabilities Act "extend[s] to parent-child visitation in a child welfare case."[6] *See* 42 U.S.C.S. §§ 12102, 12132. As such, Mother maintains the trial court abused its discretion by leaving "the location of the visits in the discretion of the custodians." In Mother's view, the visits should occur where she lives, Rocky Mount, in light of her disability.

However, Mother did not raise this argument at the trial level. *See In re B.C.T.*, 265 N.C. App. 176, 193, 828 S.E.2d 50, 61 (2019) (citation omitted) ("[P]arties are not allowed to make different arguments on appeal than before the trial court to 'swap horses between courts in order to get a better mount.' "); *see also In re S.A.*, 256 N.C. App. 398, 806 S.E.2d 81 (Nov. 7, 2017) (unpublished) ("The *Terry* court noted that claims that DSS violated the Americans with Disabilities Act must be asserted at the time the service plan is adopted to be preserved for appeal. . . . We are persuaded that the reasoning in *Terry* should apply here. [The

6. "The ADA provides that 'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.' " *In re C.M.S.*, 184 N.C. App. 488, 491–92, 646 S.E.2d 592, 594–95 (2007) (quoting 42 U.S.C.S. § 12132). "Title II of the ADA applies to . . . child welfare agencies and court systems. The 'services, programs, and activities' provided by public entities include, but are not limited to, investigations, assessments, provision of in-home services, removal of children from their homes, case planning and service planning, visitation, guardianship, adoption, foster care, and reunification services." U.S. Department of Health and Human Services and U.S. Department of Justice, *Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act*, https://archive.ada.gov/doj_hhs_ta/child_welfare_ta.html (2015) (citations omitted).

r]espondent did not object to the adequacy of the services being offered by DSS before the permanency planning hearing. Likewise, [the r]espondent's counsel did not object on this ground at the permanency planning hearing, instead arguing that [the r]espondent needed more time to work toward reunification in light of her disability. . . . Thus, [the r]espondent waived this argument on appeal.").

Before Mother's appeal, she did not claim she was entitled to accommodations under the Americans with Disabilities Act, nor did she make arguments to that effect. At the trial level, Mother testified traveling is "a lot on her body," but she could "sometimes" travel to Greenville:

> The distance. Because . . . I do have record of what's going on with my slipped disc and my pain. I was supposed to be getting a[n] e-mail from one of my doctors about not going too far, if I could help it. So I just want to make sure I could get the visits in Rocky Mount, since that's where I'm residing. Because a 45-minute ride, plus two hours activity, plus 45 minutes, can be a lot on my body. So that's one of the things that I wanted to make sure I get, is closer visits. I mean, sometimes I could – I'm sorry. Sometimes I could go to Greenville. But I would have to go kind of by how I'm feeling.

Contrary to Mother's contention, the trial court ordered visitation to be conducted at "an agreed location but not limited to the Rocky Mount and Greenville community." In any event, the trial court did not have an opportunity to address Mother's assertion since she argues it for the first time on appeal. *See In re B.C.T.*, 265 N.C. App. at 193, 828 S.E.2d at 61. Accordingly, we decline further review of Mother's contention. *See id.*

C. Chapter 50 Findings

[5] Mother asserts the trial court erred in transferring the Chapter 7B juvenile proceeding to a Chapter 50 custody proceeding since it failed to make the requisite findings of fact under N.C. Gen. Stat. §§ 7B-911(c)(1)–(2) and 50-13.2(a) (2023). Mother maintains the Chapter 50 Order's findings are insufficient, conclusory, and do not speak to the Custodians' physical, financial, or mental fitness. She also contends the trial court's PPR Order makes no finding regarding continued State intervention.

"We review an order's compliance with statutory requirements *de novo*." *In re S.M.L.*, 272 N.C. App. 499, 517, 846 S.E.2d 790, 802 (2020). "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 E.E.*, 294 N.C. App. at 136, 902 S.E.2d at 302 (citations omitted).

"N.C. Gen. Stat. § 7B-911 specifically provides the procedure for transferring a Chapter 7B juvenile proceeding to a Chapter 50 civil action." *McMillan v. McMillan*, 267 N.C. App. 537, 543, 833 S.E.2d 692, 696 (2019) (quoting *Sherrick v. Sherrick*, 209 N.C. App. 166, 169, 704 S.E.2d 314, 317 (2011)). Subsection 7B-911(a) provides, "[u]pon 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 G.S. 50-13.1, 50-13.2, 50-13.5, and 50- 13.7." N.C. Gen. Stat. § 7B-911(a). When entering a civil child custody order under section 7B-911, the trial court must "[m]ake findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes . . . ." *Id.* § 7B-911(c)(1). In addition, a trial court must make the following findings under subsection 7B-911(c)(2)(a)–(b):

> a. There is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.
>
> b. At least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

Id. § 7B-911(c)(2).

Relevant here, N.C. Gen. Stat. § 50-13.2(a) states a trial court "shall award the custody of [a minor child] to such person . . . as will promote the interest and welfare of the child." When making this determination, the trial court must consider and make written findings of all relevant factors:

> [T]he court *shall consider all relevant factors* including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party. *An order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child.*

Id. (emphasis added). "The determination of what will best promote the interest and welfare of the child . . . is a conclusion of law, . . . and this conclusion must be supported by findings of fact as to the characteristics of the parties competing for custody." *Hunt v. Hunt*, 112 N.C. App. 722, 728, 436 S.E.2d 856, 860 (1993) (citation and quotation marks omitted); *see also In re J.D.R.*, 239 N.C. App. at 72, 768 S.E.2d at 178 ("The judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child."). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978); *accord In re J.D.R.*, 239 N.C. App. at 72, 768 S.E.2d at 178; *accord Hunt*, 112 N.C. App. at 728, 436 S.E.2d at 860.

"[A] custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child . . . ." *Dixon v. Dixon*, 67 N.C. App. 73, 76–77, 312 S.E.2d 669, 672 (1984) (citation omitted). Additionally, "custody orders are routinely vacated where the 'findings of fact' consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person." *Id.*

Here, the trial court's Chapter 50 Order contains the following findings of fact:

> [Adam] is 14 years old, and he has been residing with his paternal relatives, Cliff Padilla and Dorothy Council, since on or about February 2, 2024. Mr. Padilla and Ms. Council have been meeting [Adam's] daily and well-being needs since he has come to reside with them, and they are ready, willing, and able to continue to do so. [Adam] reports being happy in this placement, and his needs are being met. [Adam] should continue to remain in this placement at this time.
>
> Mother . . . has a history of mental health illness, which she has not consistently addressed over the past three years. She is currently residing in Rocky Mount, NC at a hotel. [Mother] does not have suitable housing for [Adam], and she has not demonstrated on a consistent basis her ability to provide a safe living environment for [Adam]. For the past three years, [Mother] has not been cooperative in

> working towards reunification with [Adam], and she has only minimally engaged in visitation with [Adam].
>
> . . . .
>
> [Mother's] behaviors and failure to address the concerns that led to [Adam's] remov[al], demonstrate that her conduct is inconsistent with a parent's constitutionally protected status, and she is unfit to parent [Adam] currently. . . .

1. Subsection 7B-911(c)(1)

Mother maintains the following finding is conclusory: "[Adam] reports being happy in this placement, and his needs are being met." Contrary to Mother's urging, we hold this finding is supported by the evidence and complies with N.C. Gen. Stat. §§ 7B-911(c)(1) and 50-13.2(a).

Indeed, the DSS report notes that Adam "communicated to the Department his desires to remain in his current relative placement." At the Final PPR hearing, a social worker from DSS testified to the fact that Adam's needs were being met and he felt comfortable and safe with the Custodians:

> [DSS ATTORNEY]: And how is that placement going?
>
> [SOCIAL WORKER]: It's going well.
>
> [DSS ATTORNEY]: Have you had an opportunity to observe [Adam] in that placement?
>
> [SOCIAL WORKER]: Yes.
>
> [DSS ATTORNEY]: And describe for the Court what you've seen.
>
> [SOCIAL WORKER]: Overall, the caretakers are very committed to [Adam]. [Adam] appears to feel comfortable and safe in that environment. He has his own sleeping space, plenty of storage space, plenty of food, clean environment, very warm and open.

Mr. Padilla corroborated that Adam "ha[s] his own room, his own bed, TV, Internet, [and] phone." Mr. Padilla added that he and Ms. Council were willing to continue Adam's counseling and were "ready, willing, and able to meet [Adam's] needs going forward for as long as necessary." Moreover, the GAL report notes the Custodians cared for Adam's medical and dental needs, including: "establish[ing] [Adam] with

a [medical] provider in Greenville"; scheduling a follow up appointment with the provider in April 2024; and taking Adam to "a dentist in . . . April 2024 for a routine cleaning and exam." Mother's first challenge is therefore overruled.

Mother next contends the trial court's Chapter 50 Order does not comply with N.C. Gen. Stat. §§ 7B-911(c)(1) and 50-13.2(a) since there are no detailed findings about the "physical, financial, or mental fitness" of the Custodians. But nothing in subsection 50-13.2(a) requires the trial to make findings as to these factors. Rather, case law posits that a court *may* make findings as to these factors if they are relevant to the best interest determination and brought out by the evidence. *See Steele*, 36 N.C. App. at 604, 244 S.E.2d at 468 (emphasis added) ("These findings *may* concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child."); *see also In re J.D.R.*, 239 N.C. App. at 72, 768 S.E.2d at 178; *see also Hunt*, 112 N.C. App. at 728, 436 S.E.2d at 860.

In any event, the trial court's Chapter 50 Order contains detailed findings as to several relevant factors in the instant case, including: Mother's history of mental illness; Mother's failure to address her mental health concerns; Mother's lack of suitable housing; Mother's lack of capability in providing a safe living environment for Adam; Mother's failure to make progress in her case plan with DSS to effectuate reunification with Adam; Mother's failure to engage in consistent visitation with Adam; the Custodian's ability and desire to provide for Adam; and Adam's feelings towards his placement with the Custodians. Based on these observations, the trial court concluded: "It is in the best interest of [A]dam . . . for legal and physical custody to be granted to [the Custodians]." *See In re J.D.R.*, 239 N.C. App. at 72, 768 S.E.2d at 178 (holding the trial court rendered sufficient 7B-911(a) findings). The trial court's conclusion—awarding custody to the Custodians—is therefore "supported by findings of fact of the characteristics of the parties competing for custody." *Hunt*, 112 N.C. App. at 728, 436 S.E.2d at 860. Mother's argument here is also overruled.

2. Subsection 7B-911(c)(2)(a)—Continued State Intervention

Mother last submits the orders do not contain adequate findings regarding continued State intervention. *See* N.C. Gen. Stat. § 7B-911(c)(2)(a); *see also In re B.E.*, 296 N.C. App. 364, 372, 909 S.E.2d 505, 511 (2024) (citation omitted) ("To terminate a juvenile proceeding and enter the case to a Chapter 50 proceeding as a civil action, the trial court must make certain findings of fact, including whether '[t]here is

not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.' "). After careful consideration, we disagree.

The trial court made the following ultimate finding in its PPR Order: "There is no longer a need for the Department or the Juvenile Court to remain involved with this family." *Cf. In re J.B.*, 197 N.C. App. 497, 502, 677 S.E.2d 532, 535 (2009) (holding subsection 7B-911(c)(2)(a) was not satisfied since "the court did not find that there was no longer a need for continued State intervention on behalf of [the juvenile]."). The trial court also found:

> [R]easonable efforts towards reunification shall cease, as reasonable efforts by the Department are no longer necessary as the plan of Custody with relatives, Cliff Padilla and Dorothy [ ] Council, has been achieved.
>
> As a result of the findings, conclusions, and orders set forth herein, the Court will terminate the Court's jurisdiction in this Juvenile proceeding. The Court will enter a separate civil custody order with appropriate findings and conclusions of law regarding the custody of [Adam] and said order shall be filed in any pending custody action under Chapter 50. This order will constitute a final order on custody review in this Juvenile case as the Court is also entering, simultaneously with the entry of this order, a separate order with regards to modification of custody in a pending Chapter 50 Civil action or the initiation of a Civil action in custody of [Adam].

Ultimately, the trial court concluded: "The Juvenile case shall be closed, and the jurisdiction of the Juvenile Court terminated, and a separate Chapter 50 order should be entered. All counsel and the Guardian Ad Litem should be released."

Although the trial court did not use the exact language in subsection 7B-911(c)(2)(a), our Court has previously determined that substance prevails over form when determining the need for continued State intervention. *See In re A.S.*, 182 N.C. App. 139, 144, 641 S.E.2d 400, 403–04 (2007) (holding the trial court complied with subsection 7B-911(c)(2)(a) by finding that: regular visitation occurred; the parties communicated sufficiently to arrange their visitation without DSS's assistance; DSS wished to be relieved of further involvement; the parties had suitable homes for visitation and custody of the children; and "[DSS] and . . . GAL involvement is no longer necessary in this matter"); *cf. In re J.D.R.*, 239

N.C. App. at 72, 768 S.E.2d at 178 (distinguishing from *In re A.S.* in that "the disposition order contains no findings from which this Court could infer that the trial court considered the extent to which continued State intervention was necessary.").

As in *In re A.S.*, the trial court's State intervention finding is supported by the record in that: (1) the Custodians "are willing to transport and supervise the Juvenile with [M]other outside in Rocky Mount"; (2) Mother testified her niece would be willing to supervise future visitation with the Custodians when available; (3) the visitation protocol requires Mother to reach out to Custodians for scheduling as opposed to DSS; (4) DSS "reached out to maternal aunt . . . to supervise" the visitation that occurred prior to the final PPR hearing; (5) Mother's virtual visits (once per week) will be conducted without supervision; (6) DSS's court report recommended that DSS, counsel, and the GAL "should be released"; (6) Mr. Padilla testified that he had "no problem with [Adam] visiting with [M]other" and was willing to work with Mother; (7) Mr. Padilla was "fine with other people supervising" Mother's visits; and (8) a DSS social worker testified there was no reason for the court "to stay involved in [Adam's] life after three years." Accordingly, we hold the trial court's State intervention findings satisfied N.C. Gen. Stat. § 7B-911(c)(2)(a). Mother's final argument is overruled.

IV. Conclusion

For the foregoing reasons, we hold the trial court did not err in awarding custody of Adam to the Custodians since it made the requisite verifications under N.C. Gen. Stat. § 7B-906.1(j). We also hold the trial court did not commit error by transferring the Chapter 7B juvenile proceeding to a Chapter 50 custody proceeding since it complied with N.C. Gen. Stat. §§ 7B-911 and 50-13.2. But since the trial court's Chapter 50 Order impermissibly delegated to the Custodians the authority to modify or cease Mother's visitation with Adam, this provision is vacated and remanded to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges GRIFFIN and FREEMAN concur.

IN RE J.B.P.

[299 N.C. App. 640 (2025)]

IN THE MATTER OF J.B.P.

No. COA23-269

Filed 2 July 2025

Search and Seizure—traffic stop—smell of marijuana alone—probable cause—to suspect possession of marijuana rather than legal hemp

In a juvenile delinquency case involving a charge for possession of marijuana with intent to sell or distribute, which stemmed from a traffic stop in which two officers searched the juvenile's vehicle after smelling what they perceived to be marijuana, the trial court erred by granting the juvenile's motion to suppress and subsequently dismissing all charges against him. Specifically, the court incorrectly concluded that the perceived odor of marijuana, without more, could not establish probable cause to suspect that the juvenile's vehicle contained marijuana rather than legal hemp. Although the court based its conclusion on a memo from the State Bureau of Investigation (SBI) arguing that, because hemp and marijuana are so similar, the perceived smell of marijuana would be insufficient to establish probable cause in cases such as these, the SBI's legal interpretations were not controlling, since probable cause determinations are for the courts to make. Moreover, both officers in this case received special training and had extensive field experience not only in identifying marijuana, but also in distinguishing it from legal hemp; thus, based on their training and experience, the officers had a reasonable belief that the juvenile's vehicle contained marijuana.

Appeal by the State from orders entered 7 and 28 October 2022 by Judge Keith B. Mason in Beaufort County District Court. Heard in the Court of Appeals 28 November 2023.

Attorney General Jeff Jackson, by Special Deputy Attorney General Zachary K. Dunn, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt B. Orsbon, for Defendant-Appellee.

CARPENTER, Judge.

The State appeals from two orders: one granting the motion to suppress filed by J.B.P.[1] (the "Juvenile") and another dismissing the charges against the Juvenile. On appeal, the State argues the trial court incorrectly granted the motion to suppress and dismissed the Juvenile's charges due to the erroneous conclusion that officers lacked probable cause to search the Juvenile's vehicle. After careful review, we agree with the State. Accordingly, we vacate in part and reverse and remand in part.

I. Factual & Procedural Background

On 22 September 2022, the Beaufort County Sheriff's Office filed delinquency petitions[2] against the Juvenile in Beaufort County District Court following a traffic stop and search of the Juvenile's vehicle. The petitions alleged the Juvenile was delinquent because he was in possession of marijuana with the intent to sell or distribute and a concealed handgun without a permit. On 3 October 2022, the Juvenile filed a motion to suppress, arguing the evidence obtained from the search of his vehicle violated the Fourth Amendment of the United States Constitution. On 6 October 2022, the trial court conducted a hearing on the matter and the evidence tended to show the following.

On 22 September 2022, Narcotics Investigator Jason Cleary and Lieutenant Russell Davenport, both with the Beaufort County Sheriff's Office, were surveilling a residence suspected to be involved in the distribution of controlled substances. As Lieutenant Davenport drove by the residence, he passed a silver Dodge Charger parked in front of the residence and smelled what he perceived to be the odor of marijuana in the vehicle's vicinity. After running the vehicle's tag, officers determined the vehicle belonged to the Juvenile.

Later that day, after the Juvenile drove away from the residence in his vehicle, Investigator Cleary conducted a traffic stop of the Juvenile's vehicle. When Investigator Cleary approached the vehicle, he smelled what he believed to be marijuana emanating from inside the vehicle. When Investigator Cleary asked the Juvenile to step out of the vehicle,

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1. Initials are used to protect the identity of the Juvenile. *See* N.C. R. App. P. 42(b).

2. "A juvenile petition is the pleading in a juvenile delinquency proceeding" that "must 'contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the allegation.' " *In re J.U.*, 384 N.C. 618, 621, 887 S.E.2d 859, 862 (2023) (quoting N.C. Gen. Stat. § 7B-1802 (2021)).

Investigator Cleary identified what he believed to be marijuana odor on the Juvenile's person. Based on the perceived marijuana odor, officers searched the vehicle and seized marijuana, a digital scale, and a handgun.

Investigator Cleary was employed with the narcotics unit for ten years and had hundreds of field experiences involving contact with marijuana. In addition, through the course of his ten years in the narcotics unit, Investigator Cleary participated in several annual narcotics training conferences and in-service trainings. As part of his training and field experiences, Investigator Cleary was trained on how to identify marijuana. According to Investigator Cleary, marijuana has a "very distinct strong smell" and hemp is "not as pungent and strong as marijuana."

Lieutenant Davenport was employed with the narcotics unit since 1997 and conducted approximately five-thousand narcotics investigations. Lieutenant Davenport also completed marijuana spotter school, and one thousand hours of training on marijuana detection. Furthermore, Lieutenant Davenport had field experience in investigating hemp versus marijuana distribution. According to Lieutenant Davenport, based on his training and experience, he could discern the difference between marijuana and hemp.

The Juvenile, through counsel, argued that marijuana odor emanating from a vehicle is not sufficient to establish probable cause for a search of that vehicle. That same day, the trial court orally granted the Juvenile's motion to suppress. On 28 October 2022, the trial court entered a written order memorializing its oral findings and ruling. In the order, the trial court concluded Investigator Cleary had a reasonable, articulable suspicion that the Juvenile's vehicle was involved in criminal activity, justifying the stop of the vehicle. The trial court, however, concluded "Investigator Cleary did not have probable cause to believe the [v]ehicle was carrying marijuana rather than legal hemp, or any other controlled substance which would have justified a warrantless search of the Juvenile's vehicle."

In reaching these conclusions, the trial court took notice of a State Bureau of Investigation ("SBI") 2019 memo (the "SBI Memo"). The SBI Memo was prepared as legislative guidance arguing against the General Assembly's passage of the Industrial Hemp Act ("IHA"). According to the SBI Memo, an officer's supposed sight or smell of marijuana, by itself, cannot establish probable cause of marijuana possession because marijuana is "indistinguishable" from hemp.

Because the trial court suppressed all the evidence against the Juvenile, the trial court entered an order dismissing the charges against the Juvenile. The State timely appealed from both orders.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. §§ 7B-2602 and 7B-2604 (2023).

III. Issues

The issues are whether the trial court erred by (1) granting the motion to suppress and (2) dismissing the charges against the Juvenile.

IV. Analysis

The State argues the trial court erred by granting the motion to suppress and subsequently dismissing the charges against the Juvenile. Specifically, the State contends the trial court erred by concluding that an officer's purported sight or smell of marijuana does not create probable cause to suspect marijuana possession.[3] We agree with the State.

A. Standard of Review

We review an order granting or denying a motion to suppress to determine "whether the trial court's findings of fact are supported by competent evidence and whether those findings [of fact] support the conclusions of law." *State v. Alvarez*, 385 N.C. 431, 433, 894 S.Ed.2d 737, 739 (2023). We review the trial court's conclusions of law de novo. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). " '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, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

B. Discussion

The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. *State v. Campbell*, 359 N.C. 644, 659, 617 S.E.2d 1, 11 (2005). Generally, searches conducted without a warrant are "per se unreasonable under the Fourth Amendment—subject only to a few specifically established

3. The State does not challenge the trial court's decision to take judicial notice of the SBI Memo, so we will not address that issue.

and well-delineated exceptions." *Katz v. U.S.*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576, 585 (1967) (footnotes omitted). The automobile exception to the warrant requirement applies when there is probable cause to believe that a vehicle contains contraband, such as controlled substances. *See State v. Degraphenreed*, 261 N.C. App. 235, 241, 820 S.E.2d 331, 336 (2018).

Probable cause is "a reasonable ground for belief of guilt," *Brinegar v. U.S.*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879, 1890 (1949), requiring only a reasonable probability of guilt, not absolute proof of guilt, *Illinois v. Gates*, 462 U.S. 213, 243 n.13, 103 S. Ct. 2317, 2335 n.13, 76 L. Ed. 2d 527, 552 n.13 (1983). The probable cause determination does not turn on the innocence or guilt of conduct—but instead on the "degree of suspicion that attaches to" the conduct. *Id.* at 243 n.13, 103 S. Ct. at 2335 n.13, 76 L. Ed. 2d at 552 n.13. " 'Probable cause exists where the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.' " *Degraphenreed*, 261 N.C. App. at 241, 820 S.E.2d at 335 (quoting *State v. Downing*, 169 N.C. App. 790, 795, 613 S.E.2d 35, 39 (2005)) (alteration in original).

Here, the trial court concluded the search of the Juvenile's vehicle violated the Fourth Amendment. In particular, the trial court concluded the officers did not have probable cause to believe the Juvenile's vehicle contained marijuana, as opposed to hemp, based on the odor of marijuana emanating from the vehicle. To reach this determination, the trial court took notice of the SBI Memo. Because of the IHA, the SBI, through the SBI Memo, indicated that police no longer have probable cause to suspect marijuana possession based solely off of the perceived sight or smell of marijuana.

Possession of marijuana is unlawful in North Carolina. *See* N.C. Gen. Stat. §§ 90-94(b)(1), -95(a)(3) (2023). As noted in the SBI Memo, however, the "cultivation, processing, and sale of industrial hemp" is lawful. *State v. Parker*, 277 N.C. App. 531, 539, 860 S.E.2d 21, 28 (2021) (citing N.C. Gen. Stat. § 106-568.50 (2019) (*expired pursuant* to N.C. Sess. Laws 2015-299)). Further, "[h]emp and marijuana look the same and have the same odor, both unburned and burned." *Id.* at 540, 860 S.E.2d at 28.

Parker recognized an issue created by the IHA: Because marijuana and hemp are so similar, does the perceived sight or smell of marijuana, without more, still establish probable cause of marijuana possession for the search of a vehicle? 277 N.C. App. at 541, 860 S.E.2d at 29. *Parker*

did not answer the question because there, officers "had more than just the scent of marijuana to indicate that illegal drugs might be present in the car." *See id.* at 541, 860 S.E.2d at 29.

Here, based on the SBI Memo, the trial court answered *Parker*'s question in the negative. But a prior legal interpretation of an agency—like the SBI—is not controlling or binding. *See State ex rel. Utils. Comm'n v. Pub. Staff-N.C. Utils. Comm'n*, 309 N.C. 195, 211–12, 306 S.E.2d 435, 444–45 (1983). The judicial branch—not the executive or legislative—is the final arbiter of the law. *Id.* at 212, 306 S.E.2d at 445; *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60, 73 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Bayard v. Singleton*, 1 N.C. 5, 6–7, 1 Mart. 48, 49–50 (1787) (establishing the doctrine of judicial review in North Carolina, several years before *Marbury*). Thus, the SBI is not the ultimate arbiter of whether probable cause exists to support a search. *See Marbury*, 5 U.S. (1 Cranch) at 177, 2 L. Ed. at 73. The SBI may, as a matter of policy, instruct its agents not to investigate or charge under the circumstances described in the SBI Memo. The SBI, however, lacks authority to declare that an officer cannot establish probable cause under these circumstances. Notably, SBI decisions cannot bind the courts as probable cause determinations are for the courts to discern.

Moreover, the trial court misapprehended the question that must be answered when determining whether probable cause exists. The question is whether an officer, based on his or her training and experience, had reasonable grounds to believe that the suspect possessed marijuana. The question is not whether an officer can discern the difference between illegal marijuana or legal hemp, but rather, based on training and experience, whether the officer reasonably believes he or she smells marijuana. In this case, the trial court erred by granting the motion to suppress based on the SBI Memo's probable-cause analysis because the search of the Juvenile's vehicle did not violate the Fourth Amendment.

In *State v. Reel*, this Court considered whether the "plain smell" of marijuana was sufficient to establish probable cause for a search. 297 N.C. App. 205, 214, 910 S.E.2d 307, 315 (2024). Because the officer who identified the marijuana odor in *Reel* worked on hundreds of narcotics investigations and was experienced in identifying marijuana by smell, this Court concluded that the mere marijuana odor emanating from a residence was enough to create probable cause for a search. *Id.*, 910 S.E.2d at 315.

Similarly, in *State v. Beaver*, this Court considered whether an officer's observation of "only a shot glass containing a film of white substance appearing to be some type of white powder" was enough for the basis of a probable cause determination and search. 37 N.C. App. 513, 517–18, 246 S.E.2d 535, 538–39 (1978). The officer believed that the shot glass might have contained narcotics. *Id.* at 517–18, 246 S.E.2d at 538–39. But the officer

> did not testify that, by virtue of his training as a law enforcement officer or his familiarity with controlled substances and those using them in his community, he had any particular reason to know that shot glasses or other types of glasses were commonly used in connection with the use or sale of narcotics in such manner as to leave a similar white film residue.

Id. at 518, 246 S.E.2d at 539.

Because the officer in *Beaver* did not possess special training or experience in narcotics that could have made the officer's belief that the shot glass contained narcotics reasonable, we concluded probable cause did not exist. *Id.* at 517–19, 246 S.E.2d at 538–40. Specifically, we noted that "[a] good faith belief is not enough to constitute probable cause, unless the 'faith is grounded on facts within knowledge of the (officer) which, in the judgment of the court, would make his faith reasonable.' " *Id.* at 518, 246 S.E.2d at 539 (quoting *Carroll v. U.S.*, 267 U.S. 132, 161–62, 45 S. Ct. 280, 288, 69 L. Ed. 543, 555 (1925) (alteration in original)).

Here, Lieutenant Davenport, based on his training and extensive experience, smelled what he believed to be marijuana emanating from the Juvenile's vehicle as he drove past the vehicle. Next, after lawfully stopping the vehicle, Investigator Cleary smelled what he believed to be the odor of marijuana emanating from inside the vehicle. After asking the Juvenile to step out of the vehicle, Investigator Cleary also smelled marijuana on the Juvenile's person and observed what he believed to be bits of marijuana on the floor of the vehicle. Like the officer in *Reel*, Lieutenant Davenport and Investigator Cleary received special narcotics training and had numerous field experiences in identifying marijuana based on odor and physical appearance.

Therefore, the officers' belief that they smelled marijuana odor from the vehicle based on their training and experience created a reasonable probability that the vehicle contained marijuana. *See Beaver*, 37 N.C. App. at 517–18, 246 S.E.2d at 538–39; *Reel*, 297 N.C. App. at 214, 910

S.E.2d at 315. Accordingly, officers had probable cause to believe the vehicle contained marijuana. *See Beaver*, 37 N.C. App. at 517–18, 246 S.E.2d at 538–39; *Reel*, 297 N.C. App. at 214, 910 S.E.2d at 315.

In the context of a motion to suppress, it is immaterial whether the Juvenile actually possessed an illegal substance. Indeed, the only requirement under the Fourth Amendment is that officers develop probable cause to believe the area being searched contained contraband, such as an illegal substance. *See Gates*, 462 U.S. at 243 n.13, 103 S. Ct. at 2335 n.13, 76 L. Ed. 2d at 552 n.13. Thus, because probable cause does not turn on actual innocence or guilt, it does not follow that the possibility of confusing marijuana with hemp prevents the existence of probable cause of marijuana possession. *See id.* at 243 n.13, 103 S. Ct. at 2335 n.13, 76 L. Ed. 2d at 552 n.13 (stating that "innocent behavior frequently will provide the basis for a showing of probable cause"). Accordingly, the warrantless search of the Juvenile's vehicle complied with the Fourth Amendment because officers had probable cause to believe the vehicle contained marijuana. *See Degraphenreed*, 261 N.C. App. at 241, 820 S.E.2d at 336.

V. Conclusion

The trial court erred by granting the motion to suppress and dismissing the charges against the Juvenile. Contrary to the trial court's conclusion, an officer's sight or smell of what he or she reasonably believes to be marijuana, based on his or her training or experience, may create probable cause of marijuana possession. Accordingly, we reverse the trial court's orders.

VACATED in part; REVERSED AND REMANDED in part.

Judges COLLINS and WOOD concur.

IN RE T.C. & L.B.C.

No. COA25-71

Filed 2 July 2025

Child Abuse, Dependency, and Neglect—stipulation—signed by only one respondent and objected to by the other—sole basis for adjudication—vacated and remanded

In an abuse and neglect proceeding concerning two children, the district court erred in basing its adjudication solely on a stipulation to twenty-three allegations—largely concerning conduct by the mother—that was not signed by the mother or her counsel, but rather was signed only by the father and his counsel, and, moreover, that was accepted over the mother's specific objection and despite her request that the court hold a hearing on the merits of the petitions. A stipulation by one respondent-parent may not bind or be used against another respondent-parent who was not a party to the stipulation and who objected to its use. Absent the findings of fact derived from stipulations concerning the mother's conduct, the district court's conclusion of law that the juveniles were abused and neglected was unsupported, and, accordingly, the adjudication and disposition orders were vacated and the matter was remanded for a new adjudicatory hearing.

Appeal by Respondent-Mother from orders entered 23 March 2023 by Judge Beth Tanner and 27 August 2024 by Judge Warren M. McSweeney in Moore County District Court. Heard in the Court of Appeals 11 June 2025.

Sharlene Gilmer Anderson for Petitioner-Appellee Moore County Department of Social Services.

Parker, Poe, Adams & Bernstein LLP, by R. Bruce Thompson II, for Guardian ad Litem.

Nathalie M. Doran for Respondent-Appellee Father.

Garron T. Michael, Esq., for Respondent-Appellant Mother.

COLLINS, Judge.

Mother appeals from an order adjudicating her minor children abused and neglected and from a disposition order granting Father sole physical and legal custody of their minor children. Mother argues that the trial court erred in adjudicating the minor children abused and neglected by relying entirely on a stipulation to which Mother did not agree and to which Mother specifically objected, and by refusing to conduct a hearing on the merits despite Mother's request. We vacate the orders and remand the matter to the trial court.

I. Background

Mother and Father are the biological parents of two minor children: Tyler, born in 2017, and Lauren, born in 2015.[1] On 11 January 2023, the Moore County Department of Social Services ("DSS") filed juvenile petitions alleging that the two children were abused and neglected. Based on the petitions, DSS obtained nonsecure custody of the children and placed them in a kinship placement with their maternal grandfather and step-grandmother, with whom Father was also living.

The petitions came on for a hearing on 2 March 2023; Mother, Mother's attorney, Father, Father's attorney, DSS, and the guardian ad litem ("GAL") were all present at the hearing. The hearing, which encompassed both a pre-adjudication hearing and an adjudication hearing, lasted fifteen minutes, from 12:55 p.m. to 1:10 p.m.; the transcript of the hearing spans fifteen pages. At the outset, DSS introduced a pre-adjudication order that was consented to by all parties, and the trial court found that there were no pre-trial motions pending.

The matter moved to adjudication, and DSS told the trial court it had a "signed stipulation" signed by Father, Father's attorney, DSS, and the GAL. The stipulation stated, in part,

> The signatory respondent parents, with assistance of counsel, enter into this stipulation upon personal knowledge or upon information and belief, and while neither admitting nor denying the specific allegations of the petition, stipulate the following facts on the date of the filing of the petition upon which the Court could determine by clear, cogent and convincing evidence the status of the juveniles [Lauren] and [Tyler] as defined under N.C.G.S. § 7B-101.

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1. We use pseudonyms to protect the identity of the minor children. *See* N.C. R. App. P. 42.

(Italics omitted). The stipulation listed twenty-three allegations, a vast majority of which concerned Mother's alleged conduct giving rise to the petitions. Despite the assertion that "respondent parents" had entered in the stipulation, DSS admitted that neither Mother nor Mother's attorney had signed the stipulation.

The following exchange then occurred regarding the trial court's acceptance of the stipulation that Mother had not agreed to as a basis for an adjudication:

> [DSS]: Your Honor, it is up to the [c]ourt as to whether that is sufficient evidence. 807 says, "A record of stipulated adjudicatory facts shall be made by either reducing the facts to writing, signed by each party stipulating to them; or by reading the facts into the record. If the [c]ourt finds that the allegations have not been proven," et cetera, et cetera.
>
> But, generally, the practice is if -- we can put evidence on Your Honor; however, if we are going to put evidence on, we would need to continue the matter.
>
> THE COURT: Well, I mean, I think -- I'm sorry. And somebody can correct me about this, if I'm wrong. But I think the trouble is these stipulations would be fine, except they haven't been stipulated to by all the parties.
>
> [DSS]: All the parties do not have to stipulate. There is case law on that.
>
> THE COURT: Okay.
>
> [DSS]: As long as one parent stipulates, they can be accepted by the [c]ourt. And I should amend that. One parent who is familiar with the facts, right? If Dad wasn't a party to those facts, then that would be a problem. If he was incarcerated and hadn't been around, had no personal knowledge of them --
>
> THE COURT: Okay.
>
> [DSS]: -- that would be problematic.
>
> THE COURT: Okay. So [DSS] is asking that I accept these adjudication stipulations based upon a case that says that adjudication stipulation only has to be adjudicated -- or stipulated to between [DSS] and at least one other party with knowledge.

> [DSS]: It's also in the code.
>
> THE COURT: Okay. And the party with knowledge is the father and he has stipulated to these, and you would like for me to accept those. Do you want to be heard as to that, [Mother's attorney]?

Mother's attorney objected to the use of the stipulation and requested that the trial court hold a hearing on the merits:

> [Mother's attorney]: I would just like to note my objection to this. I think that, once you read these allegations and facts, it should be obvious to the [c]ourt as to why we have refused here to stipulate.
>
> My client desperately wants her children back and would like the opportunity to be heard to -- as to when she can have her children back at the soonest possible time. I realize that that is not going to be today, given the way things are going. But this is very hard for her at this time.
>
> . . . .
>
> So, I mean, my client came today hoping that we could convince the [c]ourt to be heard on the entire merits of the case. I do believe that it would probably take the entire lunch break, the rest of the day, and probably part of the day tomorrow to do that. And that is if we have all the evidence available to us, the -- that we would each need.

DSS responded that the stipulation was sufficient to prove the facts for adjudication, but if the trial court did not believe so, it requested a continuance:

> [DSS]: And, Your Honor, I will say that we do not have that evidence in under -- and I would be -- if you're not inclined to accept the stipulation, under 803, I do believe we have good cause for a continuance as it is reasonably required to receive additional evidence, reports, or assessments needed.
>
> . . . So we are unable at this time to go forward on any hearing as to -- definitely as to disposition.
>
> However, if the [c]ourt is inclined to take the stipulation as to adjudication, I believe we have stipulated facts in there in order to prove that. But we would be happy to

> put on evidence in a hearing. It would just have to be at a later date.

Following this exchange, Father's attorney told the trial court, "we do accept these stipulations and hope that the [c]ourt will as well." Father's attorney also clarified that Father did not have personal knowledge of the content of the stipulations stating what DSS found during its investigations. The GAL then told the trial court that "as long as [Father] knows that those are factual allegations, he can stipulate to those, even if [Mother] does not."

The trial court said, "[g]ive me just a second" and read the stipulation, after which the trial court accepted the stipulation and determined that it was clear, cogent, and convincing evidence of abuse and neglect:

> THE COURT: Okay. After having heard the argument of counsel and reviewing the adjudication stipulations, I will accept these at this time, noting the objection of [Mother] and her attorney[.]
>
> . . . .
>
> THE COURT: Hold on. Before we get to the disposition, let me just make sure I've been clear. Having accepted the adjudication stipulation, I presume now you would like for me to find that it was determined by clear, cogent, and convincing evidence that the children are abused, neglected, and dependent?
>
> Is that correct?
>
> [DSS]: Yes. Thank you, Your Honor.
>
> THE COURT: You'd like for me to find that now, and then you would like to continue the disposition?
>
> [DSS]: That's correct, Your Honor.
>
> THE COURT: Okay.
>
> [GAL]: I don't think dependency was alleged for all the children. Perhaps not.
>
> [DSS]: It was –
>
> [GAL]: I just looked at one and didn't see that dependency part[.]
>
> [DSS]: I think – I think that's correct. Dependency has not been alleged.

> [GAL]: Just wanted to --
>
> THE COURT: I'm sorry. Can somebody -- is that on here? But formally with --
>
> [DSS]: Look at the petitions.
>
> THE COURT: You are correct. I apologize. That was the [c]ourt's mistake. [DSS] has not requested that they be found dependent, only that they be found abused and neglected. Based on that and because, of course, there would've been no notice of a finding -- or a request to find dependent, I will only find the juveniles abused and neglected.

After adjudicating Tyler and Lauren abused and neglected based solely on the stipulation, the trial court continued their non-secure custody with DSS, discussed potential disposition hearing dates with the attorneys, and concluded the adjudication hearing. The trial court entered its written adjudication order on 23 March 2023. In its order, the trial court noted Mother's objection to the stipulation, but its findings of fact in support of the adjudication were based solely on that stipulation and were essentially verbatim recitations of the facts alleged in the stipulation. The matter moved to disposition.

Prior to the disposition hearing, Mother retained new counsel, who filed a motion to "[m]odify the placement and/or visitation of [Tyler] to allow maximum contact with [Mother] . . . ." Mother asserted that the modification would be in Tyler's best interest, and she stated that there had "not been an evidentiary hearing on this issue and [Tyler] was removed from [her] custody [on] January 11, 2023 . . . ." The trial court held a hearing on Mother's motion on 8 June 2023 and found that Mother "has been cooperating with []DSS" and "has complied with the case plan as currently constituted," but that DSS was "waiting on further recommendations from the children's medical records review" and for the results from Mother's "parental capacity and psychological evaluation." The trial court determined that it was contrary to both Tyler's and Lauren's best interest to return custody to Mother, but it determined that supervised visitation with Mother was in their best interest. The trial court granted Mother two hours of supervised visitation each week and two fifteen-minute phone calls each week. The issue of visitation was again heard on 10 August 2023, and the trial court granted Mother four hours of supervised visitation each week.

The disposition hearing began on 26 October 2023. At the beginning of the hearing, Mother's attorney raised concerns about the adjudication

hearing and the trial court's reliance on the stipulations that Mother did not sign or agree to, and she moved to dismiss the matter "for lack of subject matter jurisdiction . . . based on the improper adjudication or the fact that the adjudication was not done in keeping with the statute and specifically the statute § 7B-807, which sets out adjudication." The trial court denied Mother's motion to dismiss and began hearing evidence. The disposition hearing took place on four different court dates, spanning a period of six months, and concluded on 4 April 2024.

In its written dispositional order, entered on 27 August 2024, the trial court found that Tyler and Lauren had been adjudicated abused and neglected juveniles and that DSS's efforts were reasonable to achieve the primary plan of family reunification. The trial court granted Father "sole physical and legal custody of the juveniles," reduced Mother's visitation to four hours of supervised visitation every other weekend, and granted Mother "reasonable telephonic access to the minor child[ren]" but gave Father "the discretion to terminate a phone call if he feels the communication is not in the best interests of the minor children." The trial court then converted the matter into a Chapter 50 custody order and terminated its jurisdiction, stating that "any further proceedings. . . shall occur in the Chapter 50 civil custody proceeding established herein."

Mother timely filed notice of appeal from the adjudication and disposition orders on 24 September 2024.

II. Discussion

Mother argues that the trial court erred by adjudicating Tyler and Lauren abused and neglected "where it relied entirely on a stipulation that Mother did not agree to, specifically objected to, and refused to conduct a hearing on the merits despite a clear request by Mother's counsel[.]"

A. Preservation

DSS argues that Mother's issue on appeal regarding the stipulation is not properly before this Court because, "while [Mother] did 'object' to the stipulations, the exact objection and grounds for the objection are not clear in the transcript or the order." DSS further claims that, "[a]t no point in time does [Mother] clearly or specifically object to the facts contained in the stipulation, the use of the stipulation . . . , or competency of the stipulated facts for the adjudication of abuse and neglect." DSS thus argues that Mother "did not preserve the precise issue for appellate review." DSS's arguments are entirely unsupported and border on frivolous.

The transcript of the adjudicatory hearing and the adjudication order clearly show that the precise issue on appeal was properly preserved. The following exchange took place at the adjudicatory hearing:

> THE COURT: Well, I mean, I think -- I'm sorry. And somebody can correct me about this, if I'm wrong. But I think the trouble is these stipulations would be fine, except they haven't been stipulated to by all the parties.
>
> [DSS]: All the parties do not have to stipulate. There is case law on that.
>
> THE COURT: Okay.
>
> [DSS]: As long as one parent stipulates, they can be accepted by the [c]ourt. And I should amend that. One parent who is familiar with the facts, right? If Dad wasn't a party to those facts, then that would be a problem. If he was incarcerated and hadn't been around, had no personal knowledge of them --
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> THE COURT: Okay.
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> [DSS]: -- that would be problematic.
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> THE COURT: Okay. So [DSS] is asking that I accept these adjudication stipulations based upon a case that says that adjudication stipulation only has to be adjudicated -- or stipulated to between [DSS] and at least one other party with knowledge.
>
> [DSS]: It's also in the code.
>
> THE COURT: Okay. And the party with knowledge is the father and he has stipulated to these, and you would like for me to accept those. Do you want to be heard as to that, [Mother's attorney]?
>
> [Mother's attorney]: I would just like to note my objection to this. I think that, once you read these allegations and facts, it should be obvious to the [c]ourt as to why we have refused here to stipulate.
>
> . . . .
>
> So, I mean, my client came today hoping that we could convince the [c]ourt to be heard on the entire merits of the case. I do believe that it would probably take the entire

> lunch break, the rest of the day, and probably part of the day tomorrow to do that. And that is if we have all the evidence available to us, the -- that we would each need.

The content and context of this exchange show that Mother and her attorney clearly and specifically objected to the use of the stipulation at the adjudicatory hearing and that Mother wanted to put on evidence and be heard on the "entire merits" of the case.

Moreover, the trial court found as fact in the adjudication order that Mother's "attorney . . . made an objection to the stipulation as his client did not sign or enter into the stipulation" and that the "objection was overruled, and the Court accepted the stipulation." The issue regarding the stipulation is properly preserved for our review, and DSS's assertion to the contrary is unavailing and not appreciated.

B. Standard of Review

A juvenile abuse and neglect proceeding involves two separate phases: an adjudicatory phase and a dispositional phase. *See* N.C. Gen. Stat. §§ 7B-807, 7B-901 (2023). We review a trial court's adjudication to determine whether the trial court's findings of fact are supported "by clear and convincing evidence." N.C. Gen. Stat. § 7B-805 (2023); *In re J.A.M.*, 372 N.C. 1, 8 (2019) (citations omitted). In turn, "the trial court's findings" must properly "support the trial court's conclusion[s] of law." *Id.* at 9. The determination that a child is abused or neglected is a conclusion of law, which this Court reviews de novo. *In re G.C.*, 384 N.C. 62, 66 (2023) (citations omitted). Under de novo review, we consider the matter anew and "freely substitute" our own judgment for that of the trial court. *Id.* (citation omitted). If the petitioner meets its burden during the adjudicatory phase, the trial court proceeds to the dispositional phase, where it must consider the child's best interest. *In re A.J.L.H.*, 386 N.C. 305, 310 (2024). We review the trial court's determination as to the best interest of the child "solely for abuse of discretion." *Id.* (citations omitted).

C. Stipulations

N.C. Gen. Stat. § 7B-807 "allows factual stipulations made by a party to be used in support of an adjudication." *In re R.L.G.*, 260 N.C. App. 70, 73 (2018) (citation omitted). N.C. Gen. Stat. § 7B-807(a) provides, "If the court finds from the evidence, including stipulations by a party, that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state." N.C. Gen. Stat. § 7B-807(a). The statute further provides, "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.*

"Despite the contemplation of 'stipulations by a party' in the statute, our caselaw has made clear that stipulations do not extend beyond what was agreed to by those stipulating." *In re E.P.-L.M.*, 272 N.C. App. 585, 605 (2020) (Murphy, J., concurring) (citing *Rickert v. Rickert*, 282 N.C. 373, 380 (1972)). "Stipulations do not extend beyond what was agreed to, and do not extend to parties who did not agree to them either." *Id.*; *see Lumber Co. v. Lumber Co.*, 137 N.C. 431, 438-39 (1905) ("Parties undoubtedly have the right to make agreements and admissions in the course of judicial proceedings . . . [but] the court will not extend the operation of the agreement beyond the limits set by the parties or by the law."); *Rickert*, 282 N.C. at 380 (stating that stipulations "will not be so construed as to give the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished") (citations omitted).

"A stipulation is a judicial admission. As such, [i]t is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of producing evidence to establish the admitted fact." *Moore v. Humphrey*, 247 N.C. 423, 430 (1958) (quotation marks and citation omitted). Accordingly, a stipulation by one respondent parent may not bind another respondent parent who was not a party to the stipulation and objects to its use. *See In re E.P.-L.M.*, 272 N.C. App. at 605.

Here, the only evidence offered at the adjudication hearing to prove the allegations in the juvenile petitions was the stipulation. The stipulation's sole purpose was to prove Mother's alleged conduct which constituted the abuse and neglect of the juveniles. Mother did not agree to the stipulation. Neither Mother nor Mother's attorney signed the stipulation. Mother's attorney clearly and specifically objected to the trial court accepting the stipulation as evidence of the juveniles' adjudication. DSS specifically informed the trial court that the juveniles could be adjudicated abused and neglected based on a stipulation not signed by all the parties. While the stipulation could have supported allegations of Father's conduct, the stipulation could not and did not extend to Mother, who did not agree to it. *See id.*; *Lumber*, 137 N.C. at 438-39; *Rickert*, 282 N.C. at 380.

The findings of fact in support of the juveniles' adjudication track the "stipulated" facts concerning Mother's conduct in the stipulation. As the stipulation was not competent to establish those facts, and the trial

court received no other evidence at the adjudication hearing, the trial court's findings of fact are not supported "by clear and convincing evidence." N.C. Gen. Stat. § 7B-805. As a result, the trial court's conclusions of law that the juveniles are abused and neglected are not supported. *In re G.C.*, 384 N.C. at 66. The trial court thus erred by adjudicating the children abused and neglected.

The GAL, DSS, and Father all cite *In re E.P.-L.M.* for the proposition that North Carolina law allows for the use of a stipulation signed by only one parent who has personal knowledge of the facts. This misrepresents the procedural history and facts of that case. While the stipulation here could have supported allegations of Father's conduct, the holding in *In re E.P.-L.M.* does not support any of the arguments made by the GAL, DSS, or Father at trial or on appeal, and the prescient concurring opinion explains why these parties' arguments are wrong.

In *In re E.P.-L.M.*, DSS filed a juvenile petition alleging the minor child was abused, neglected, and dependent. 272 N.C. App. at 588. The trial court held a hearing on DSS's petition with all parties present and represented by counsel. "DSS, the GAL, and Father tendered stipulations to the trial court concerning [m]other's alleged conduct giving rise to the petition; [m]other, however, did not sign the stipulations." *Id.* "DSS and the GAL both argued that the stipulations could be used to establish [m]other's conduct even absent her agreement to them." *Id.* "As discussion continued, DSS argued to the court that the stipulations could—without more—be used to meet its burden." *Id.* at 589. Mother did not "object to the stipulations or argue that they could not be used to establish her conduct[.]" *Id.*

"The trial court ultimately accepted the stipulations as 'between three out of the four parties as to the facts in the stipulations.' " *Id.* (brackets omitted). The trial court adjudicated the child abused, neglected, and dependent in open court, stating: "All right, on the adjudication then, this order is based on the stipulated facts between DSS, the GAL, and Father, the evidence presented by DSS, and the evidence presented by [m]other, and the arguments of all four counsel." *Id.* at 590 (brackets omitted). The trial court entered a written order adjudicating the child abused, neglected, and dependent, "based upon the stipulated facts, the evidence presented, testimony of [m]other, and arguments of counsel." *Id.* at 591 (brackets omitted).

The mother argued on appeal that the stipulations were not admissible in evidence. *Id.* This Court concluded that mother had failed to preserve her argument for appellate review by failing to object to the

admission of the stipulations into evidence. *Id.* at 592. Mother also argued that the trial court's adjudication order was not supported by sufficient evidence. *Id.* This Court "h[e]ld that the trial court's unchallenged findings of fact were sufficient to support the trial court's adjudication [order]." *Id.* at 594.

The concurring opinion agreed that mother had failed to preserve her argument about the stipulation for review but wrote separately to reject the GAL's and DSS's arguments that, had the issue been preserved, the trial court's use of the "stipulation" against mother was appropriate. *Id.* at 605. It stated, "The GAL suggests that a party who did not agree to a stipulation may be bound by the content of the stipulation. This is not the law, this has never been the law, and this should never be the law in an adversarial system." *Id.* It further explained:

> Stipulations are not evidence of anything against a party beyond what is stipulated to by that party. As our Supreme Court stated [in *Rickert*], even if a stipulation could fully establish a claim on its own, it still would not entitle a party to relief on that claim when the stipulation was not intended to extend to the claim. This further demonstrates that a stipulation is not evidence to the extent there is not agreement to its terms. . . . If a stipulation is not evidence beyond the extent of the parties agreed-upon terms, it cannot be evidence against a party who does not agree to it. If this were not true, it would make the requirement "that the parties or those representing them assent to the stipulation" pointless, as in any action with three or more parties, two parties could enter a stipulation only about the other party, as happened here, that would be included in evidence against all other parties despite the other parties not agreeing to the stipulation. . . . Using the "stipulation" here as evidence against Mother despite her not being a party to it was improper, and the trial court erred in considering the "stipulation" as evidence against her.

Id. at 607-08 (citations omitted).

While a concurring opinion may not be binding, it is surely instructive, and we adopt its reasoning. For the reasons explained in the concurring opinion and stated here in this present opinion, "[u]sing the 'stipulation' here as evidence against Mother despite her not being a party to it was improper, and the trial court erred in considering the 'stipulation' as evidence against her." *Id.* at 608.

III. Conclusion

Because the trial court's findings of fact are not supported by clear and convincing evidence, the findings of fact fail to support the trial court's conclusion of law that Tyler and Lauren were abused and neglected. We vacate the adjudication and disposition orders, and we remand the matter to the trial court for an adjudicatory hearing in which the parties shall have the opportunity to provide evidence regarding the allegations of abuse and neglect contained in the petitions.

VACATED AND REMANDED.

Judges TYSON and ZACHARY concur.

VICKIE LYNN JONES, PLAINTIFF
v.
LESTER GREGORY JONES (ADMINISTRATOR), FULTON JONES, CATHERINE ELLER, DILLARD WAYNE JONES, PATRICIA BOONE, AND RONNIE (MATT) JONES, DEFENDANTS

No. COA24-544

Filed 2 July 2025

Husband and Wife—separation agreement—validity—reconciliation—no written modification—rescission not required

In an action initiated by plaintiff after her husband died intestate in which plaintiff sought to have their separation agreement, which also contained property settlement provisions, declared void, the trial court's determination that the agreement remained in effect was supported by competent evidence. Even assuming that plaintiff and her husband had reconciled after signing the agreement—about which conflicting evidence was presented—any reconciliation did not operate as a revocation of the agreement because plaintiff and decedent never revoked or modified the agreement in writing as required by the agreement's terms. Plaintiff failed to show that missed payments by her husband pursuant to the agreement constituted a material breach for which rescission was required, since legal remedies were available to compensate her for her loss. Finally, there was no merit to plaintiff's contention that a loan modification executed by her and her husband (modifying the terms of a deed of trust) constituted a modification of the separation agreement,

where the two documents were entirely separate in subject matter and intentions.

Appeal by plaintiff from order entered 12 October 2023 by Judge Robert J. Crumpton in District Court, Ashe County. Heard in the Court of Appeals 5 November 2024.

Epperson Law Group, PLLC, by Lauren E. R. Watkins, for plaintiff-appellant.

Anné C. Wright for defendants-appellees.

STROUD, Judge.

Plaintiff appeals the trial court's order denying her claim raised in a complaint filed in District Court requesting that the District Court rule on the existence of a separation agreement as stated in her attached "Petition to declare separation agreement void[;] remove the administrator, Lester Gregory Jone[s], and appoint Vickie Lynn Jones as administrator." (Capitalization altered.) Plaintiff contends the trial court "erred by holding that the separation agreement entered into by Plaintiff[ ] and the decedent was valid" and "by holding that . . . Plaintiff[ ] and the decedent never modified their separation agreement in writing." In the separation agreement, Plaintiff and the decedent agreed that if they reconciled, "the terms of this agreement will remain in effect unless the parties revoke it in writing." Plaintiff and the decedent never revoked or modified the agreement in writing, so the trial court did not err by entering a declaratory judgment that the agreement is valid. We affirm the trial court's order.

I. Background

Harold Jones ("Decedent") and Plaintiff were married on 28 June 2002. Plaintiff and Decedent separated in April 2018. On 3 April 2018, Plaintiff and Decedent entered into a written separation agreement ("the Agreement"). Relevant portions of the Agreement state:

> 20. This agreement contains the entire agreement between the parties about their relationship with each other. It replaces any earlier written or oral agreement between the parties.
>
> 21. Should any portion of this agreement be held by a court of law to be invalid, unenforceable, or void, such

> holding will not have the effect of invalidating or voiding the remainder of this agreement, and the parties agree that the portion so held to be invalid, unenforceable, or void will be deemed amended, reduced in scope, or otherwise stricken only to the extent required for purposes of validity and enforcement in the jurisdiction of such holding.
>
> 22. The parties may only amend this agreement in writing after the parties have obtained legal advice on the changes.
>
> . . . .
>
> 28. This agreement will be binding upon and will enure to the benefit of the parties, their respective heirs, executors, administrators, and assigns.
>
> 29. If the parties reconcile the terms of this agreement will remain in effect unless the parties revoke it in writing.
>
> 30. This agreement may only be terminated or amended by the parties in writing signed by both of them.

On or about 20 July 2021, Decedent died intestate. On 26 July 2021, Lester Gregory Jones, one of Decedent's siblings, applied to be appointed as Administrator of Decedent's estate and he was appointed as Administrator of the estate. On 17 February 2023, Plaintiff filed a Petition in the estate matter, File 22 E 323, entitled "Petition to declare separation agreement void[;] remove the administrator, Lester Gregory Jone[s], and appoint [Plaintiff] as administrator." On the same day, Plaintiff also filed a complaint in the District Court, Ashe County, against the Administrator and Decedent's other heirs requesting that the District Court declare the Agreement void, or in the alternative, that Plaintiff recover the monies owed to her under the Agreement, since the Clerk "could only hear and determine if the Administrator should be removed and not the underlying matters that would be necessary to make that determination" and "the attorneys for all parties agreed that it would be in the best interests of all concerned and the most cost efficient for the matters raised in the Petition, excepting the removal of the Administrator, be heard in District Court[.]"

The complaint alleged that Plaintiff, as Decedent's wife, should be named Administrator of Decedent's estate as the Agreement "had been rendered null and void and was no longer of any force and effect" when Plaintiff and Decedent reconciled after execution of the Agreement. In support of her argument that she and Decedent had reconciled, Plaintiff

alleged "it was public knowledge that . . . [Plaintiff] and Decedent had reconciled their relationship and were living together as husband and wife" and identified a document in which Decedent identified Plaintiff as "wife," among other reasons. Plaintiff also argued Plaintiff and Decedent "executed a Mortgage Modification Agreement" in 2021 which was written, signed, and executed with the requisite formalities under North Carolina General Statute Section 52-10.1. Plaintiff argued this document "is clear evidence that the parties waived the provisions of the previously executed" Agreement.

Defendants filed "Motions to Dismiss, Answer, and Counterclaim" on 3 March 2023. The motions to dismiss were under Rule 12(b)(6) and North Carolina General Statute Section 6-21.5 for failing to allege a justiciable issue; the answer admitted some allegations but denied Plaintiff's allegations regarding reconciliation or modification of the Agreement. Defendants made a counterclaim for a declaratory judgment under North Carolina General Statute Section 1-253 seeking to enforce the Agreement, which granted sole ownership of the real property owned by Plaintiff and Decedent to Decedent and waived Plaintiff's inheritance rights as a surviving spouse and her right to administer Decedent's estate.

The matter was heard on 9 October 2023. On 12 October 2023, the trial court entered an order under the Declaratory Judgment Act, North Carolina General Statute Section 1-253, and North Carolina General Statute Section 7A-242. The order included findings of fact regarding Plaintiff's and Decedent's marriage, separation, the relevant provisions of the Agreement, and other matters. The trial court found that even if Plaintiff and Decedent had reconciled, "there was no written modification of" the Agreement and that the execution of a loan document was "not a modification of the [A]greement[.]" The trial court concluded as follows:

> 1. The . . . [A]greement entered into evidence as Plaintiff's exhibit 1 is and remains the . . . [A]greement between . . . Plaintiff and Decedent.
>
> 2. This matter shall be remanded to the Ashe County Clerk of Superior Court to rule on . . . Defendants' Rule 70 motion and all other proceedings.

On 13 November 2023, Plaintiff timely filed written notice of appeal of the order.

II. Jurisdiction of the District Court

We first note under North Carolina General Statute Section 28A-2-4, "[t]he clerks of superior court of this State, as ex officio judges of probate, shall have original jurisdiction of estate proceedings. Except as provided in subdivision (4) of this subsection, the jurisdiction of the clerk of superior court is exclusive." N.C. Gen. Stat. § 28A-2-4 (2023). But under North Carolina General Statute Section 7A-244,

> [t]he district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody *and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof.*

N.C. Gen. Stat. § 7A-244 (2023) (emphasis added). The complaint filed in the district court division was solely

> for an [o]rder declaring the . . . Agreement between . . . [D]ecedent and . . . Plaintiff be declared void, in whole or in part and[/]or the recovery of monies owed to Plaintiff pursuant to said agreement and the return of her separate property and not part of the Estate of her deceased husband.

The removal and appointment of the Administrator of the estate was specifically excluded from the complaint filed in District Court. Defendants' counterclaim sought a declaratory judgment, and the trial court entered a declaratory judgment as to the validity of the Agreement. Thus, jurisdiction was proper in the District Court under North Carolina General Statute Sections 7A-244 and 1-253. *See id.*; *see also* N.C. Gen. Stat. § 1-253 (2023). We note only the issue involving the validity of the Agreement was properly before the District Court and this is the only issue on appeal.

III. Validity of the Agreement

Plaintiff contends (1) "the trial court erred by holding that the . . . [A]greement entered into by Plaintiff[ ] and . . . Decedent was valid" and (2) "the trial court erred by holding that . . . Plaintiff[ ] and . . . Decedent never modified their . . . [A]greement in writing." (Capitalization altered.) We disagree.

"The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial

court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *In re Archibald*, 183 N.C. App. 274, 276, 644 S.E.2d 264, 266 (2007) (citations and quotation marks omitted).

> Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the interpretation of contracts generally. Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution.
>
> The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time. When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning.

Lane v. Scarborough, 284 N.C. 407, 409-10, 200 S.E.2d 622, 624 (1973) (citations and quotation marks omitted).

A. Trial Court's Determination the Agreement was Valid

Plaintiff first argues the trial court erred in determining the Agreement was still valid. Plaintiff contends (1) "the trial court's finding that the . . . [A]greement was valid even though Plaintiff[ ] and . . . [D]ecedent had reconciled, and such a reconciliation substantially defeated the purpose of the . . . [A]greement is not based on competent evidence[;]" and (2) "the trial court's finding that the . . . [A]greement was valid even though . . . [D]ecedent's actions constituted a material breach and rescission of the . . . [A]greement is not based on competent evidence." (Capitalization altered.) We disagree.

1. Reconciliation of the Marriage

Although Plaintiff's first argument is that the trial court's "finding" that the Agreement was valid was "not based on competent evidence," she does not challenge any of the trial court's findings of fact as unsupported by the evidence. Therefore, the trial court's findings of fact are binding on appeal. *See Isom v. Duncan*, 279 N.C. App. 171, 172, 864 S.E.2d 831, 834 (2021) ("When a finding of fact is unchallenged, it is binding on appeal."). In reality, Plaintiff's argument is that the trial court's

findings of fact do not support its conclusion of law that the Agreement had not been rescinded by their reconciliation. We review the trial court's conclusions of law *de novo*. *See Diener v. Brown*, 290 N.C. App. 273, 276, 892 S.E.2d 212, 214 (2023) ("A trial court's conclusions of law are reviewable de novo.").

In this argument, Plaintiff largely argues the facts supporting her claim that she and Decedent had reconciled after the Agreement was signed. As to Plaintiff's claims that she and Decedent had reconciled before his death, the trial court found:

> 12. There is conflicting evidence as to whether . . . Plaintiff and Decedent reconciled after signing the . . . [A]greement.
>
> . . . .
>
> 14. Regardless of whether there was a reconciliation, there was no written modification of the . . . [A]greement.

The trial court's finding is correct: there was conflicting evidence as to reconciliation, and normally, findings must resolve any issues of fact raised by the evidence. *In re L.M.B.*, 284 N.C. App. 41, 52, 875 S.E.2d 544, 551 (2022) ("Under Rule 52, the trial court is required to do three things in writing: (1) To find the facts on all issues of fact joined on the pleadings[.]" (citation and quotation marks omitted)). But here, as the trial court also found, whether Plaintiff and Decedent had actually reconciled was not relevant to the legal issue presented.

We will assume for purposes of this opinion that everything Plaintiff alleges about the reconciliation is true. But even if the marriage was reconciled, the Agreement had a provision stating "if the parties reconcile the terms of this agreement will remain in effect unless the [p]arties revoke it in writing." Plaintiff contends that the reconciliation operates as a revocation of the Agreement, citing *Stegall v. Stegall*, 100 N.C. App. 398, 397 S.E.2d 306 (1990), and *Fletcher v. Fletcher*, 123 N.C. App. 744, 474 S.E.2d 802 (1996), in support of this argument.

In *Stegall*, the parties entered into a separation agreement in 1983 but then executed a new separation agreement in 1988. 100 N.C. App. at 402, 397 S.E.2d at 308. The 1988 agreement "provide[d] for the distribution of the parties' property" but made no reference to the 1983 agreement. *Id*. This Court discussed

> whether the 1983 separation agreement is itself an enforceable contract in the event that the 1988 agreement is declared void. On this point [the] defendant first argues

> that in determining the intended effects of the 1983 separation agreement it is necessary to separate the property settlement provisions from the marital/support components of the separation agreement. It is his contention that even if the four-year reconciliation voided the marital/support provisions of the agreement, the property provisions of the document are still in effect.

Id. at 402-03, 397 S.E.2d at 308. This Court concluded the parties had reconciled after the 1983 agreement and "h[e]ld that any executory provisions of the 1983 separation agreement were terminated upon the parties' reconciliation." *Id.* at 411, 397 S.E.2d at 313. However, in discussing how the case in *Stegall* was different from this Court's opinion in *In re Tucci*, 94 N.C. App. 428, 380 S.E.2d 782 (1989), we stated the

> defendant's reliance on [*Tucci*] is misplaced for another reason. In *Tucci*, the separation agreement in question contained the following paragraph: "should at any time in the future the parties resume marital cohabitation in any respect the provisions of this Separation Agreement and Property Settlement are and shall remain valid and fully enforceable, and of full legal force and effect." *Tucci*, 94 N.C.App. at 430, 380 S.E.2d at 783. The Stegalls' document, in contrast, contains no such clause and states that as consideration for the separation agreement the parties "propose to continue to live so separate and apart from one another."

Id. at 410, 397 S.E.2d at 312-13 (citations, ellipses, and brackets omitted). While Plaintiff attempts to argue the alleged reconciliation voided the entire Agreement without mentioning the reconciliation provision of the Agreement, we cannot overlook that provision in our discussion of the Agreement, and *Stegall* is inapposite to this case. *See S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 620, 659 S.E.2d 442, 455 (2008) ("A court must construe a contract as it is written and give effect to every part and provision whenever possible." (citation and quotation marks omitted)).

In *Fletcher*, the parties executed a separation agreement in 1993 and the plaintiff later sued for breach of the separation agreement alleging that the parties had reconciled and asked "the court [to] rescind the agreement and effect an equitable distribution of the marital property." 123 N.C. App. at 745-46, 474 S.E.2d at 803-04. This Court discussed in detail whether the parties had reconciled and concluded they had not. *See id.* at 751, 474 S.E.2d at 807. This Court then rejected the plaintiff's

argument that the defendant "materially breached" the agreement since any alleged breaches were not material. *Id.* at 751-52, 474 S.E.2d at 807-08. There is no mention in *Fletcher* of a provision in the parties' separation agreement that reconciliation would not affect the separation agreement.

While Plaintiff argues the alleged reconciliation voided the Agreement entirely, this Court's discussion in *Bradshaw v. Bradshaw* is instructive on the effect of the reconciliation provision in the Agreement and contains a helpful summary of relevant caselaw. In *Bradshaw*, the husband and wife "married in 1987 in Virginia and separated in 1991." 264 N.C. App. 669, 670, 826 S.E.2d 779, 781 (2019). The husband and wife "entered into a Stipulation and Agreement in Virginia governed by Virginia law" and the agreement had "provisions addressing separation, spousal support, and property division." *Id.* The agreement also had a similar provision as to reconciliation as this case, which stated:

> In the event of reconciliation and resumption of the marital relationship between the parties, the provisions of this [a]greement for settlement of property rights, spousal support, debt payments and all other provisions shall nevertheless continue in full force and effect without abatement of any term or provisions hereof, except as otherwise provided by written agreement duly executed by each of the parties after the date of the reconciliation.

Id. at 670, 826 S.E.2d at 782. After entering the agreement the parties reconciled, moved to North Carolina, and later separated again; the parties "never entered into any written agreement modifying or revoking the [a]greement." *Id.* The wife

> filed a complaint seeking absolute divorce and equitable distribution, but not postseparation support or alimony. [The h]usband filed an answer admitting the allegations relevant to absolute divorce but denying those relevant to equitable distribution, and he counterclaimed for a declaratory judgment that the [a]greement "remains in full force and effect" and bars [the w]ife's claim for equitable distribution.

Id. at 671, 826 S.E.2d at 782. The trial court concluded "(1) the [a]greement is valid under Virginia law; (2) application of Virginia law would be contrary to North Carolina's public policy; (3) the [a]greement's reconciliation provision violates North Carolina public policy; and, (4) the [a]greement does not apply to [the w]ife's claim for equitable distribution." *Id.* at 672, 826 S.E.2d at 783.

On appeal, as the agreement was entered in Virginia and had a choice of law provision indicating Virginia law would apply to the validity and interpretation of the agreement, this Court first addressed whether this choice of law provision was valid. *See id.* at 673-74, 826 S.E.2d at 783. However, we then recognized "the [a]greement is enforceable in North Carolina only if it is not 'opposed to the settled public policy' of this State" and thus addressed "whether the [a]greement is unenforceable because the reconciliation provision is against public policy of North Carolina." *Id.* at 674, 826 S.E.2d at 783-84. We recognize the case here involves exclusively a North Carolina agreement and Plaintiff does not argue the Agreement is barred by public policy, but Plaintiff essentially contends that since she and Decedent reconciled, the Agreement must be void since reconciliation defeats the purpose of the Agreement. In *Bradshaw*, "the validity of the [a]greement under Virginia law is not at issue in this appeal. . . . [the w]ife has never denied that the [a]greement was a valid and enforceable agreement under Virginia law in 1993 when it was executed[.]" *Id.* at 674, 826 S.E.2d at 784. And since *Bradshaw* discusses the relevant law as to separation and property settlement agreements in the context of a reconciliation provision, it is useful to our determination.

The parties and the trial court here only refer to the Agreement as a separation agreement, but it includes provisions addressing both separation and property settlement. The portions of the Agreement in question here are property settlement provisions. *See Morrison v. Morrison*, 102 N.C. App. 514, 518-19, 402 S.E.2d 855, 858 (1991) ("A separation agreement is defined as a contract between spouses providing for marital support rights and is executed while the parties are separated or are planning to separate immediately. The heart of a separation agreement is the parties' intention and agreement to live separate and apart forever. A property settlement agreement provides for a division of real and personal property held by the spouses. The parties may enter a property settlement at any time, regardless of whether they contemplate separation or divorce. A property settlement contains provisions which might with equal propriety have been made had no separation been contemplated." (citations, quotation marks, ellipses, and brackets omitted)). The Agreement releases Plaintiff and Decedent from equitable distribution claims, estate and testamentary rights in each other's property, and pension rights in a variety of retirement accounts. While the Agreement also provides for support payments to Plaintiff, most of the Agreement, and the portions relevant to this case, involves settling the property rights of Plaintiff and Decedent. They could have entered into a property settlement agreement with the same terms as to their

real property and rights of inheritance even if they had never separated. *See id.* ("The parties may enter a property settlement at any time, regardless of whether they contemplate separation or divorce.").

Bradshaw also discussed "the distinction between a property settlement agreement and a pure separation agreement [and] how to determine if an agreement with both types of provisions is an integrated agreement[,]" stating:

> Whether the executory provisions of a property settlement agreement are rescinded upon resumption of marital relations depends on whether the property settlement is negotiated in reciprocal consideration for the separation agreement. This is so whether the property settlement and the separation agreement are contained in a single document or separate documents. If the property settlement is negotiated as reciprocal consideration for the separation agreements, the agreements are deemed integrated and the resumption of marital relations will terminate the executory provisions of the property settlement agreement. If not in reciprocal consideration, the provisions of the property settlement are deemed separate and the resumption of marital relations will not affect either the executed or executory provisions of the property settlement agreement.

Bradshaw, 264 N.C. App. at 676-77, 826 S.E.2d at 785 (citing *Morrison*, 102 N.C. App. at 519, 402 S.E.2d at 858). After reviewing Virginia's law on contracts, we noted

> even under North Carolina law—which the trial court used instead of Virginia law—the agreement to separate was not "reciprocal consideration" for the property settlement, since the [a]greement has a specific provision that the [a]greement's provisions are severable. *See Hayes v. Hayes*, 100 N.C. App. 138, 147, 394 S.E.2d 675, 680 (1990) ("Where the parties include unequivocal integration or non-integration clauses in the agreement, this language governs.").

Id. at 678, 826 S.E.2d at 786 (brackets omitted). We specifically discussed our earlier decision in *Stegall*, and stated "*Stegall* does not hold that *reconciliation* necessarily voids a property settlement agreement, and it does not address the effect of a reconciliation provision in an agreement at all, since the agreement in *Stegall* did not have this provision." *Id.* at 679, 826 S.E.2d at 786 (emphasis in original) (citation omitted).

We then explained *Morrison* in further detail in relation to the trial court's finding that "[t]he terms of the agreement are void[:]"

> the primary focus of *Morrison* is the distinction between a separation agreement and a property settlement agreement, and where an agreement includes both types of provisions, how to determine if the agreement is integrated. *Id.* As noted above, we must construe the [a]greement under Virginia law, but as to North Carolina's public policy, *Morrison* also notes that reconciliation provisions in agreements with provisions regarding both separation and property rights are *not* against public policy:
>
> We therefore reject the suggestion that all agreements, whether in one document or two, relating to support and property rights are reciprocal as a matter of law. To so hold would prohibit the parties from entering into contracts which do not violate law or public policy. *Because contracts providing that a reconciliation will not affect the terms of a property settlement are not contrary to law or public policy, adopting the rule that all agreements relating to support and property rights are reciprocal as a matter of law would impermissibly interfere with the parties' freedom of contract rights.* On the other hand, contracts which provide that reconciliation will not affect the terms of a separation agreement violate the policy behind separation agreements and are therefore void.

Id. at 679-80, 826 S.E.2d at 787 (emphasis in original). Finally, after discussing *Porter*, where a separation agreement had a reconciliation provision similar to the one in this case and in *Bradshaw*, we concluded:

> even the reconciliation provision of the [a]greement would offend North Carolina's public policy if applied to the "pure separation" provisions of the [a]greement; the "pure separation" provisions were not reciprocal consideration for the property settlement provisions. The parties agreed that the provisions of the [a]greement are severable, and enforcement of the property settlement provisions of the [a]greement does not conflict with North Carolina's public policy.

Id. at 681, 826 S.E.2d at 788.

The case here is similar to *Bradshaw*. The Agreement has a similar reconciliation provision that "if the parties reconcile the terms of this [A]greement will remain in effect unless the [p]arties revoke it in writing." And like in *Bradshaw*, "the Agreement has a specific provision that the Agreement's provisions are severable[:]"

> Should any portion of this agreement be held by a court of law to be invalid, unenforceable, or void, such holding will not have the effect of invalidating or voiding the remainder of this agreement, and the parties agree that the portion so held to be invalid, unenforceable, or void will be deemed amended, reduced in scope, or otherwise stricken only to the extent required for purposes of validity and enforcement in the jurisdiction of such holding.

Id. at 678, 826 S.E.2d at 786. Thus, the Agreement is not integrated under *Morrison*. *See Morrison*, 102 N.C. App. at 520, 402 S.E.2d at 859 ("Whether the property settlement agreement was negotiated as reciprocal consideration for the separation agreement 'requires a determination of the intent of the parties regarding integration or non-integration of' its provisions. *Hayes v. Hayes*, 100 N.C.App. 138, 147, 394 S.E.2d 675, 680 (1990). There is a presumption that the provisions of a marital agreement are separable and the burden of proof is on the party claiming that the agreement is integrated. *Id.* 'This presumption of separability prevails unless the party with the burden to rebut the presumption proves by a preponderance of the evidence that an integrated agreement was in fact intended by the parties.' *Id.* 'However, where the parties include unequivocal integration or non-integration clauses in the agreement, this language governs.' ").

And while Plaintiff does not argue the Agreement here is void for public policy reasons specifically, her argument relies mostly on the facts alleging Plaintiff and Decedent had reconciled, and since the facts show they reconciled, the Agreement cannot be valid since the actions of Plaintiff and Decedent "created a situation where the . . . [A]greement was void." But other than citing the general proposition in *Stegall* and *Fletcher* that reconciliation voids a separation agreement, Plaintiff does not demonstrate why the entire Agreement here would be void when it is not a pure separation agreement and it has reconciliation and severability provisions. Plaintiff and Decedent specifically addressed estate and property rights, stated reconciliation would not affect the Agreement, and agreed the Agreement could only be modified in a writing, indicating Plaintiff and Decedent contemplated this situation and intended the Agreement remain in effect. We cannot say the purpose of

the Agreement has been defeated when the Agreement is valid under North Carolina law and Plaintiff and Decedent specifically addressed this situation.

The trial court did not err by concluding the Agreement was still valid even if Plaintiff and Decedent had reconciled. This argument is overruled.

2. Rescission of the Agreement

Plaintiff next argues "the trial court's finding that the . . . [A]greement was valid even though . . . [D]ecedent's actions constituted a material breach and rescission of the . . . Agreement is not based on competent evidence." Again, the trial court concluded as a matter of law that the Agreement "was and remains the separation agreement between the Plaintiff and Decedent," and material breach of the Agreement requiring rescission of the Agreement would be a legal conclusion we review *de novo*, not a finding of fact. *See Long v. Long*, 160 N.C. App. 664, 668-69. 588 S.E.2d 1, 4 (2003) ("The trial court's decision as to whether a breach is material is a conclusion of law and is therefore not binding on appeal, but is reviewable as any other conclusion of law."). The trial court did not directly address Plaintiff's contention that Decedent's failure to pay her all sums required under the Agreement was a material breach requiring rescission. As to the facts regarding Decedent's performance under the Agreement, the trial court found as follows:

> 13. The [c]ourt reviewed the bank records of . . . Decedent's business, which contained checks written to . . . Plaintiff as agreed in the . . . [A]greement. There is a gap in check payments from November 15, 2020 until July of 2021, which may indicate a reconciliation occurred.

According to the Agreement and to Plaintiff's complaint, Plaintiff contends the "material breach" of the Agreement was that Decedent "still owed Plaintiff[ ] $47,325.00 in payments under the Agreement and had not made any payments since [Plaintiff and Decedent] separated" and that Decedent "had failed to secure an insurance policy to ensure the monies owed to Plaintiff[.]" Plaintiff states "[t]he purpose of [the] . . . [A]greement . . . was to be equitable in nature. The payments from . . . [D]ecedent to Plaintiff[ ] were to make Plaintiff[ ] whole in exchange for . . . [D]ecedent keeping certain marital property."

> Rescission, an equitable remedy, is allowed to promote justice. The right to rescind does not exist where the breach is not substantial and material and does not go

> to the heart of an agreement. Rescission of a separation agreement requires proof of a material breach—a substantial failure to perform. *Cator v. Cator*, 70 N.C.App. 719, 722, 321 S.E.2d 36, 38 (1984) (intermittent payment of alimony for six month period a "mere lapse of performance" and not a "substantial failure to perform").

Fletcher, 123 N.C. App. at 751-52, 474 S.E.2d at 807.

Here, we first note Plaintiff's contention that Decedent "had not made any payments since [Plaintiff and Decedent] separated" is not supported by the record, and the trial court's finding of fact, which Plaintiff does not challenge as unsupported by the evidence, is binding on appeal. *See Isom*, 279 N.C. App. at 172, 864 S.E.2d at 834. Plaintiff may have meant these payments stopped upon the alleged reconciliation, but this contention is complicated as Plaintiff testified at the hearing reconciliation happened in 2020 but contended in her brief in support of her Petition in the trial court and her brief to this Court that reconciliation happened in 2019. The record shows Decedent was making payments to Plaintiff from the time Plaintiff and Decedent separated in April 2018 through November 2020, totaling $47,675.00 in payments. The trial court found "[t]here [was] a gap in check payments from November 15, 2020 until July of 2021[.]" Decedent died on 20 July 2021. Thus, Plaintiff's claim Decedent "had not made any payments since [Plaintiff and Decedent] separated" is not supported, but both the trial court's finding and the record support Plaintiff's contention Decedent failed to fulfill the payment schedule set out in the Agreement and still owed her $47,325.00 at the time of his death.

Plaintiff contends that Decedent's missed payments are a "material breach" of the Agreement, sufficient to rescind the Agreement based on *Cator v. Cator*, 70 N.C. App. 719, 321 S.E.2d 36. In *Cator*, the husband made payments from April 1981 through January 1983, but then "did not make the January, March, and June 1983 payments." *Id.* at 721, 321 S.E.2d at 37. And unlike this case, the separation agreement at issue in *Cator*

> expressly grant[ed] the wife the right to bring an action for alimony "if the [h]usband fails to make the monthly payments of alimony as herein specified." Therefore, the alimony provision could be rescinded independently of the rest of the agreement, which provided for the distribution of real and personal property, payment of medical, dental and hospital bills and charge accounts.

Id. at 723, 321 S.E.2d at 39 (ellipses omitted). The wife thus wanted to rescind only the alimony provisions of the separation agreement so she could pursue an alimony action. *See id.* at 719-20, 321 S.E.2d at 37. This Court noted that the "husband's breaches occurred simultaneously with the hearings on the motion for summary judgment and that the husband performed intermittently during that time" and concluded there was no substantial failure to perform as the wife did not prove a material breach. *Id.* at 724, 321 S.E.2d at 39.

Here, in addition to the payment schedule set out in the Agreement, the Agreement also released Plaintiff and Decedent from equitable distribution claims, claims to each other's respective estates, and claims to their pensions including "IRAs, 401k plans, or any defined contribution plan, defined benefits plan, retirement plan or pension, savings plan, or profit sharing plan of any type[.]" This Court in *Cator* was not considering the entire separation agreement as a whole, even though it had other provisions regarding property distribution and payment of other bills, since "the alimony provision could be rescinded independently of the rest of the agreement[.]" *Id.* at 723, 321 S.E.2d at 39. Here, Plaintiff does not raise any issue regarding alimony, and even if the agreement had been rescinded, any potential claim for alimony would have ended upon Decedent's death. *See* N.C. Gen. Stat. § 50-16.9(b) (2023) ("Postseparation support or alimony shall terminate upon the death of either the supporting or the dependent spouse."). The relevant provisions of the Agreement here are the property settlement provisions.

"Where there is such a breach as permits a rescission, the parties, are entitled to be placed in status quo, but if the breach is not so material as in effect to defeat the purpose of the contract, the injured party is compensated by damages." *See Childress v. C. W. Myers Trading Post, Inc.*, 247 N.C. 150, 156, 100 S.E.2d 391, 395 (1957). Similarly, in *Morris v. Scenera Research, LLC*, our Supreme Court again emphasized "[a]s with all equitable remedies, rescission will not lend its aid in any case where the party seeking it has a full and complete remedy at law." 368 N.C. 857, 867, 788 S.E.2d 154, 161 (2016) (citations and quotation marks omitted). The Court stated

> [t]he Court of Appeals incorrectly applied the test for rescission. The court held that Scenera's failure to pay [the] plaintiff his patent bonuses was prima facie evidence of a material breach, and, because [the] defendants breached the contract materially, [the] plaintiff could pursue rescission. But, rescission cannot be the remedy for every material breach. A party may pursue rescission only

> when a material breach occurs *and* all legal remedies falls short of compensating the injured party for its loss.

Id. (emphasis added). And here, just as in *Morris*, Plaintiff's argument as to rescission involves a fixed sum of money which can be recovered via money damages. In fact, Plaintiff's Petition stated in the alternative a request "for an Order enforcing payment of the sums remaining due . . . [Plaintiff] under the . . . Agreement, namely $55,125.00." Thus, Plaintiff has not demonstrated that a legal remedy of damages would "fall[ ] short of compensating" her for her loss and the trial court did not err by concluding the Agreement was valid. *Id.*

B. Written Modification of the Agreement

Finally, Plaintiff argues "the trial court erred by holding that . . . Plaintiff[ ] and . . . Decedent never modified their separation agreement in writing." (Capitalization altered.) As to modification, the trial court found:

> 15. . . . Plaintiff testified to having to sign on a loan for . . . Decedent. Signing for such a loan is not a modification of the [A]greement.

Plaintiff acknowledges the Agreement was validly executed but contends "the subsequent documents entered into by Plaintiff[ ] and . . . [D]ecedent qualify as a modification of the . . . [A]greement." We disagree.

We first note that Plaintiff does not clearly state exactly how the loan modification documents would "modify" the provisions of the Agreement; she claims only that the loan modification documents are "directly contradictory" to the provision that she would remove her name from the deed. Plaintiff certainly does not contend that the loan modification documents modified the Agreement by voiding the provision of the Agreement which assigned sole responsibility for the mortgage on the property to Decedent. Instead, she seeks to claim ownership of the real property because she had not yet removed her name from the deed, although it is not clear if she is also seeking full sole responsibility for the payment of the mortgage debt.

Again, the trial court's conclusion was labeled as a finding of fact, but we review the trial court's "finding" as to the lack of modification of the Agreement as a conclusion of law. *See In re V.M.*, 273 N.C. App. 294, 298, 848 S.E.2d 530, 534 (2020) ("As a general rule, the labels 'findings of fact' and 'conclusions of law' employed by the lower tribunal in a written order do not determine the nature of our standard of review. Thus, if the lower tribunal labels as a finding of fact what is in substance

a conclusion of law, we review that 'finding' as a conclusion *de novo*." (citation, quotation marks, and brackets omitted)).

North Carolina General Statute Section 52-10.1 outlines the general requirements for a valid separation agreement: "Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b)." N.C. Gen. Stat. § 52-10.1 (2023). Plaintiff contends the subsequent deed of trust modifies the Agreement since it

> was signed by both Plaintiff[ ] and . . . [D]ecedent before a notary, also known as a certifying officer. The refinance of the property in the names of both Plaintiff[ ] and . . . [D]ecedent is directly contradictory to the provision in [Plaintiff and Decedents'] . . . Agreement whereby Plaintiff[ ] would remove her name from all documents pertaining to the marital house and property.

Plaintiff relies on *Jones v. Jones*, 162 N.C. App. 134, 590 S.E.2d 308 (2004), to contend the deed of trust was a modification of the Agreement. However, *Jones* merely lays out the requirements of North Carolina General Statute Section 52-10.1 and emphasizes oral modifications are not valid. *See id.* at 137, 590 S.E.2d at 310-11. *Jones* dealt with a situation where "the court appears to have relied on testimony from [the] defendant about conversations with [the] plaintiff in which he contended that [the plaintiff] agreed to a modified alimony arrangement" and concluded "[b]ecause separation agreements cannot be orally modified, the testimony of conversations between [the] plaintiff and [the] defendant, even if corroborated, could not constitute a valid modification of the earlier agreement." *Id.* at 138, 590 S.E.2d at 311-12. *Jones* is inapposite to this case as there is no contention the Agreement was orally modified.

Here, Plaintiff and Decedent first executed a deed of trust for the real property on 12 January 2009. On 29 January 2014, Plaintiff and Decedent entered into a loan modification agreement to change the payment schedule of the original mortgage. On 3 April 2018, Plaintiff and Decedent entered into the Agreement, which provided that Plaintiff or Decedent would pay "any indebtedness secured against, or attributable to, any item of property that either party is receiving under this [A]greement[.]" The [A]greement also specifically provided Decedent would pay the "house an (sic) land payment" and Plaintiff would take her name off of all "home an (sic) land" documents. The Agreement set out a

schedule of payments Decedent was to make to Plaintiff; Decedent was to pay "a total of $75,000.00 in cash payments to [Plaintiff] in exchange for her release of the entireties property."

On 26 April 2021, Plaintiff and Decedent refinanced the loan again in a deed of trust modification agreement, which modified the maturity date of the original deed of trust. The writing Plaintiff contends modified the Agreement was part of the April 2021 refinancing. Plaintiff argues that this document "is directly contradictory" to a provision in the Agreement that Plaintiff "agrees to have her name took (sic) off all home an[d] land documents." However, the 2021 deed of trust modification agreement does not mention the Agreement.

"Applying contract principles, we determine the intent of the parties by the plain meaning of the written terms. We must decide the case, therefore, by what is written in the contract actually made by them." *RL Reg'l N.C., LLC v. Lighthouse Cove, LLC*, 367 N.C. 425, 428, 762 S.E.2d 188, 190 (2014) (citations, quotation marks, and ellipses omitted).

> The making of a second contract dealing with the subject matter of an earlier one does not necessarily abrogate the former contract. To have the effect of rescission, it must either deal with the subject matter of the former contract so comprehensively as to be complete within itself and to raise the legal inference of substitution, or it must present such inconsistencies with the first contract that the two cannot in any substantial respect stand together. Before the new contract can be accepted as discharging the old, the fact that such was the intention of the parties must clearly appear.
>
> If upon comparison it should be found that rescission has not been effected, the two instruments must be read and construed together in ascertaining the intent of the parties and in determining what portions of the agreement are still enforceable. In such construction the rules applied to interpretation of a single contract are applicable, perhaps with added propriety. We must, of course, keep within the bounds of the writings, but the circumstances surrounding their execution, the relation of the parties and the object to be accomplished, are all to be consulted in arriving at the intent.

CL Howard Invs. I, LLC v. Wilmington Sav. Fund Soc'y FSB, 297 N.C. App. 234, 242, 911 S.E.2d 384, 391 (2024) (citation omitted).

Plaintiff is correct that the 2021 deed of trust modification agreement is in writing, signed by Plaintiff and Decedent, and acknowledged before a certifying officer, a notary; but simply meeting the broad requirements for execution or modification of a separation agreement under North Carolina General Statute Section 52-10.1 does not, by itself, show Plaintiff and Decedent intended to modify the Agreement. The Agreement and deed of trust modification are two separate contracts, with different subject matter and intentions. These documents are not even "directly contradictory" as Plaintiff contends. At the time Decedent and Plaintiff entered into the Agreement, both were responsible for the existing mortgage on the real property but Decedent received sole ownership of the property and agreed to pay the mortgage. In 2021, they refinanced that mortgage. At most, the fact that Plaintiff signed the deed of trust modification documents tends to highlight the fact that Plaintiff had not yet taken her name off "all home an[d] land documents" as she was obligated to do under the Agreement, so the lender would have required her signature. In any event, the loan modification does not show Plaintiff and Decedent intended the deed of trust modification to have any effect on the Agreement. And as the deed of trust modification does not reference the Agreement, the trial court did not err by concluding the deed of trust did not modify the Agreement. This argument is overruled.

IV. Conclusion

The trial court did not err in concluding the Agreement was still valid even if Plaintiff and Decedent had reconciled before his death. The trial court also did not err by concluding the written deed of trust did not modify the Agreement. Therefore, we affirm the trial court's order declaring that the Agreement is valid.

AFFIRMED.

Judges ZACHARY and CARPENTER concur.

JUSTIN TREVOR MARLOW, WIDOWER OF PHELIFIA MICHELLE MARLOW,
DECEASED EMPLOYEE, PLAINTIFF
v.
TCS DESIGNS, INC., EMPLOYER,
FFVA MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA24-901

Filed 2 July 2025

1. Workers' Compensation—subject matter jurisdiction—voluntary dismissal without prejudice—claim no longer active

After plaintiff took a voluntary dismissal without prejudice of his claim for workers' compensation (which he had filed after his wife was shot and killed by a co-worker), to which defendants (the wife's employer and its insurance company) did not object, the Industrial Commission no longer had subject matter jurisdiction over the matter, unless and until plaintiff chose to refile his claim within one year of the voluntary dismissal. Although defendants argued that their filing of a Form 60 (Employer's Admission of Employee's Right to Compensation) constituted an "award" from the Commission, after which they began sending weekly compensation checks to plaintiff (which plaintiff did not cash), defendants' actions did not create jurisdiction in the Commission that would permit the dismissal of plaintiff's claim with prejudice, as sought by defendants. Therefore, the Commission's order denying defendants' request for relief and dismissing plaintiff's claim without prejudice for lack of subject matter jurisdiction was affirmed.

2. Appeal and Error—frivolous appeal—multiple assertions of nonexistent jurisdiction—sanctions imposed

In a case in which plaintiff took a voluntary dismissal without prejudice of a claim for workers' compensation (which he had filed after his wife was shot and killed by a co-worker), which divested the Industrial Commission of subject matter jurisdiction over the matter, where defendants (the wife's employer and its insurance company) thereafter repeatedly submitted forms and filings to the Commission and asserted that the Commission had jurisdiction to grant their requests for relief, the appellate court determined that defendants' appeal of the Commission's order denying defendants' filings was frivolous and taken to harass and cause an unnecessary increase in the cost of litigation. Therefore, the appellate court decided in its discretion to impose sanctions, pursuant to Appellate

Rule 34, by taxing defendants the costs of the appeal and attorney's fees incurred by plaintiff in defending the appeal.

Appeal by Defendants from order entered 25 June 2024 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 April 2025.

White & Stradley, PLLC, by J. David Stradley, and Law Office of Lyndon R. Helton, PLLC, by Lyndon R. Helton, for Plaintiff-Appellee.

Cranfill Sumner LLP, by W. Scott Fuller and Steven A. Bader, for Defendants-Appellants.

COLLINS, Judge.

This appeal arises from the death of Plaintiff Justin Marlow's wife, Phelifia "Michelle" Marlow, who had been an employee of Defendant TCS Designs, Inc. when she was shot and killed by a co-employee. TCS and FFVA Mutual Insurance Company (collectively, "Defendants") appeal from the North Carolina Industrial Commission's order denying Defendants' request for relief and dismissing Plaintiff's claim without prejudice. We affirm and impose sanctions against TCS for this frivolous appeal.

I. Background

Michelle was shot and killed by a co-worker on 13 January 2021 while working for TCS, a commercial furniture manufacturer in Hickory, North Carolina. Plaintiff filed a Form 18, Notice of Accident to Employer, in the Commission on 11 February 2021. Defendants responded with a Form 61, Denial of Workers' Compensation Claim, on 26 February 2021, asserting that "Plaintiff's allegations do not establish that plaintiff has carried plaintiff's burden of proving that a compensable event occurred on 01/13/2021." Plaintiff filed a request that the claim be assigned for hearing "for determination and Order from the Industrial Commission for payment of death benefits." Defendants responded that they have been unable to agree because "Defendants continue to investigate the circumstances surrounding [Michelle's] murder. At this time, plaintiff has not established that [Michelle's] death is compensable."

The Commission appointed a mediator on 17 May 2021. A mediated settlement conference was held on 25 October 2021; however, the conference ended in an impasse and no mediated settlement was reached.

Later that same day, Plaintiff filed an amended request that the claim be assigned for hearing for a determination of death benefits. In this request, Plaintiff also sought sanctions.

On 28 January 2022, Defendants filed a Form 29, Supplemental Report for Fatal Accidents, with the Commission, maintaining that "Plaintiff asserts a claim within the exclusive jurisdiction of the [Commission], but plaintiff has not established compensability." Also on 28 January, a deputy commissioner filed a discovery order. In this order, the deputy commissioner granted Plaintiff's "Motion to Compel Defendants to Provide Employee Files of Tangela Parker and Eric Parker," and set Plaintiff's claim for a full evidentiary hearing, to be held on 23 February 2022 before the Commission.

On 7 February 2022, Defendants filed a response to Plaintiff's amended request that the claim be assigned for hearing, asserting "that Plaintiff has refused to identify issues with specificity, that Plaintiff has refused to voluntarily produce relevant documents, and that Plaintiff has refused to participate in discovery, in good faith, making Plaintiff's claim for sanctions or other similar relief a meritless one."

On 17 February 2022, Plaintiff moved to voluntarily dismiss his workers' compensation claim without prejudice in accordance with Commission Rule 616. The Commission granted Plaintiff's motion by order entered the next day. In its order, the Commission noted that Defendants had no objection to Plaintiff's motion and that Plaintiff had one year from the date of the order, or until 18 February 2023, within which to refile his claim, "at which time the undersigned agrees to resume jurisdiction over a full evidentiary hearing if so requested."

Plaintiff then filed a wrongful death action on 21 February 2022 in Catawba County superior court against TCS and a number of other defendants.

On 11 April 2022, approximately two months after Plaintiff voluntarily dismissed his workers' compensation claim and filed the wrongful death action in superior court, Defendants filed a Form 60, Employer's Admission of Employee's Right to Compensation, in the Commission and began sending weekly compensation checks to Plaintiff in conjunction with the form. Defendants then filed a request that the claim be assigned for hearing to determine, among other things, "[Michelle's] dependent(s)," "those credits/offsets against any compensation benefits due Deceased Employee's dependent(s)," and "[Michelle's] average weekly wage."

On 15 July 2022, the Commission denied Defendants' Motion Under Commission Rule 605(7) to Serve Requests for Admissions "in light of the fact that [] this claim has been dismissed without prejudice." Defendants appealed this order by filing another request that the claim be assigned for hearing.

TCS and the other defendants moved to dismiss Plaintiff's wrongful death action in superior court for lack of subject matter jurisdiction, arguing that the Commission had exclusive jurisdiction over the matter. The superior court denied the motion on 22 July 2022, concluding that it, not the Commission, had subject matter jurisdiction over the claims arising from Michelle's death. TCS and the other defendants appealed that order to this Court on 10 August 2022.

Meanwhile, Defendants continued sending compensation checks to Plaintiff, pursuant to the Form 60. Plaintiff has never cashed them; the uncashed checks have remained in the possession of Plaintiff's counsel. On 26 August 2022, Plaintiff filed in the Commission a "Motion to Stay Matter in All Aspects, Including Requests for Hearing, Discovery, and Motions." Defendants filed an objection, arguing that Plaintiff's motion was "not supported by fact, law, or policy." Defendants noted that they had been sending weekly compensation checks to Plaintiff, and that, pursuant to N.C. Gen. Stat. § 97-82, such payment "shall constitute an award of the Commission on the question of compensability." Defendants therefore argued that they "followed the statutory procedure [in] N.C. Gen. Stat. § 97-18(b), that [they] made payments to plaintiff, and that the time that plaintiff has to contest the award of the Commission has long since passed . . . . A stay does nothing except serve plaintiff's interest in making trouble in civil court." The deputy commissioner entered an order on 20 September 2022, finding in part, as follows:

- Plaintiff's claim had been dismissed without prejudice on 18 February 2022;
- "Plaintiff ha[d] not undertaken any affirmative action within the workers' compensation claim . . . since the dismissal without prejudice of h[is] claim except to respond, through counsel, to Defendants['] filings and motions";
- "On April 11, 2022, Defendants filed a Form 60 stating that they accept Plaintiff's claim as compensable and began sending to counsel for Plaintiff compensation checks to Plaintiff";

- Defendants filed and served Form 33s on 13 May and 15 July 2022;
- "Defendants argue that pursuant to [N.C. Gen. Stat. §] 97-18, the acceptance and payment of compensation, even after a dismissal without prejudice of Plaintiff's claim for benefits, is an award of the Commission";
- "It is well settled that the North Carolina Rules of Civil Procedure are not strictly applicable to [] Commission proceedings but are nevertheless instructive";
- "In both the North [Carolina] General Courts of Justice and the United States District Courts, a dismissal means that Plaintiff's claim ceases to be and is no longer operative or extant until the refiling of the Complaint or order of the court";
- Once Plaintiff's claim was dismissed, the cause of action "cease[d] to exist, and Defendants cannot force Plaintiff to accept what they offer and Plaintiff does not claim – here, acceptance of a workers' compensation claim . . . and the payment of temporary total disability payments sent to counsel for the Plaintiff";
- "If [the Commission] were to interpret 'Dismissal without prejudice' as anything other than the termination of a 'claim' made by the Plaintiff along with the cessation of all discovery and motions, a plaintiff would be forced to defend motions, allegations, and requests of Defendants when [P]laintiff has no desire and/or ability to do so."

Upon entry of its findings the deputy commissioner granted Plaintiff's motion because "Plaintiff's claim for workers' compensation benefits was dismissed without prejudice and, therefore, the Commission's obligation to adjudicate the issues before it does not exist until Plaintiff refiles his claim . . . ." The deputy commissioner ordered Plaintiff's case stayed and/or removed from the hearing docket until Plaintiff refiled the claim. The deputy commissioner "noted and recognized" that although he was entering an order staying and temporarily removing the case from the docket when "Plaintiff's claim at this time is without effect as it was dismissed without prejudice," the Commission was still "required to rule on the motions within some framework in order to properly address the issues raised by the parties." The deputy commissioner further stressed

that the order "is not meant in any way [to] validate Defendants' arguments that Plaintiff's claim, although dismissed without prejudice, can be accepted by Defendants after the dismissal thereby becoming an award of the Commission."

On 1 January 2023, Defendants appealed this order to the Full Commission wherein they raised several arguments, including that "[t]he deputy commissioner erred in entering the stay, which obstructs TCS's right to provide prompt payment for a compensable claim." Defendants then, on 1 March 2023, filed in the Commission a Form 62, Notice of Reinstatement or Modification of Compensation.

On 2 May 2023, this Court affirmed the superior court's order denying TCS's motion to dismiss Plaintiff's wrongful death action, concluding that because "Michelle's death did not arise out of her employment with TCS, the Industrial Commission does not have exclusive jurisdiction over the matter." *Marlow v. TCS Designs, Inc.*, 288 N.C. App. 567, 574 (2023).

On 11 July 2023, the Full Commission affirmed the deputy commissioner's order granting Plaintiff's Motion to Stay Matter in All Aspects, Including Requests for Hearing, Discovery, and Motions. Defendants filed a motion to reconsider on 21 July 2023; the Full Commission denied the motion on 11 August 2023. Defendants filed a second motion to reconsider on 28 August 2023.

The North Carolina Supreme Court denied TCS's petition for discretionary review of this Court's opinion on 30 August 2023. *Marlow v. TCS Designs, Inc.*, 385 N.C. 318 (2023) (unpublished).

The Full Commission denied Defendant's second motion to reconsider on 5 September 2023.

Defendants then filed in the Commission a Request for Relief, asking for entry of "a final award that nullifies [P]laintiff's Commission Form 18, that vacates the Commission Form 60, that reimburses [D]efendants for all workers' compensation benefit that [D]efendants have paid on account of [Michelle's] death, and that dismisses all workers' compensation claims against [D]efendants that arise out of [Michelle's] death."

Plaintiff filed a response, arguing that the Commission did not have subject matter jurisdiction over the matter and indicating that Defendants' checks had not been cashed.

Defendants then filed a Motion for Dismissal With Prejudice once again asking for entry of "a final award that nullifies [P]laintiff's

Commission Form 18, that vacates the Commission Form 60, that reimburses [D]efendants for all workers' compensation benefit that [D]efendants have paid on account of [Michelle's] death, and that dismisses all workers' compensation claims against [D]efendants that arise out of [Michelle's] death."

Plaintiff filed a response and moved for a hearing to determine sanctions against Defendants. Plaintiff specifically asked for attorney's fees as a sanction for Defendant's "undue and unreasonable litigiousness over the entire course of this claim."

After a hearing, by order entered 6 May 2024, the Commission denied Defendants' Request for Relief, dismissed Plaintiff's claim without prejudice for lack of subject matter jurisdiction, and denied Plaintiff's request for sanctions. Defendants appeal.

II. Discussion

A. Defendants' Appeal

[1] Defendants articulate the issue on appeal as follows: "Whether the [] Commission must vacate its award, which requires the defendants to pay ongoing workers' compensation death benefits, after the Commission dismissed the case because it lacked subject matter jurisdiction over the claim." Defendants' argument is meritless.

1. Standard of Review

When reviewing a decision of the Commission, this Court examines "whether any competent evidence supports the Commission's findings of fact and whether those findings . . . support the Commission's conclusions of law." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496 (2004) (brackets and citation omitted). "The Industrial Commission's findings of fact are conclusive on appeal if supported by competent evidence even though there is evidence to support a contrary finding." *Murray v. Associated Insurers, Inc.*, 341 N.C. 712, 714 (1995) (citation omitted). Conclusions of law are reviewed de novo. *Griggs v. Eastern Omni Constructors*, 158 N.C. App. 480, 483 (2003).

2. Subject Matter Jurisdiction

"Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act[.]" *In re T.R.P.*, 360 N.C. 588, 590 (2006). "Subject matter jurisdiction is conferred upon courts by law and operates as a structural limitation on the power of courts." *Slattery v. Appy City, LLC*, 385 N.C. 726, 729 (2024) (citing N.C. Const. art. IV §§ 1, 12). It is well-settled

that "the existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent." *Id.* (brackets and citation omitted).

"[A] court without subject matter jurisdiction can do nothing more than recognize its lack of jurisdiction and make rulings that are directly consequent to that determination." *Quevedo-Woolf v. Overholser*, 261 N.C. App. 387, 423 (2018). "Any additional action taken would be a nullity and unenforceable." *Id.*

3. Voluntary Dismissal Without Prejudice

The Commission has adopted rules establishing processes and procedures to be used for carrying out the provisions of the Workers' Compensation Act. *See* N.C. Gen. Stat. § 97-80(a) (2023). Commission Rule 616 allows a claim filed under the Workers' Compensation Act to be dismissed without prejudice "upon order of the Commission in the interest of justice." 11 N.C. Admin. Code 23A.0616(a) (2018). "Unless otherwise ordered by the Commission in the interests of justice, a plaintiff shall have one year from the date of the Order of Voluntary Dismissal Without Prejudice to refile his claim." *Id.*

While the Commission's rules allow for a voluntary dismissal without prejudice of a workers' compensation claim, neither the Workers' Compensation Act nor the Commission's Rules articulate the effect of a plaintiff's voluntary dismissal without prejudice on the Commission's subject matter jurisdiction. As a result, we look to Civil Procedure Rule 41(a) and cases applying that rule for guidance. *See Lauziere v. Stanley Martin Cmtys., LLC*, 271 N.C. App. 220, 223 (2020) (looking to Rule 41(b) for guidance on involuntary dismissals); *see also Lentz v. Phil's Toy Store*, 228 N.C. App. 416, 421 (2013) (emphasizing that the Rules of Civil Procedure "may provide guidance in the absence of an applicable rule under the Workers' Compensation Act") (citations omitted).

Civil Procedure Rule 41(a) governs voluntary dismissals of actions. The rule allows an action to be dismissed upon a plaintiff's written notice or the parties' written stipulation, N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2023), or "upon order of the judge and upon such terms and conditions as justice requires," *Id.* § 1A-1, Rule 41(a)(2) (2023). Unless such order states otherwise, "a dismissal under this subsection is without prejudice" and "a new action based on the same claim may be commenced within one year after such dismissal unless the judge shall specify in his order a shorter time." *Id.*

A voluntary dismissal divests the court of jurisdiction over the matter. *See VSD Commc'ns, Inc. v. Lone Wolf Publ'g Grp., Inc.*, 124

N.C. App. 642, 643-44 (1996) ("The filing of a voluntary dismissal strips the trial court of its authority to enter further orders in the adversary proceedings, 'except as provided by Rule 41(d) which authorizes the court to enter specific orders apportioning and taxing costs.' ") (citation omitted); *see also Walker Frames v. Shively*, 123 N.C. App. 643, 646 (1996) (recognizing that, as a general proposition, a Rule 41(a) dismissal "terminate[s] all adversary proceedings in [the] case") (citations omitted). Upon a plaintiff's voluntary dismissal, "the action [is] terminated. The case [is] closed and nothing further [can] be done regarding it." *Lowe v. Bryant*, 55 N.C. App. 608, 611 (1982) ("The case having been voluntarily dismissed, there was no pending action upon which a valid order could be rendered."); *see also Doe v. Duke Univ.*, 118 N.C. App. 406, 408 (1995) ("Once a party voluntarily dismissed her action pursuant to []Rule 41(a)(1) [], it is as if the suit had never been filed, and the dismissal carries down with it previous rulings and orders in the case.") (cleaned up).

4. Analysis

Here, Plaintiff filed a Form 18, Notice of Accident to Employer, in the Commission on 11 February 2021. TCS filed a Form 61 in response, denying Plaintiff's workers' compensation claim on 17 February 2022. Defendants maintained that "[P]laintiff has not established that [Michelle's] death is compensable." A mediated settlement conference held on 25 October 2021 ended in an impasse, and as a result, Plaintiff filed an amended request that the claim be assigned for hearing. The Commission then filed a discovery order, granting Plaintiff's motion to compel Defendants to provide certain discovery and setting Plaintiff's claim for a full evidentiary hearing. Defendants, however, asserted that "Plaintiff has refused to identify issues with specificity, that Plaintiff has refused to voluntarily produce relevant documents, and that [P]laintiff has refused to participate in discovery, in good faith . . . ."

On 17 February 2022, Plaintiff moved to voluntarily dismiss the workers' compensation claim without prejudice in accordance with Commission Rule 616. The Commission granted Plaintiff's motion by order entered the next day. In its order, the Commission noted that Defendants had no objection to Plaintiff's motion and that Plaintiff had one year from the date of the order, or until 18 February 2023, within which to refile his claim. Although Plaintiff had a year within which to refile his claim, he was not required to do so.

Upon entry of this order, the Commission no longer had subject matter jurisdiction over the matter. *See VSD Commc'ns, Inc.*, 124 N.C. App. at 643-44. The Commission could therefore do nothing more than

recognize its lack of jurisdiction and make rulings that were "directly consequent to that determination." *Quevedo-Woolf*, 261 N.C. App. at 423. Accordingly, the Commission repeatedly "recognize[d] its lack of jurisdiction" and made rulings "directly consequent to that determination" in response to Defendants' continuous filings. *Id.*

Defendants did not and could not create jurisdiction in the Commission after Plaintiff's claim had been dismissed by filing the Form 60 and sending weekly compensation checks to Plaintiff. Defendants argue that the Form 60 constitutes an "Award" from the Commission. However, because the Commission did not have subject matter jurisdiction over the claim, the Form 60 was nothing more than a nullity. As the deputy commissioner correctly stated in its 20 September 2022 order:

> Once that claim is dismissed (especially here as [TCS] originally denied Plaintiff's claim), the cause of action . . . ceases to exist, and [TCS] cannot force Plaintiff to accept what [it] offer[s] . . . .
>
> . . . .
>
> . . . Plaintiff's claim for workers' compensation benefits was dismissed without prejudice and, therefore, the Commission's obligation to adjudicate the issues before it does not exist until the Plaintiff refiles his claim for benefits as ordered by [the Commission] . . . .

Accordingly, we affirm the Commission's denial of Defendants' Request for Relief and Motion for Dismissal With Prejudice.

B. Plaintiff's Request for Sanctions

[2] Plaintiff moves this Court to sanction TCS for pursuing a frivolous appeal.

Pursuant to Rule 34 of our Rules of Appellate Procedure, we may sanction a party, an attorney, or both if we determine an appeal was frivolous because it "was not well-grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" or was "taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation[.]" N.C. R. App. P. 34(a). We may impose as sanctions "single or double costs" and "reasonable attorney fees, incurred because of the frivolous appeal[.]" N.C. R. App. P. 34(b)(2).

In evaluating a Rule 34 motion, we focus on whether the appeal itself is frivolous. *See Yeager v. Yeager*, 232 N.C. App. 173, 183 (2014).

Generally, we impose sanctions under Rule 34 when parties repeatedly advance frivolous arguments. *See*, *e.g.*, *ACC Constr.*, *Inc. v. SunTrust Mortg.*, *Inc.*, 239 N.C. App. 252, 272 (2015) (imposing sanctions in the form of costs and attorney's fees when a plaintiff asked the trial court to set aside an order from a different trial court, and the plaintiff received numerous sanctions at the trial-court level for raising frivolous arguments); *Shebalin v. Shebalin*, 284 N.C. App. 86, 91 (2022) (imposing sanctions due to a party's "insistence to pursue [a] frivolous appeal" after he "repeatedly and baselessly asserted" that an interlocutory order was "a final order, despite the order's interlocutory nature being apparent on its face [and] multiple admonitions from opposing counsel"); *Ritter v. Ritter*, 176 N.C. App. 181, 184-85 (2006) (imposing sanctions pursuant to Rule 34 when a party appealed from an interlocutory order, "fil[ed] numerous non-meritorious motions in the trial court and this Court," and "was cautioned several times by the trial court for ignoring its previous orders, ignoring court rules and procedural requirements, and harassing court personnel").

Here, Plaintiff argues TCS's appeal is frivolous because it "disregards 'a universal principle as old as the law itself' . . . that proceedings in the absence of subject-matter jurisdiction are 'a nullity.' " Plaintiff further argues that "TCS has made no argument—good faith or otherwise—to change this 'universal principle,' nor has TCS even attempted to distinguish the cases which hold that a court that lacks jurisdiction may only dismiss the action without prejudice." Plaintiff finally argues that "TCS has suffered no harm from the [C]ommission's order" because Plaintiff has not cashed any of the weekly compensation checks sent by TCS in accordance with the Form 60.

Since the entry of the Commission's order dismissing Plaintiff's workers' compensation claim without prejudice on 18 February 2022, TCS has continued to submit forms and filings to the Commission. The Commission has repeatedly explained in its orders denying relief that it lacked subject matter jurisdiction over the claim. On appeal, TCS makes no different argument for subject matter jurisdiction than it repeatedly made to the Commission, and the applicable law and analysis undertaken by this Court is no different from the law relied upon and the analysis undertaken by the Commission.

Indeed, TCS's appeal is "not well-grounded in fact," is "not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law," and has been taken "to harass [and] cause unnecessary [] increase in the cost of litigation[.]" N.C. R. App. P. 34(a). In our discretion, we tax TCS with the costs of this appeal, as well

as the attorney's fees incurred by Plaintiff in the defense of this appeal. Pursuant to Rule of Appellate Procedure 34(c), we remand this case to the trial court for a determination of the reasonable amount of attorney's fees incurred by Plaintiff in defense of this appeal.

III. Conclusion

For the foregoing reasons, we affirm the Commission's order denying Defendants' request for relief and dismissing Plaintiff's claim without prejudice. We allow Plaintiff's request for sanctions for filing a frivolous appeal.

AFFIRMED AND REMANDED.

Judges FREEMAN and MURRY concur.

MARK W. PONDER, PLAINTIFF
v.
STEPHEN R. BEEN, DEFENDANT

No. COA24-552

Filed 2 July 2025

Process and Service—abuse of process—judgment notwithstanding the verdict—more than a scintilla of evidence

In an alienation of affection proceeding that resulted in a jury finding in favor of defendant, the trial court erred in allowing plaintiff's motions for judgment notwithstanding the verdict on defendant's abuse of process claim—that plaintiff brought the action to harass, inconvenience, and embarrass defendant and plaintiff's former wife, who married defendant following her divorce from plaintiff—where plaintiff essentially conceded the existence of the first element of abuse of process (ulterior motive), and, taken in the light most favorable to defendant, more than a scintilla of evidence supported the second element (an act in the use of process not proper in the regular prosecution of the proceeding); namely, that on the pretext of assisting the process server, plaintiff trespassed onto defendant's property and spit on defendant. Further, plaintiff committed those acts after defendant's counsel communicated to plaintiff that counsel would accept service on defendant's behalf.

Appeal by defendant from order entered 14 December 2023 by Judge Nathaniel J. Poovey in Superior Court, Mecklenburg County. Heard in the Court of Appeals 13 February 2025.

Sodoma Law, P.C., by Amy E. Simpson and Caitlin H. Hickman, for plaintiff-appellee.

Womble Bond Dickinson (US) LLP, by James P. Cooney III and Patrick Grayson Spaugh, for defendant-appellant.

STROUD, Judge.

This matter is before us following a jury verdict finding Stephen Been ("Defendant") not liable for alienation of affections and Mark Ponder ("Plaintiff") liable for abuse of process. The jury awarded Defendant compensatory and punitive damages, and Plaintiff moved for judgment notwithstanding the verdict ("JNOV"). The trial court granted Plaintiff's motion and Defendant appealed. We reverse the trial court's order setting aside the jury verdict.

I. Factual and Procedural Background

The factual background and procedural history of this case were set forth by this Court in *Ponder v. Been*, 275 N.C. App. 626, 853 S.E.2d 302 (2020) ("*Ponder I*"). We briefly summarize *Ponder I*, the Supreme Court's subsequent reversal, and the additional facts now pertinent to Defendant's argument on appeal. The relevant facts from *Ponder I* are as follows. *See id.* at 626-628, 853 S.E.2d at 304.

Plaintiff met Mary in 2008, and they married in June 2010. Mary had two children from a prior marriage, John[1] and Max, and worked in the home as a stay-at-home mother. Plaintiff owned a home in Naples, Florida and Mary occasionally vacationed alone at the home. During one of her visits in May 2013, Mary met Defendant, who lived nearby. Following this visit, Mary and Defendant remained in frequent contact through text messages and telephone calls.

In November 2013, Plaintiff confronted Mary and accused her of having an affair with Defendant. This encounter resulted in Mary seeking a domestic violence protection order against Plaintiff. On 13 November 2013, the order was granted and Mary and Plaintiff separated. After their separation, Mary remained in the marital home until June 2014, when

1. We have used pseudonyms to protect the identities of the children.

she and her children moved to Naples, Florida and lived in properties owned by Defendant.

On 5 November 2015, Plaintiff filed a complaint against Defendant alleging alienation of affections. Plaintiff voluntarily dismissed this action on 15 September 2016 after Defendant moved to dismiss for lack of personal jurisdiction. On 14 September 2017, Plaintiff refiled his claim for alienation of affections against Defendant, seeking compensatory and punitive damages. Plaintiff alleged "[w]ith full knowledge of her marital status, Defendant, willfully, maliciously and intentionally engaged in a campaign to alienate [Mary] from Plaintiff," which severed Plaintiff and Mary's marital bond. In response, Defendant again moved to dismiss Plaintiff's action for lack of personal jurisdiction, citing a violation of North Carolina's long-arm statute, North Carolina General Statute Section 1-75.4.

On 29 October 2019, the trial court entered its order denying Defendant's motion to dismiss for lack of personal jurisdiction. Defendant appealed. On 31 December 2020, with a divided panel, this Court in *Ponder I* reversed the trial court's order. *Ponder I*, 275 N.C. App. at 635, 853 S.E.2d at 308. On 11 March 2022, our Supreme Court reversed this Court's decision in *Ponder I* for the reasons discussed in the dissenting opinion. *Ponder v. Been*, 380 N.C. 570, 869 S.E.2d 193 (2022). Thus, consistent with the dissenting opinion in *Ponder I*, the trial court's order denying Defendant's motion to dismiss for lack of personal jurisdiction was affirmed.

Following the issuance of the Supreme Court's decision, on 20 April 2022 Defendant filed an answer to Plaintiff's 2017 complaint for alienation of affections. Defendant also asserted a counterclaim against Plaintiff for abuse of process and sought an award of punitive damages. The basis of his claim arose from Plaintiff's service of process of the 14 September 2017 complaint. Defendant alleged that on 28 October 2017 Plaintiff appeared at Defendant's home, allegedly to locate Defendant to serve him with the complaint. Plaintiff was highly intoxicated when he arrived and he initiated an altercation involving Defendant, Mary, and Mary's son. Following the altercation, a court in Florida issued a domestic violence protection order against Plaintiff. Defendant alleged that Plaintiff used the service of his complaint as a pretextual basis for appearing at his home.

The trial on Plaintiff's alienation of affections claim and Defendant's abuse of process counterclaim spanned 14 August 2023 to 24 August 2023. The evidence presented at trial regarding the background of

this matter and Defendant's abuse of process claim tended to show the following.[2]

After Plaintiff and Mary wed in 2010, Plaintiff engaged in verbal, physical, and emotional abuse toward Mary on a daily basis. The severity of the abuse worsened as Plaintiff began consuming alcohol heavily about six out of seven days per week. Mary's sons, who were ages 6 and 7 in 2010, often witnessed the abuse and experienced it themselves. Plaintiff yelled and cursed at them and occasionally hit them. Mary's older son, John, testified that Plaintiff would hit him across the face with an open palm and continued to do so until Plaintiff got a reaction out of him. When Mary tried to intervene as Plaintiff engaged in this behavior with her sons, Plaintiff redirected the abuse toward Mary. At trial, Plaintiff denied the abuse of Mary and her children.

Mary met Defendant in May 2013, and they remained in contact through text messages and telephone conversations. The last incident of Plaintiff's abuse of Mary occurred in November 2013, after Plaintiff accused Mary of having an affair with Defendant. On 10 November 2013, Plaintiff arrived home drunk and told Mary's sons that they had a new father, Defendant, and they needed to leave. Plaintiff made threatening remarks to Mary, stating he would "cut her [vagina] out so that no one else could have her." Mary's younger son, Max, called the police and Mary and her sons stayed in a hotel that night. On 13 November 2013, after Mary and her sons returned home, Plaintiff yelled at John and made several degrading comments to him. Max again called the police. Later that day, Mary obtained a domestic violence protection order against Plaintiff, and he was required to leave the marital home. During Plaintiff's testimony, he denied what occurred on 10 and 13 November 2013.

Thereafter, Plaintiff and Mary communicated through attorneys about their separation and tried to settle their dispute about their Premarital Agreement. Mary ultimately moved to Florida in June 2014 and got engaged to Defendant in 2017.

Plaintiff refiled his complaint[3] on 14 September 2017 and Defendant's attorney informed Plaintiff's attorney that he would accept service on

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2. The only issue on appeal arises from the trial court's order granting JNOV in favor of Plaintiff on Defendant's abuse of process claim. Therefore, we do not address the evidence presented at trial regarding Plaintiff's alienation of affections claim except to the extent necessary to address the issue presented on appeal.

3. As noted above, Plaintiff had filed the first complaint against Defendant alleging alienation of affections in November 2015 and voluntarily dismissed that action on 15 September 2016.

behalf of Defendant. But Plaintiff did not attempt to have Defendant's attorney accept service. Instead, on 28 October 2017, Plaintiff arrived at Defendant's home purportedly to locate Defendant for service. That day, Defendant and John were upstairs watching a football game when they heard "screaming noises" coming from Mary. John immediately ran downstairs, with Defendant following behind, though he struggled to keep up due to the condition of his health. When John entered the garage, he saw Plaintiff yelling at Mary and "backing her up against the wall." Upon noticing John, Plaintiff turned to him and stated "[y]ou think you're big now. I'm going to hire someone to f*** your mom in the a**." Once Defendant made it downstairs, he saw Plaintiff "stumbling around drunk." Defendant told Plaintiff he needed to leave. In response, Plaintiff walked up to Defendant, spat on him, and left the home. They called the police, and Defendant was arrested and convicted in connection with the altercation.

According to Plaintiff's testimony, Defendant's attorney indicated that he would not accept service on behalf of Defendant, so Plaintiff hired a private investigator in Florida to serve him. The private investigator attempted to serve Defendant at his home three times before the date of the altercation. Following the unsuccessful attempts, Plaintiff drove to Defendant's home in Florida with a passenger in his vehicle. The passenger took photographs of Defendant's home and the vehicles parked in the driveway. Plaintiff then sent the photographs to the private investigator, along with a text message stating "[f]ound [Defendant] at home. See photos. Black Tahoe is his." Plaintiff testified that he never exited his vehicle, did not observe anyone at the home, and left immediately after the photographs were taken.

Two days after the altercation, Mary filed a petition for a domestic violence protection order against Plaintiff in a court in Florida. The court held a hearing and heard testimony from Plaintiff, the passenger in Plaintiff's vehicle, Mary, and John. The court granted the petition and found: "there was absolutely no reason for [Plaintiff] to be over at [Defendant]'s residence;" "[Plaintiff] has a recent history of harassment towards [Mary];" and "[Plaintiff's] actions are of a larger scheme of harassment of [Mary] and her family."

Defendant was eventually served with the summons and complaint on 1 November 2017 while he was attending one of John's football games. The trial began on 14 August 2023. Following the evidence, Plaintiff moved for a directed verdict on Defendant's abuse of process claim. The trial court denied Plaintiff's motion. On 24 August 2023, the jury found Defendant not liable for alienation of affections and found Plaintiff

liable for abuse of process. The jury awarded Defendant $932,042.00 in compensatory damages and $606,502.31 in punitive damages.

On 25 September 2023, Plaintiff filed a motion for JNOV, or alternatively, a new trial. The trial court held a hearing on Plaintiff's motion on 9 November 2023. By written order entered 30 November 2023, the trial court granted Plaintiff's motion. The trial court found "Defendant failed to introduce competent evidence to support both requisite elements for the counterclaim of abuse of process" and that "no reasonable jury could have reached a verdict in favor of Defendant." Thus, the trial court ordered that the judgment entered based on the jury verdict should be amended to reflect that Plaintiff is not liable to Defendant for either abuse of process or punitive damages. On 14 December 2023, Defendant appealed from the trial court's order granting Plaintiff's motion for JNOV and "any amendments to the Judgment directed by the Order."

II. Analysis

Defendant argues the trial court erred by granting Plaintiff's motion for JNOV. He argues there was substantial evidence presented to support his abuse of process claim and the trial court erred by setting aside the jury verdict and award of punitive damages.

A motion for JNOV is made under Rule 50 of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 50 (2023). The motion "is essentially a renewal of an earlier motion for directed verdict." *Jones v. Corn*, 293 N.C. App. 596, 602, 902 S.E.2d 17, 23 (2024) (citation omitted); *see Martin v. Pope*, 257 N.C. App. 641, 644, 811 S.E.2d 191, 194 (2018) ("[A] directed verdict motion is an 'absolute prerequisite' to a JNOV motion." (citation omitted)). Accordingly, when the trial court denies a party's motion for directed verdict, that party "may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict[.]" N.C. Gen. Stat. § 1A-1, Rule 50.

Both a motion for a directed verdict and a motion for JNOV challenge the sufficiency of the evidence. A motion for a directed verdict addresses whether there is sufficient evidence to submit the case to the jury, while a JNOV "provides the trial court with an opportunity to reconsider the question of the sufficiency of the evidence after the jury has returned a verdict." *Primerica Life Ins. Co. v. James Massengill & Sons Const. Co.*, 211 N.C. App. 252, 256-57, 712 S.E.2d 670, 675 (2011) (citation omitted). Stated differently, "[t]he purpose of a motion for JNOV is to test the sufficiency of the evidence on which the jury relied and to enter a judgment contrary to the jury's verdict if, as a matter of

law, the evidence presented does not support that verdict." *Vanguard Pai Lung, LLC v. Moody*, 387 N.C. 376, 379, 912 S.E.2d 788, 791 (2025) (citation omitted).

When contemplating a motion for JNOV, "the trial court must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor." *Hummer v. Pulley, Watson, King & Lischer, P.A.*, 157 N.C. App. 60, 65, 577 S.E.2d 918, 923 (2003) (citation omitted). This motion should not be granted "where there is more than a scintilla of evidence to support each element of a plaintiff's case." *Id.*; *see Morris v. Scenera Rsch., LLC*, 368 N.C. 857, 861, 788 S.E.2d 154, 158 (2016) (defining scintilla as "very slight evidence" (citations omitted)). "The nonmovant meets this low bar by demonstrating that the evidence would permit the jury to resolve the evidentiary conflicts in its favor based on more than raw 'suspicion, conjecture, guess, surmise, or speculation.' " *Moody*, 387 N.C. at 380, 912 S.E.2d at 792 (citation omitted).

Our Supreme Court has cautioned the trial court when considering a motion for JNOV, establishing that such a motion should be "cautiously and sparingly granted." *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 369, 329 S.E.2d 333, 338 (1985) (citation omitted). When a JNOV is granted, the trial court is, in effect, "deciding that the question has become one exclusively of law and that the jury has no function to serve." *Primerica Life Ins. Co.*, 211 N.C. App. at 257, 712 S.E.2d at 675 (citation omitted). In other words, it enables the trial court to "usurp the jury's role." *Corn*, 293 N.C. App. at 602, 902 S.E.2d at 23 (citation omitted). Consequently, "[t]he legal standard applied to a JNOV motion is quite demanding." *Moody*, 387 N.C. at 379, 912 S.E.2d at 791.

On appeal, "questions concerning the sufficiency of the evidence to withstand a Rule 50 motion for directed verdict or judgment notwithstanding the verdict present an issue of law[.]" *Jones v. Durham Anesthesia Assocs., P.A.*, 185 N.C. App. 504, 508, 648 S.E.2d 531, 535 (2007) (citation omitted). Therefore, this Court's review of a trial court's ruling on a motion for JNOV is *de novo*. *See Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 455, 873 S.E.2d 567, 577 (2022). Under a *de novo* review, "we consider the matter anew and freely substitute our judgment for that of the trial court[.]" *Hodgson Const., Inc. v. Howard*, 187 N.C. App. 408, 412, 654 S.E.2d 7, 11 (2007) (citation, quotation marks, and ellipses omitted).

Here, the trial court granted Plaintiff's motion for JNOV on Defendant's abuse of process claim. Abuse of process is "the misuse

of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ." *Chidnese v. Chidnese*, 210 N.C. App. 299, 310, 708 S.E.2d 725, 734 (2011) (emphasis in original) (citation omitted). Two elements must be established to prove abuse of process: "(1) the existence of an ulterior purpose; and (2) an act in the use of the process not proper in the regular prosecution of the proceeding." *Beroth Oil Co. v. Whiteheart*, 173 N.C. App. 89, 99-100, 618 S.E.2d 739, 747 (2005) (citation omitted). Moreover, "the mere filing of a civil action with an ulterior motive is not sufficient to sustain a claim for abuse of process. . . . [A] plaintiff must allege the misuse of process after an action between the parties has already commenced." *Chidnese*, 210 N.C. App. at 312, 708 S.E.2d at 735.

The first element, "ulterior purpose," is met "when the plaintiff alleges that the prior action was initiated by [the] defendant or used by him to achieve a collateral purpose not within the normal scope of the process used." *Fox v. City of Greensboro*, 279 N.C. App. 301, 327, 866 S.E.2d 270, 291 (2021) (citation omitted). Likewise, "[o]ne who uses legal process . . . for the purpose of oppression or annoyance is liable in damages in a common law action for abuse of process." *Melton v. Rickman*, 225 N.C. 700, 703, 36 S.E.2d 276, 278 (1945). The second element, the "act" requirement, "is satisfied when the plaintiff alleges that once the prior proceeding was initiated, the defendant committed some willful act whereby he sought to use the existence of the proceeding to gain advantage of the plaintiff in respect to some collateral matter." *Fox*, 279 N.C. App. at 327, 866 S.E.2d at 291 (citation and emphasis omitted). Stated another way, an "improper act or perversion taking place after the filing of the complaint that is wholly inconsistent with and collateral to the action instituted." *Fox v. Barrett*, 90 N.C. App. 135, 138, 367 S.E.2d 412, 414 (1988); *see Hewes v. Wolfe*, 74 N.C. App. 610, 614, 330 S.E.2d 16, 19 (1985) (noting that use of the legal proceeding "as a vehicle" to "achieve a purpose for which [the cause of action] was never intended" fulfills the "act" requirement).

We now must examine the evidence presented at trial to determine whether there is more than a "scintilla of evidence" to support each element of Defendant's abuse of process claim. *Hummer*, 157 N.C. App. at 65, 577 S.E.2d at 923. When assessing the evidence, we view all the evidence in the light most favorable to Defendant, considering any evidence which supports Defendant's claim as being true. *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337-38; *see also Corn*, 293 N.C. App. at 607, 902 S.E.2d at 26 ("[W]e must give [the nonmovant] the benefit of every reasonable

inference that may legitimately be drawn from the evidence[.]" (citations and quotation marks omitted)).

As to the first element, ulterior motive, Plaintiff's brief essentially concedes that the evidence, taken in the light most favorable to Defendant, would support a finding that Plaintiff had an ulterior purpose. Defendant presented evidence that Plaintiff initiated this action to harass, inconvenience, and embarrass Mary and Defendant. Because we have omitted many facts presented in this trial based on the jury's ruling against Plaintiff on his claim for alienation of affections and the limited issue on appeal, we will simply note that even Plaintiff's summary of the circumstances leading up to his complaint illustrates the level of animosity he had against both Defendant and Mary:

> From [Plaintiff]'s vantage point, [Mary] had cheated on him, falsely accused him of domestic violence, taken his house away from him for one year, stolen his furniture, and started a new life with her now husband (and her then boyfriend). It was for that reason that his lawyer demanded that [Mary] honor the Premarital Agreement and give him back his home, settle and give him his life back or else he would do what it would take legally to do so.
>
> In this litigation, [Plaintiff] contended that [Defendant] alienated the affections of [Mary] which actions caused (in part if not in whole) the demise of the marriage and what [Plaintiff] contended were the baseless domestic violence proceedings (although he acknowledges that Judge Strickland did not believe his innocence in the original 50B filings and ruled against him).

As to the first element of ulterior motive, there is more than a scintilla of evidence that Plaintiff instituted this action against Defendant to continue his abuse of Mary.

Plaintiff's argument that the trial court did not err by granting the motion for JNOV focuses mainly on the second element, "an act in the use of the process not proper in the regular prosecution of the proceeding." *Beroth Oil Co.*, 173 N.C. App. at 99-100, 618 S.E.2d at 747 (citation omitted). Plaintiff argues that even if Plaintiff's filing of the lawsuit and the issuance of the summons "was undertaken maliciously," this is not sufficient to uphold the verdict for abuse of process because the "process was limited to the regular and legitimate function in relation to the cause of action stated in the complaint that initiated the process." Plaintiff's argument then focuses entirely on his version of the facts

surrounding the attempted service of process at Defendant's home: that he "drove by [Defendant's] condo in an attempt to help his private investigator locate [Defendant] so he could serve him with process;" he "had a friend take photographs of [Defendant's] driveway and cars parked in it using [Plaintiff's] phone;" and Plaintiff's "process server ultimately served [Defendant] in public while attending [Mary's] son's football game." Plaintiff argues that he "had every right" to drive by Defendant's home on a public street and to allow someone in his car to take photographs of the "driveway or the cars in it" and he himself did not "actually [try] to serve that process." If these were the facts upon which we review the order granting JNOV, Plaintiff would be correct. Even if he had "evil purpose" in bringing the lawsuit against Defendant, "regular and legitimate use of process" in attempting to serve Defendant with the complaint would not be an abuse of process. As noted by our Supreme Court in *Melton v. Rickman*: "Evil purpose alone is not sufficient. The bad intent must finally culminate in the abuse, for it is only the latter which is the gist of the action. . . . Regular and legitimate use of process, though with a bad intention, is not a malicious abuse of process." 225 N.C. 700, 704, 36 S.E.2d 276, 278 (1945) (citations and quotation marks omitted).

But for purposes of review of the trial court's order granting JNOV, we must view the evidence in the light most favorable to Defendant, and those facts differ greatly from those posited in Plaintiff's brief. Defendant's evidence shows that Plaintiff's "bad intent" did "finally culminate in the abuse." *Id.* The "abuse" was Plaintiff's trespass on Defendant's property and spitting on Defendant while he was at Defendant's home on the pretext of assisting the process server in serving the complaint. Had Plaintiff merely driven by Defendant's home, taken photographs of a car, and later had Defendant served in a public place, this would be a very different case.

Defendant presented evidence that, after Plaintiff's complaint was filed on 14 September 2017, Defendant's attorney offered to accept service on behalf of Defendant. Rather than letting Defendant's attorney accept service, Plaintiff used the need to serve Defendant as an excuse to drive to Defendant's home in Florida allegedly to locate him to assist the process server. But Plaintiff did not merely drive by; he trespassed on Defendant's property, went into the garage, and confronted Mary. John saw Plaintiff yelling at Mary and backing her against a wall. Plaintiff made verbal threats to John, stating he would hire someone to sexually assault Mary. Plaintiff spat on Defendant before leaving the home. Following this incident, a court in Florida granted Mary's petition for a domestic violence protection order against Plaintiff. The Florida court

found that there was no reason for Plaintiff to be at Defendant's home and his actions were of a larger scheme of harassment toward Mary and her family. And although the findings of the Florida court are not determinative for purposes of this action, they are part of the evidence presented to the jury and which we must consider in the light most favorable to Defendant for review of the order granting JNOV.

From this evidence, a jury could reasonably conclude that Plaintiff used the legal process for an ulterior purpose *and* committed acts to further that purpose which were not proper in the regular course of proceedings. He used the legal process—his claim he was helping the private process server to serve the summons and complaint on Defendant—as a pretext to trespass on Defendant's property, to confront Mary and John, and to assault Defendant by spitting on him. This evidence would allow the jury to conclude that Plaintiff brought this suit for an ulterior purpose and then committed an act to further his ulterior purpose in his visit to Defendant's home for the claimed purpose of serving the complaint. *See Corn*, 293 N.C. App. at 605, 902 S.E.2d at 25 (explaining that when reviewing the denial of a JNOV, "it was the jury's role to weigh the evidence–not ours").

Importantly, Plaintiff committed these acts *after* Defendant's attorney communicated that he would accept service on his behalf. Despite the attorney's offer to accept service for Defendant, Plaintiff did not even attempt to have Defendant's attorney accept service. Under Rule 4(a) of the North Carolina Rules of Civil Procedure, Plaintiff himself could not serve Defendant; this rule provides that "[o]utside this State, such proper person shall be anyone who is not a party and is not less than 21 years of age or anyone duly authorized to serve summons by the law of the place where service is to be made." N.C. Gen. Stat. § 1A-1, Rule 4(a) (2023). Although Plaintiff himself could not serve Defendant, his actions were directed at "locating" Defendant for service. Plaintiff claimed there was a need for him to drive from his home in North Carolina to Defendant's home in Florida to assist the private process server by checking to see if Defendant was present at his home. But even if the process server needed help in locating Defendant, there would be no legitimate need for Plaintiff to get out of his car and trespass on Defendant's property, much less to confront and accost Defendant, Mary, and her son. Plaintiff could have simply advised the process server that Defendant was at home to allow the process server to serve the complaint. Based on this evidence, a jury could reasonably conclude that Plaintiff used the legal proceeding, specifically service of process, as a pretext to further abuse and harass Mary and Defendant.

We recognize that Plaintiff presented conflicting evidence, including his testimony that he was attempting to locate Defendant for service and that he merely drove by his home. However, we resolve all discrepancies in the evidence in Defendant's favor. *See Morris*, 368 N.C. at 862, 788 S.E.2d at 158 ("[I]n the context of a directed verdict and JNOV, the trial court must resolve [evidentiary] conflicts in [the nonmovant's] favor."). Thus, in the light most favorable to Defendant, there was "more than a scintilla of evidence" that Plaintiff used the process to accomplish an ulterior motive which was not within the normal scope of the process. *Hummer*, 157 N.C. App. at 65, 577 S.E.2d at 923. As Defendant presented sufficient evidence to support his claim for abuse of process, the trial court erred by granting Plaintiff's motion for JNOV and setting aside the jury verdict. *See Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009) (noting that a JNOV is "not properly allowed unless it appears, as a matter of law, that a recovery cannot be had by the [nonmovant] *upon any view of the facts* which the evidence reasonably tends to establish" (emphasis added) (citations and quotation marks omitted)).

III. Conclusion

Defendant presented more than a scintilla of evidence supporting his abuse of process claim. Specifically, Defendant presented evidence that Plaintiff had an ulterior purpose and committed willful acts that were collateral to the action instituted. Thus, the trial court erroneously granted Plaintiff's motion for JNOV on Defendant's abuse of process claim. The trial court's order is reversed.

REVERSED.

Judges ARROWOOD and FREEMAN concur.

SAULSBY v. AMPHASTAR PHARM., INC.

[299 N.C. App. 703 (2025)]

ARTEZ ROMEL SAULSBY, AS THE ADMINISTRATOR OF THE ESTATE OF SHARON SAULSBY ASKEW, PLAINTIFF
v.
AMPHASTAR PHARMACEUTICALS, INC., DEFENDANT

No. COA24-931

Filed 2 July 2025

Products Liability—death from over-the-counter inhaler—contributory negligence—failure to read label—summary judgment

In an action brought by the estate of a woman who died after taking a single dose of an over-the-counter bronchodilator, the trial court properly granted summary judgment to defendant (the drug's manufacturer) on claims of negligence and breach of implied warranty of merchantability where the facts did not raise any genuine issue of fact for a jury to resolve. Decedent's boyfriend purchased the inhaler from a drugstore after asking the pharmacist if the product was "good for breathing" without mentioning decedent's underlying health conditions; decedent self-administered one puff of the inhaler even though there were specific, express warnings on the packaging that the product should not be taken unless the user had been diagnosed with asthma—which decedent had not—and to consult a doctor before use if the user had heart disease or high blood pressure—both of which decedent had. Therefore, due to decedent's own contributory and negligent acts, the trial court properly concluded that plaintiff's claims were barred under N.C.G.S. § 99B-4(1) and (3)—even though, since the statute is written in the disjunctive, either one of the subsections would have been sufficient to bar recovery.

Appeal by defendant from judgment entered 18 March 2024 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 10 April 2025.

Lanier Law Group, P.A., by Robert O. Jenkins, for the plaintiff-appellant.

Hall Booth Smith, P.C., by Brenda S. McClearn, and Katherine W. Dandy, for the defendant-appellee.

TYSON, Judge.

Sharon Saulsby Askew ("Decedent") died after taking a single dose from a Primatene Mist inhaler, an over-the-counter bronchodilator manufactured by Amphastar Pharmaceuticals, Inc. ("Defendant"). Artez Saulsby ("Plaintiff"), Administrator of the Estate of Sharon Saulsby Askew, appeals the trial court's order granting Defendant's Motion for Summary Judgment. We affirm.

I. Background

Sharon Askew experienced shortness of breath on 4 May 2021. Decedent's long-term boyfriend of nine years, Tyrone Hayes, went to a Walgreens drugstore to seek a product to aid Decedent with relief from her shortness of breath. Hayes asked the pharmacist on duty, "Is Primatene Mist good for breathing?" The pharmacist responded, "Exactly." Hayes purchased the Primatene Mist. At the time of purchase, Hayes did not convey or discuss any of Decedent's underlying health issues with the pharmacist.

Hayes returned to Decedent's home and gave her the product. Decedent administered one puff of the Primatene Mist to herself. Shortly thereafter, Decedent experienced cardiopulmonary arrest and was transported to the hospital by ambulance. Decedent died at the hospital on 9 May 2021.

Primatene Mist is approved by the Food and Drug Administration for the treatment of "temporary relief of mild symptoms of intermittent asthma." This statement appeared in a red box on the front of the Primatene Mist packaging. It is undisputed Decedent was not diagnosed with, treated for, or prescribed medication for asthma. The Primatene Mist box provided the following warning: "Do not use unless a doctor said you have asthma." It also instructed potential users to "Ask a doctor before use if you have . . . heart disease [or] high blood pressure." It is undisputed Hayes did not read the Primatene Mist packaging at the time of purchase. There is no evidence of whether Decedent read the warning box or labels prior to her self-administration.

Decedent suffered from congestive heart failure, chronic kidney disease, and high cholesterol. Decedent also experienced high blood pressure and was a recipient of an implanted pacemaker.

Plaintiff filed a Complaint against Defendant on 15 March 2023 alleging Defendant was negligent in selling Primatene Mist and had breached the implied warranty of merchantability. Defendant filed a Motion to Dismiss, Answer, and Defenses on 22 May 2023.

Defendant also filed a Motion for Summary Judgment on 28 December 2023 and submitted a supplemental memorandum of law

in support on 14 March 2024. The trial court concluded Defendant was "entitled to summary judgment as to Plaintiff's claims for negligence and breach of implied warranty and further is entitled to summary judgment due to the contributory negligence of Plaintiff's Decedent and pursuant to N.C.G.S. § 99B-4." The trial court granted Defendant's Motion for Summary Judgment by Order entered on 3 April 2024. Plaintiff filed his Notice of Appeal on 16 April 2024.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2023).

III. Issues

Plaintiff asserts the trial court erred by granting Defendant's Motion for Summary Judgment. He argues whether Decedent was contributorily negligent is a question for the jury pursuant to N.C. Gen. Stat. § 99B-4 (2023). Plaintiff further alleges Defendant breached the implied warranty of merchantability and asserts Primatene Mist is a dangerous and an essentially useless product.

IV. Motion for Summary Judgment

Plaintiff argues the trial court erred in granting Summary Judgment. Plaintiff argues the statute Defendant cites for its contributory negligence defense, N.C. Gen. Stat. § 99B-4(1) and (3), requires the jury to make a negligence determination of whether Decedent exercised reasonable care under the circumstances *and* whether the warning was adequate. Plaintiff contends Hayes' purchase of Primatene Mist, which he made with a pharmacist's assistance and was preceded by an online search, demonstrates the general public's perception that over-the-counter medications are inherently risk-free. Plaintiff lastly argues, regardless of the warnings on the use of Primatene Mist, the Supreme Court of North Carolina has previously held a jury can find a consumer exercised reasonable care, even if that consumer did not read the instructions or warnings accompanying a product.

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)). Summary judgment is not appropriate where questions exist about the credibility of witnesses or

about the weight of evidence. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979).

A defendant may show entitlement to summary judgment by "(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery [ ] the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing [ ] the plaintiff cannot surmount an affirmative defense." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995).

"Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000). "To hold otherwise . . . would be to allow plaintiffs to rest on their pleadings, effectively neutralizing the useful and efficient procedural tool of summary judgment." *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 64, 414 S.E.2d 339, 342 (1992).

B. Analysis

Issues of contributory negligence are appropriate for summary judgment "where the evidence establishes plaintiff's own negligence so clearly that no other reasonable conclusion may be reached[.]" *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997).

"In order for contributory negligence to apply, it is not necessary that plaintiff be *actually aware* of the unreasonable danger of injury to which his conduct exposes him." *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980). "[T]he existence of contributory negligence does not depend on [the] plaintiff's subjective appreciation of danger; rather, contributory negligence consists of conduct which fails to conform to an objective standard of behavior 'such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.' " *Id.* (quoting *Clark v. Roberts*, 263 N.C. 336, 343, 139 S.E.2d 593, 597 (1965)).

N.C. Gen. Stat. § 99B-4 provides guidance for assessing knowledge or reasonable care in a products liability case. No manufacturer or seller will be held liable if:

> (1) The use of the product giving rise to the product liability action was contrary to any express and adequate

> instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; *or*
>
> (2) The user knew of or discovered a defect or dangerous condition of the product that was inconsistent with the safe use of the product, and then unreasonably and voluntarily exposed himself or herself to the danger, and was injured by or caused injury with that product; *or*
>
> (3) The claimant failed to exercise reasonable care under the circumstances in the use of the product, and such failure was a proximate cause of the occurrence that caused the injury or damage complained of.

N.C. Gen. Stat. § 99B-4 (2023) (emphasis supplied).

Plaintiff argues N.C. Gen. Stat. § 99B-4 shields Defendant from product liability claims, only if Defendant can satisfy both subsections (1) *and* (3). Plaintiff asserts N.C. Gen. Stat. § 99B-4 only bars liability if Defendant demonstrates Decedent exercised reasonable care under the circumstances (pursuant to § 99B-4(1)) *and* the warning on the Primatene Mist was adequate (pursuant to § 99B-4(3)).

Here, the trial court applied a disjunctive approach to the statutory language of "or", not the conjunctive "and." We agree. "Where a statute contains two clauses which prescribe its applicability, and the clauses are connected by a disjunctive (e.g., 'or'), the application of the statute is not limited to cases falling within both clauses, but will apply to cases falling within either of them." *Davis v. N.C. Granite*, 259 N.C. 672, 675, 131 S.E.2d 335, 337 (1963).

Each subsection of the statute can operate to independently bar recovery based on the specific facts of each case. *See Lee v. Crest Chemical Co.*, 583 F. Supp. 131, 132 (M.D.N.C. 1984) (concluding N.C. Gen. Stat. § 99B-4(1) is a complete defense when the plaintiff read the product's warning prior to use, but did not wear gloves as directed and suffered chemical burns, and therefore granting the defendant's motion for summary judgment). Satisfying any one of the statute's subsections in N.C. Gen. Stat. § 99B-4 is sufficient to bar liability. *See Nicholson*, 346 N.C. at 772-74, 488 S.E.2d at 243-44 (explaining N.C. Gen. Stat. § 99B-4(1) and (3) codify the defense of contributory negligence, applying § 99B-4(3) to the plaintiff's products liability claim, and providing

§ 99B-4(3) "does not create a different rule for products liability actions"); *Smith*, 300 N.C. at 678, 268 S.E.2d at 510 (finding the application of contributory negligence as a defense in product liability actions under N.C. Gen. Stat. § 99B-4(3)); *Champs Convenience Stores, Inc. v. United Chem. Co.*, 329 N.C. 446, 453, 406 S.E.2d 856, 860 (1991) ("In addition to codifying the general doctrine of contributory negligence, § 99B-4 sets out or explains more specialized fact patterns which would amount to contributory negligence in a products liability action."). The trial court properly applied the statute in the disjunctive. N.C. Gen. Stat. § 99B-4 (2023); *Davis*, 259 N.C. at 675, 131 S.E.2d at 337.

C. Warnings and Instructions

1. *Smith v. Selco*

Plaintiff argues N.C. Gen. Stat. § 99B-4(1) requires consideration of whether a consumer knew or should have known, through the exercise of reasonable and diligent care, of a product's warnings and instructions. In *Smith v. Selco*, this Court held § 99B-4(1) was not conclusively established as a matter of law where the plaintiff violated a warning attached to the product. *Smith v. Selco Prod., Inc.*, 96 N.C. App. 151, 156, 385 S.E.2d 173, 175 (1989). The court emphasized "[a] manufacturer must properly inform users of a product's hazards, uses, and misuses or be liable for injuries resulting therefrom under some circumstances." *Id.* In *Smith*, the Court concluded the warning was inadequate, because it had failed to advise the plaintiff the tape-switch sensor might malfunction, resulting in the plaintiff's injury. *See id.* at 157, 385 S.E.2d at 176.

The warnings on the Primatene Mist packaging clearly informed and warned potential users not to use the product unless they had been diagnosed with asthma, and it also instructed users with heart disease or high blood pressure to consult with a doctor before using Primatene Mist. It is undisputed that Decedent was not diagnosed with asthma. At the time of purchase, Hayes did not know if Decedent had asthma or not. Both Decedent and Hayes were also aware Decedent had heart disease and high blood pressure. Despite this knowledge, Decedent used and inhaled the product contrary to the express instructions and warnings.

The Primatene Mist packaging contained specific, express warnings directly addressing Decedent's medical conditions, unlike those in *Smith*, where the warning was incomplete. *See id.* Both Decedent and Hayes either knew or, with the exercise of reasonable and diligent care, should have known of these warnings. *See Lee*, 583 F. Supp. at 133-34; *Padgett v. Synthes, Ltd.*, 677 F. Supp. 1329 at 1335 (W.D.N.C. 1988) (finding warnings given to the physician in the insert constitute sufficient

notice to the plaintiff under N.C. Gen. Stat § 99B-4). The trial court properly concluded N.C. Gen. Stat. § 99B-4(1) bars recovery.

2. *Champs Convenience Stores Inc. v. United Chem. Co., Inc.*

Plaintiff argues the Supreme Court of North Carolina has previously held a jury can find a consumer exercised reasonable care, despite failing to read the instructions or warning accompanying a product. *Champs*, 329 N.C. at 456, 406 S.E.2d at 862. The facts of this case are distinguishable.

In *Champs*, the Court held the evidence was insufficient to establish contributory negligence as a matter of law because there were "questions of fact to be decided." *Id.* The defendant in *Champs* had delivered the wrong product to the plaintiff. *Id.* When the product was delivered, the plaintiff checked the invoice, which inaccurately indicated the plaintiff had received the correct product. *Id.* The plaintiff had previously received complete usage instructions from the defendant's employee over the telephone. *Id.* The plaintiff subsequently cleaned the floors with the delivered product, which was a toxic chemical that ruined half of the store's inventory. *Id.* Although the plaintiff had failed to read the written instructions, which accompanied the delivered product, the Court concluded: "[w]hether [plaintiff] could reasonably rely on the instructions given over the telephone and on the invoice is a jury question, and the trial court properly submitted the question to the jury." *Id.*

Here, Decedent was not given the wrong product, nor were there any extensive conversations by Hayes with the pharmacist regarding the product's instructions or warnings. Hayes only asked whether Primatene Mist was "good for breathing?" The pharmacist, unaware of Decedent's lack of an asthma diagnosis or her underlying heart and medical conditions, had no opportunity to provide further individualized warnings. Unlike in *Champs*, where the wrong product was delivered and extenuating circumstances had created a factual dispute, the facts in the present case do not raise genuine issues for a jury. *See id.* With the exercise of reasonable or diligent care, Decedent or Hayes knew, or should have known, of the express warnings on Primatene Mist's packaging. The trial court properly concluded Decedent's contributory negligence barred Plaintiff's claims as a matter of law. N.C. Gen. Stat. § 99B-4(1) (2023).

D. Reasonable Care Under the Circumstances

The care an ordinarily prudent person should or would exercise under the same or similar circumstances determines whether Decedent

was contributorily negligent. *See Smith*, 300 N.C. at 677, 268 S.E.2d at 508. N.C. Gen. Stat. § 99B-4(3) indicates a plaintiff's behavior "under the circumstances" must be considered in determining whether contributory negligence exists. *See Smith*, 96 N.C. App. at 159, 385 S.E.2d at 177. It is undisputed Hayes did not inform the pharmacist of Decedent's underlying health conditions when he only asked, "Is Primatene Mist good for breathing?" This omission, combined with the failure to read the product's instructions and warnings, and the fact Hayes, rather than Decedent herself, sought Primatene Mist to address her mild symptoms, demonstrates both Hayes and Decedent failed to exercise the care an ordinarily prudent person would exercise under the same or similar circumstances. *See Smith*, 300 N.C. at 676-77, 268 S.E.2d at 507-08. Their failure to exercise reasonable care contributed to and proximately caused Decedent's death. *See Lee*, 583 F. Supp. at 135 (finding plaintiff's disregard for product instructions was the proximate cause of her injury). The trial court properly concluded N.C. Gen. Stat. § 99B-4(3) also bars recovery.

V. Implied Warranty of Merchantability

In light of our holding, we need not review this issue because the contributory negligence statute bars a product liability claim against a manufacturer based on breach of implied merchantability. *See Nicholson*, 346 N.C. at 773, 488 S.E.2d at 244 ("[C]ontributory negligence also bars a products liability claim against a manufacturer or seller based on breach of implied warranty." (citing N.C. Gen. Stat. § 99B-4 ("No manufacturer or seller shall be held liable in *any* product liability action if [plaintiff is contributorily negligent.]") (emphasis supplied))); *Gillespie v. American Motors Corp.*, 69 N.C. App. 531, 317 S.E.2d 32 (1984).

VI. Conclusion

The trial court properly applied N.C. Gen. Stat. § 99B-4 and did not err in granting summary judgment due to Decedent's own contributory and negligent acts. Under the objective standard, a person experiencing mild respiratory distress must either read the product's warnings and instructions or consult a doctor before use, particularly when the product is expressly indicated for asthma, and Decedent had not been diagnosed with asthma. *See* N.C. Gen. Stat. § 99B-4(1) (2023).

Primatene Mist's labeling clearly and expressly warned against its use by individuals with heart disease and high blood pressure, both conditions for which Decedent had been diagnosed. Despite these express warnings and Decedent's known medical conditions, she proceeded to use the product.

The evidence clearly establishes Decedent's own negligence. No genuine issues of material fact exist, and no other reasonable conclusion may be reached. *See Nicholson*, 346 N.C. at 772-74, 488 S.E.2d at 243-44. The trial court properly granted Defendant's Motion for Summary Judgment. *Id.* The order appealed from is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge DILLON and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
NICOLAS GANNAR FRENCH

No. COA24-704

Filed 2 July 2025

1. Assault—multiple assaults—sufficiency of evidence—distinct interruption—change in location

At a trial for three different assault charges arising from the same domestic violence incident, the trial court properly denied defendant's motion to dismiss all but one assault charge where the State presented substantial evidence that defendant committed three separate assaults on his wife rather than one continuous assault. Specifically, the evidence—including testimony from defendant's wife—showed that: defendant pushed his way into the home, struck his wife, and then grabbed her neck, after which she broke free and begged defendant to stop (the first assault); then, defendant pushed his wife up against the kitchen stove, placed one hand around her throat, and struck her in the ribs and stomach with his free hand, after which the wife broke free again and ran to a different part of the home (the second assault); and, finally, defendant pinned his wife onto the floor, got on top of her, and strangled her until she managed to escape and call the police (the third assault).

2. Sentencing—multiple assault charges—stemming from the same incident—distinct interruptions between assaults—separate sentences properly imposed

After defendant was convicted on three different assault charges arising from the same domestic violence incident, the trial court properly imposed separate sentences for each assault charge,

running consecutively, despite defendant's argument that the statutes under which he was convicted (N.C.G.S. §§ 14-32.4(b) and 14-33(c)(1)-(2)) forbade the court from imposing punishments for the lesser assault offenses (assault on a female and assault inflicting serious injury) where it had already imposed a punishment for the greater offense (assault by strangulation) involving the same conduct. To the contrary, the statutes at issue allowed for multiple sentences based on multiple assaults occurring in the same altercation so long as the State presented substantial evidence of separate assaults delineated by distinct interruptions, as was the case here.

Appeal by defendant from judgments entered 7 December 2023 by Judge Robert C. Roupe in Onslow County Superior Court. Heard in the Court of Appeals 10 April 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney Generals Lisa T. Pakela, Melody R. Hairston, and Christopher R. McLennan, for the State.

Law Office of John W. King, Jr. PLLC, by John W. Moss, for the defendant-appellant.

TYSON, Judge.

Nicolas French ("Defendant") appeals from the jury's verdicts and the final judgments entered thereon for assault by strangulation, assault on a female, and assault inflicting serious injury. Our review discerns no error.

I. Background

Defendant and Christine Riley ("Ms. Riley") were married in October 2016. Defendant moved into Ms. Riley's home during May 2017. Both Defendant and Ms. Riley testified, but each gave differing accounts of events, which occurred on 4 October 2022. Defendant and Ms. Riley were home and Defendant began drinking alcohol. Ms. Riley asked Defendant to stop drinking and told him to leave and stay out of the house if he planned to continue drinking. Defendant left to go to a neighbor's house.

Ms. Riley further testified she was awoken by Defendant banging on the back door of their home at around 11:20 p.m. or 11:30 p.m. He was demanding to come inside and requested his phone. Ms. Riley answered and again told Defendant, if he was going to continue drinking, she did not want him inside the house. She went inside to retrieve his phone.

When Ms. Riley returned with his phone, Defendant forced his way into the home and began to strike her on the right side of her head. Defendant put his hands around her neck and applied pressure. The two fell onto the floor. Ms. Riley was able to break free from Defendant and ran away.

Defendant caught up with Ms. Riley and pushed her into the kitchen stove, keeping one hand around her throat while using his other to strike her in the ribs and stomach. Ms. Riley was again able to get away from Defendant and ran towards the living room.

Defendant knocked her into an area between the kitchen and living room, pushed her onto the floor, and got on top of her. Defendant again placed his hands around Ms. Riley's neck and throat, making it difficult for her to breathe. Ms. Riley testified this assault lasted at least 45 seconds. Ms. Riley was able to get away for yet a third time and ran into the living room to call 911 for help.

Defendant saw Ms. Riley speaking on the phone and briefly left the house before returning. Officers from the Jacksonville Police Department and EMS shortly arrived at the scene. Defendant was restrained and placed under arrest. Ms. Riley drove herself to and was treated at Onslow Memorial Hospital the following day.

On 7 March 2023, Defendant was indicted on charges of assault by strangulation and assault on a female. A superseding indictment was entered on 3 October 2023 on charges of assault by strangulation, assault on a female, and assault with a dangerous weapon inflicting serious injury. The jury found Defendant guilty of assault by strangulation, assault on a female, and guilty of the lesser-included offense of assault inflicting serious injury.

On 7 December 2023, Defendant was sentenced in the presumptive range as a prior record level I offender to an active term of 6 months to 17 months for the offense of assault by strangulation. Defendant was also sentenced to an active term of 60 days for assault on a female, which was set to run consecutively to his first sentence. Defendant was lastly sentenced to an active term of 60 days for assault inflicting serious injury, which was set to run consecutively to his second sentence. Defendant appeals.

II. Jurisdiction

Jurisdiction lies in this court pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Issues

Defendant was charged with and convicted of three separate assaults. Defendant argues the State failed to present substantial evidence indicating the assaults were distinct incidents and asserts the trial court erred in denying Defendant's motion to dismiss two of the three assault charges. Defendant also contends he was improperly sentenced separately and consecutively for assault by strangulation, assault on a female, and assault inflicting serious injury, in violation of the General Assembly's statutory mandates.

IV. Motion to Dismiss

[1] Defendant moved to dismiss all charges at the close of the evidence. The trial court denied the motion. Defendant argues the trial court erred by denying his motion to dismiss two of the three assault charges. Defendant contends his assaults on Ms. Riley occurred "during one continuous interaction," the State presented evidence of only a single assault, and the State had failed to offer sufficient evidence to support the other two separate assaults for which Defendant was charged and convicted.

A. Standard of Review

"Whether the State presented substantial evidence of each essential element of the offense is a question of law." *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016) (internal citations omitted). 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). "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 contradiction in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

B. Analysis

Defendant asserts the State's evidence shows only one assault occurred, with no distinct interruption from beginning to end. Defendant argues the State's evidence was insufficient to prove multiple assaults, and the trial court erred when it failed to dismiss all but one of the assault charges.

To survive a motion to dismiss based on insufficiency of the evidence, the State must present "substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein,

and (2) of defendant being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (internal citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Blake*, 319 N.C. 599, 604, 356 S.E.2d 352, 355 (1987) (citation and quotation marks omitted). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

The relevant question is whether the State presented substantial evidence of not just one, but three, distinct assaults. Defendant was charged with assault by strangulation, assault on a female, and assault with a dangerous weapon inflicting serious injury. The crime of assault is defined by common law rules as:

> [A]n overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.

State v. Dew, 379 N.C. 64, 70, 864 S.E.2d 268, 273-74 (2021).

"[T]he State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults." *Dew*, 379 N.C. at 72, 864 S.E.2d at 275. "[A] distinct interruption may take the form of an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another." *Id.*

Defendant argues the State failed to present sufficient evidence of separate assaults, but rather only showed proof of one continuous assault. The State argues two distinct interruptions took place, resulting in three separate assaults.

We conclude the evidence supports the State's contention. Testimony from Ms. Riley asserted Defendant first assaulted her by pushing his way into the home and immediately striking her on the right side of her head on 4 October 2022. Defendant then put his hands around Ms. Riley's neck and applied pressure before the two fell onto the floor. The first

distinct interruption of the attack occurred when Ms. Riley briefly broke free, begged Defendant to stop, and told him he could stay at the house.

The evidence presented by the State regarding this distinct interruption, specifically Ms. Riley's testimony she had "managed to get up at that point [and] ran over [while] begging him to stop," is sufficient to show an "interruption in the momentum of the attack." *Dew*, 379 N.C. at 72, 864 S.E.2d at 275. This interruption in the momentum delineates the end of the first assault and the beginning of the second.

The State's evidence further shows Defendant then pushed Ms. Riley up against the kitchen stove, placed one hand around her throat and struck her in the ribs and stomach with his other. The second distinct interruption in the second attack occurred when Ms. Riley again escaped from Defendant and ran from the kitchen stove toward a different area of the home between the kitchen and living room. The evidence presented by Ms. Riley's testimony tended to show she "managed to get away . . . tried running toward the living room[,] and then he pushed [her] into the area that's between the kitchen and the living room." This testimony, pursuant to *Dew*, is sufficient to show "a change in location." *Id.* This change in location of the attack delineates the end of the second assault and the beginning of the third assault.

In this new area of the home, Defendant pushed Ms. Riley to the floor, got on top of her, and again placed both hands around her neck, causing her to begin to lose consciousness. Ms. Riley testified she kicked her legs in an attempt to stop the assault until she was able to again get away and call the police, ending the third and final assault.

The evidence presented supports each distinct interruption and is sufficient to delineate the end of one assault and the beginning of another, showing both interruptions in the momentum of the attacks and changes in the location of the home where they occurred. These distinct interruptions occurred first when Ms. Riley ran and begged Defendant to stop, and later, when Ms. Riley ran into a different area of the home near the living room. The State also presented evidence supporting each separate charge through documentary evidence, including pictures from 4 October 2022 and previous assaults, as well as testimonial evidence from Ms. Riley, medical providers from Onslow Memorial Hospital, and law enforcement officers from Jacksonville Police Department.

1. State v. Dew and State v. Robinson

Defendant argues *State v. Dew* and *State v. Robinson* supports his contention only one continuous assault occurred. *Dew*, 379 N.C. 64, 864

S.E.2d 268; *State v. Robinson*, 381 N.C. 207, 219, 872 S.E.2d 28, 37 (2022). Those cases are distinguishable from the evidence here. In *Dew*, the victim testified the defendant had hit her " 'over and over,'—a continuous non-stop beating—for at least two hours." *Dew*, 379 N.C. at 65, 864 S.E.2d at 270. In *Robinson*, the victim's statement described the attack as "continuous . . . without pause or interruption." 381 N.C. at 219, 872 S.E.2d at 37.

During Ms. Riley's testimony, she did not describe the attack as an ongoing and continuous assault, but rather described two distinct interruptions, supporting three separate assault charges. We conclude the trial court did not err in denying Defendant's motion to dismiss two of the three assault charges. The State presented sufficient evidence to support presenting all three charges to the jury. Defendant's arguments are overruled.

V. Sentencing

[2] Defendant was sentenced in the presumptive range to an active term of 6 months minimum to 17 months maximum for the offense of assault by strangulation; to an active term of 60 days for assault on a female, consecutive to the first sentence; and, to an active term of 60 days for assault inflicting serious injury consecutive to the second sentence.

Defendant argues he was improperly sentenced separately and consecutively for assault by strangulation under N.C. Gen. Stat. § 14-32.4(b), assault on a female under N.C. Gen. Stat. § 14-33(c)(2), and assault inflicting serious injury under N.C. Gen. Stat. § 14-33(c)(1) in violation of the legislature's statutory mandates. N.C. Gen. Stat. §§ 14-32.4(b); 33(c)(1)-(2) (2023). Defendant contends the General Assembly authorized punishment only once for the same assault through the language of these statutes. Defendant further contends the trial court lacked statutory authority to impose additional sentences for assault on a female and assault inflicting serious injury by imposing consecutive active punishments on him after sentencing him for the greater offense of assault by strangulation.

A. Standard of Review

Defendant's argument involves a question of statutory interpretation. "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Jones*, 237 N.C. App. 526, 530, 767 S.E.2d 341, 344 (2014) (citation omitted). "The prefatory clause of assault on a female statute . . . imposed a statutory mandate that preserved for appellate review [D]efendant's claim that he

could not be punished for [each assault] based on the same conduct, despite his failure to object." *Id.*; N.C. Gen. Stat. § 14-33(c) (2023).

"When a trial court acts contrary to a statutory mandate, the defendant's right to appeal is preserved despite the defendant's failure to object during trial." *State v. Harding*, 258 N.C. App. 306, 316, 813 S.E.2d 254, 262 (2018) (quoting *State v. Braxton*, 352 N.C. 158, 177, 531 S.E.2d 428, 439 (2000) (citations and quotation marks omitted)).

VI. Analysis

Defendant argues he was improperly punished because the beginning clause of each statute under which he was convicted limits the trial court's ability to impose punishment for lesser assault offenses if a higher offense punishment is imposed for a higher offense involving the same conduct. The State asserts Defendant was properly sentenced because the trial court may impose punishment for multiple assaults when sufficient evidence is presented of, and the jury finds, multiple separate assaults occurred.

As noted, the jury found Defendant guilty of assault by strangulation under N.C. Gen. Stat. § 14-32.4(b), assault on a female under N.C. Gen. Stat. § 14-33(c)(2), and the lesser included assault inflicting serious injury under N.C. Gen. Stat. § 14-33(c)(1). Pursuant to N.C. Gen. Stat. § 14-32.4(b), "[u]nless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts physical injury by strangulation is guilty of a Class H felony." N.C. Gen. Stat. § 14-32.4(b) (2023).

N.C. Gen. Stat. § 14-33(c)(1) and (2) provide:

> Unless the conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she: (1) [i]nflicts serious injury upon another person or uses a deadly weapon; (2) [a]ssaults a female, he being a male person at least 18 years of age; . . . .

See N.C. Gen. Stat. § 14-33(c)(1) and (2) (2023).

Each statute begins with the clause "unless the conduct is covered under some other provision of law providing greater punishment." *See* N.C. Gen. Stat. § 14-32.4(b); and N.C. Gen. Stat. § 14-33(c). Defendant contends this language indicates the General Assembly intended for

punishment to be imposed either for the more serious offense or for the lesser offense, but not both. *See id.* " 'The intent of the Legislature controls the interpretation of a statute [and] [w]hen a statute is unambiguous, this Court will give effect to the words without resorting to judicial construction.' " *Jones*, 237 N.C. App. at 530, 767 S.E.2d at 344 (quoting *State v. Davis*, 364 N.C. 297, 302, 698 S.E.2d 65, 68 (2010)).

"In order for a criminal defendant to be charged and convicted of two separate counts of assault stemming from one transaction," in accord with double jeopardy principles, "the evidence must establish 'a distinct interruption in the original assault followed by a second assault[,]' so that the subsequent assault may be deemed separate and distinct from the first." *Littlejohn*, 158 N.C. App. at 635, 582 S.E.2d at 307 (quoting *State v. Brooks*, 138 N.C. App. 185, 189, 530 S.E.2d 849, 852 (2000)). "[T]he evidence must show that 'two separate and distinct assaults occurred' in order to support more than one charge." *State v. Prince*, 271 N.C. App. 321, 324, 843 S.E.2d 700, 701, *writ allowed*, 375 N.C. 280, 842 S.E.2d 601 (2020) (quoting *State v. McCoy*, 174 N.C. App. 105, 116, 620 S.E.2d 863, 872 (2005)).

"[W]here multiple assaults occurring during one altercation may be 'deemed separate and distinct,' multiple sentences based on those assaults may be imposed." *Harding*, 258 N.C. App. at 316, 813 S.E.2d at 262 (quoting *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (2003) (explaining that where multiple assault convictions arise from "one transaction, the evidence must establish 'a distinct interruption in the original assault followed by a second assault[,]' so that the subsequent assault may be deemed separate and distinct from the first" (citation omitted)). A trial court may sentence a defendant for multiple counts of assault when there is substantial evidence of a distinct interruption between assaults. *Id.*; *Dew*, 379 N.C. at 65, 864 S.E.2d at 270.

Here, the State presented sufficient evidence tending to show the attacks on Ms. Riley were not one continuous or non-stop assault, but rather three separate assaults, separated by distinct interruptions. The State offered substantial evidence in support of each assault, including photographs, documents, and testimony from Ms. Riley, medical providers, and law enforcement officers.

Based upon the evidence presented by the State, Defendant's attack on Ms. Riley was interrupted by at least two distinct breaks in the assaults, which occurred after she broke away from him twice. The evidence supports the jury's conclusion that three separate assaults occurred.

Defendant was properly sentenced separately and consecutively, within the trial court's discretion, for each of the three offenses. *Prince*, 271 N.C. App. at 324, 843 S.E.2d at 702. Defendant's arguments are overruled.

VII. Conclusion

The trial court properly denied Defendant's motion to dismiss two of the three assault charges. Defendant was properly sentenced within the presumptive ranges, consecutively, for three separate assaults on Ms. Riley.

Defendant received a fair trial, free from prejudicial errors he brought forth and argued. We discern no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Chief Judge DILLON and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
QUINTERIUS JAMAL GILBERT

No. COA25-32

Filed 2 July 2025

Criminal Law—prosecutor's closing argument—defendant's choice not to testify—prejudicial error not shown

At a trial for crimes arising from a home break-in and subsequent attempts to sell wristwatches stolen from the home, where defendant did not testify or present other evidence, the trial court did not commit prejudicial error by failing to intervene ex mero motu when the prosecutor stated during closing arguments that "[defendant] doesn't have to testify, but there's no other evidence to say otherwise as to how he got those watches honestly." The prosecutor's remarks were improper, since they violated defendant's statutory and constitutional rights against self-incrimination. Moreover, the error was never cured where the State did not withdraw the remark and the trial court neither made a statement indicating that the remark was improper nor instructed the jury not to consider defendant's failure to testify. Nevertheless, the prosecutor's remarks

were not so grossly improper as to entitle defendant to a new trial given the overwhelming, uncontradicted evidence of his guilt of the charged crimes.

Judge TYSON concurring by separate opinion.

Appeal by Defendant from judgments entered 17 April 2024 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 11 June 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Daniel J. Burke, for the State-Appellee.

Joseph E. Gerber for Defendant-Appellant.

COLLINS, Judge.

Defendant Quinterius Jamal Gilbert appeals from judgments entered upon jury verdicts of guilty of various crimes related to a break in and upon his guilty plea to having attained habitual felon status. Defendant argues that the trial court prejudicially erred by failing to intervene ex mero motu during the State's closing argument when it referenced Defendant's decision not to testify. After careful consideration, we find no prejudicial error.

I. Background

Defendant was indicted in April 2023 for felony breaking and entering, felony larceny after breaking and entering, and obtaining property by false pretenses. Defendant was subsequently indicted as a habitual felon. Defendant's case came on for trial in March 2024. The evidence at trial tended to show the following:

The Troncoso-Ortiz family's home in High Point, North Carolina was broken into on 8 December 2022. Mr. Troncoso-Ortiz reported seven wristwatches and a container of loose coins missing and gave the police a description of the watches. The next day, Defendant showed his identification to the manager of Cash American Pawn in High Point and sold two watches to the pawn shop. Law enforcement accessed the pawn shop's records and put a hold on the watches sold by Defendant because they matched the description of the stolen watches. Mr. Troncoso-Ortiz subsequently identified the watches as his. Defendant attempted to sell additional watches to the pawn shop on 12 December 2022, but the pawn shop refused to purchase them.

After deliberating for thirty minutes, the jury found Defendant guilty of all charges. Defendant pled guilty to having attained habitual felon status. The trial court sentenced Defendant to an active term of 96-128 months of imprisonment with a credit of 424 days served. Defendant gave notice of appeal in open court.

II. Discussion

Defendant's sole argument on appeal is that the trial court prejudicially erred by failing to intervene ex mero motu during the State's closing argument when the State referenced Defendant's decision not to testify.

"The standard of review for assessing alleged improper closing arguments that fail[ed] to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene ex mero motu." *State v. Jones*, 355 N.C. 117, 133 (2002) (italics and citation omitted). This Court must determine "(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). "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 (1998) (citations omitted).

A criminal defendant cannot be compelled to testify, and the State's reference to or comment on his decision not to testify violates the defendant's right to remain silent under the Fifth Amendment of the United States Constitution. *State v. Grant*, 293 N.C. App. 457, 458 (2024) (citing *Griffin v. California*, 380 U.S. 609, 615 (1965)). Likewise, the North Carolina Constitution provides that a criminal defendant cannot "be compelled to give self-incriminating evidence." N.C. Const. art. I, § 23. Additionally, our North Carolina General Statutes provide that a criminal defendant shall not be compelled to testify or "answer any question tending to criminate himself." N.C. Gen. Stat. § 8-54 (2024). Because a criminal defendant's right to remain silent is constitutionally and statutorily protected, "a prosecution's argument which clearly suggests that a defendant has failed to testify is error." *State v. Reid*, 334 N.C. 551, 555 (1993) (citation omitted).

However, "a comment implicating a defendant's right to remain silent, although erroneous, is not invariably prejudicial." *State v. Ward*, 354 N.C. 231, 251 (2001) (citation omitted). "The error may be cured by a withdrawal of the remark or by a statement from the court that it

was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness." *Trull*, 349 N.C. at 452-53 (brackets and citation omitted). The trial court's "inclusion in the jury charge of an instruction on a defendant's right not to testify" alone is insufficient to cure the State's error. *Reid*, 334 N.C. at 556.

In this case, Defendant did not offer evidence and exercised his right not to testify. The State made the following remark about Defendant's decision during its closing argument, without objection:

> You don't have any other evidence to say otherwise. Now, *he doesn't have to testify*, but there's no other evidence to say otherwise as to how he got those watches honestly. . . .

(emphasis added). This specific and direct statement made during closing argument, that Defendant "doesn't have to testify," violated Defendant's constitutional and statutory rights. *Reid*, 334 N.C. at 555. The error was not cured because the State did not withdraw the remark, nor did the trial court indicate that the remark was improper or instruct the jury not to consider "the failure of the accused to offer himself as a witness." *Trull*, 349 N.C. at 452-53 (citation omitted). Although the trial court included in the jury charge an instruction on a defendant's right not to testify, this instruction alone was not sufficient to cure the improper remark. *Reid*, 334 N.C. at 556.

Notwithstanding this error, Defendant is not entitled to a new trial because he has failed to show the error "was so grossly improper as to impede [his] right to a fair trial." *Huey*, 370 N.C. at 179. The State presented substantial uncontradicted evidence of Defendant's guilt. Law enforcement discovered that Defendant had presented identification and sold two watches to a pawn shop in High Point the day after seven watches were reported stolen from the Troncoso-Ortiz family's High Point home. The watches Defendant sold matched the description of the stolen watches given by Mr. Troncoso-Ortiz, and Mr. Troncoso-Ortiz subsequently identified the watches as belonging to him. Defendant returned to the same pawn shop a few days later to sell additional watches. The State's remark and the trial court's lack of curative action, while error, was not so grossly improper as to impede Defendant's right to a fair trial in light of the overwhelming and uncontradicted evidence of Defendant's guilt.

III. Conclusion

For the reasons above, the trial court did not prejudicially err.

NO PREJUDICIAL ERROR.

Judge ZACHARY concurs.

Judge TYSON concurs by separate opinion.

TYSON, Judge, concurring.

I. Background

This case addresses a Defendant's right to not answer questions or make statements, to remain silent upon the advice of counsel or otherwise, to not testify at trial, and, more specifically, for the State not to refer to, comment on, nor to use or challenge Defendant's silence, or his assertion or retention of those rights, against him at trial. We all agree the State's unlawful comments on Defendant's decision to exercise his right to remain silent violated Defendant's rights. This Court's patience and tolerance for the State's unlawful conduct is thin. Despite the clear prejudice Defendant demonstrated, I fully concur in this Court's ultimate decision to not award Defendant a new trial given the overwhelming evidence of guilt.

II. Preservation

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.* (emphasis supplied).

If counsel or the State 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.*

"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, and his argument is properly preserved.

See id.; *Jones*, 355 N.C. at 129, 558 S.E.2d at 105; *State v. Earley*, 298 N.C. App. 172, 193-94, 914 S.E.2d 79, 94-95 (2025) (Tyson, J., dissenting).

III. Closing Argument Remarks

A. Standard of Review

A prosecutor's closing argument must avoid appeals to passion or prejudice. *Jones*, 355 N.C. at 135, 558 S.E.2d at 108. "[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). "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).

B. Analysis

The Fifth and Fourteenth Amendments of the Constitution of the United States preserve and protect a criminal defendant's right to remain silent and not be compelled to testify or offer evidence. U.S. Const. amend. V; XIV. North Carolina's Constitution also provides a criminal defendant cannot "be compelled to give self-incriminating evidence." N.C. Const. art. I, § 23. Our General Assembly has implemented these Constitutional provisions by statutorily mandating a criminal defendant shall not be compelled to testify or "answer any question tending to criminate himself." N.C. Gen. Stat. § 8-54 (2023).

"[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).

Our General Statutes also mandate the State's limits of 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).

"[A] prosecution's argument which clearly suggests that a defendant has failed to testify is error." *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993).

Our Supreme Court has further held:

> [C]ounsel 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, 473, 319 S.E.2d 163, 168 (1984) (citations and internal quotation marks omitted) (emphasis supplied).

The Supreme Court of the United States over 90 years ago warned 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.

Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 1324 (1935). *See also State v. Smith*, 279 N.C. 163, 167, 181 S.E.2d 458, 460 (1971).

Our Supreme Court explained: "The prosecuting attorney should use every honorable means to secure a conviction, but it is his 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).

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).

Defendant correctly argues the prosecutor made impermissible comments during closing argument. Our Supreme Court stated in *Hembree* and *Reid*, with or 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*." *State v. Hembree*, 368 N.C. 2, 20, 770 S.E.2d 77, 90 (2015); *Reid*, 334 N.C. at 556, 434 S.E.2d at 197. The trial court's "inclusion in the jury charge of an instruction on a defendant's right not to testify" alone is insufficient to cure the State's error. *Reid*, 334 N.C. at 556, 434 S.E.2d at 197.

"The error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness." *State v. Trull*, 349 N.C. 428, 452-53, 509 S.E.2d 178, 194 (1998) (brackets and citation omitted).

As is held in this Court's opinion, the State presented substantial uncontradicted evidence of Defendant's guilt beyond a reasonable doubt. On appeal, he has failed to show the State's error, while prejudicial, "was so grossly improper as to impede [his] right to a fair trial." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017).

STATE OF NORTH CAROLINA
v.
JAVIER TYQUAN GRAY

No. COA24-898

Filed 2 July 2025

Damages and Remedies—restitution—larceny of a firearm—exact value of award—worksheet insufficient—remanded

The trial court's award of $1,000 in restitution—entered after a jury found defendant guilty of the larceny of a firearm that defendant, an employee at a car detailing business, stole from the trunk of a customer's vehicle—was vacated and the matter was remanded for a rehearing on restitution. While the victim's trial testimony provided some evidence regarding the firearm (that it was a "special" 1911 Colt 45 caliber gun which had been competition-tuned by a gunsmith) which would support an award, the only evidence on the exact value of the gun was the restitution worksheet, a document that has been expressly held insufficient to sustain an award of restitution.

Appeal by Defendant from Judgments entered 25 October 2023 by Judge Henry L. Stevens in Wayne County Superior Court. Heard in the Court of Appeals 20 May 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Monique Nketah, for the State.

Parry Law, PLLC, by Edward Eldred, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Javier Tyquan Gray (Defendant) appeals from Judgments entered pursuant to jury verdicts finding him guilty of Larceny of a Firearm and Possession of a Firearm by a Felon. The Record before us, including evidence presented at trial, tends to reflect the following:

On 19 August 2022, Travis Skaggs took his car to Ojay's Auto Detailing for service. Defendant worked at Ojay's Auto Detailing and was the only person who serviced Skaggs' vehicle. Upon entering the shop, the owner of Ojay's observed Defendant shut Skaggs' trunk. Video footage

from cameras in the shop also showed Defendant opening the trunk of Skaggs' car. The detailing service Skaggs requested did not require any work to be done in the trunk, and Ojay's policy is that employees do not go into a customer's trunk unless asked. The owner then saw Defendant look around, exit, and walk around the building in a manner suggesting he had an item in his sweatpants. The owner asked Skaggs "do you have a gun or any money in your car?" and specifically inquired whether Skaggs had "anything in the trunk of any value." Skaggs stated he had a 1911 Colt 45 caliber gun in a safe in the trunk. The two inspected the trunk and noticed the trunk's safe was cracked and the gun was missing. Defendant had left the premises and did not return.

On 6 March 2023, Defendant was indicted for Larceny of a Firearm, Safecracking, Misdemeanor Larceny, and Possession of a Firearm by a Felon. The case came on for trial on 24 October 2023.

At trial, Skaggs testified to buying the gun at issue from a police officer with whom he had worked. Skaggs described the gun as "special" in that it had been ported by a gunsmith to be competition-tuned so that it would not jam. Skaggs did not testify to the purchase price or value of the gun. At the close of the State's evidence, defense counsel moved to dismiss the case for insufficient evidence. The trial court dismissed the Safecracking charge but denied the Motion as to all other charges. On 25 October 2023, the jury returned verdicts finding Defendant not guilty of Misdemeanor Larceny, but guilty of Larceny of a Firearm and Possession of a Firearm by a Felon.

At sentencing, the State's attorney reported he had "a restitution worksheet in the amount of $1,000 for what was put on the victim impact statement as the cost and value of that Colt 1911 pistol." The State's attorney then asked, "May I approach?" to which the Court responded "Yes, sir." The sentencing discussion moved to the topic of Defendant's prior record level. The victim impact statement had not been filed or admitted by the trial court. In its Judgments, the trial court ordered Defendant to pay restitution in the amount of $1,000.00. At the conclusion of sentencing, Defendant orally gave notice of appeal in open court.

Issue

The issue on appeal is whether the trial court erred by ordering Defendant to pay $1,000.00 in restitution for Larceny of a Firearm.

Analysis

"On appeal, we review *de novo* whether the restitution order was 'supported by evidence adduced at trial or at sentencing.' " *State*

v. Wright, 212 N.C. App. 640, 645, 711 S.E.2d 797, 801 (2011) (quoting *State v. Shelton*, 167 N.C. App. 225, 233, 605 S.E.2d 228, 233 (2004)). "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. Hill*, 291 N.C. App. 633, 648, 896 S.E.2d 216, 226 (2023) (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)).

"The amount of restitution must be limited to that supported by the record[.]" *Wright*, 212 N.C. App. at 645, 711 S.E.2d at 801 (quoting N.C. Gen. Stat. § 15A-1340.36 (2009)). "[T]he quantum of evidence needed to support a restitution award is not high." *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011). "When . . . there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal." *Id.* (quoting *State v. Hunt*, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986)). "In applying this standard our appellate courts have consistently engaged in fact-specific inquiries rather than applying a bright-line rule." *Id.* "Prior case law reveals two general approaches: (1) when there is *no* evidence, documentary or testimonial, to support the award, the award will be vacated, and (2) when there is specific testimony or documentation to support the award, the award will not be disturbed." *Id.* (emphasis in original).

Testimony regarding the purchase price of an item is enough to support a restitution award of that exact amount. *See State v. Cousart*, 182 N.C. App. 150, 154-55, 641 S.E.2d 372, 375 (2007). This Court has also determined written victim impact statements, together with oral victim statements, an expense worksheet, and other accompanying documentation constituted sufficient evidence to support a restitution award. *See State v. Hillard*, 258 N.C. App. 94, 97, 811 S.E.2d 702, 704-05 (2018). In contrast, this Court "has repeatedly held that 'a restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution.' " *Moore*, 365 N.C. at 285, 715 S.E.2d at 849 (quoting *State v. Mauer*, 202 N.C. App. 546, 552, 688 S.E.2d 774, 778 (2010) (citing *State v. Swann*, 197 N.C. App. 221, 225, 676 S.E.2d 654, 657-58 (2009))).

For example, in *Mauer*, where no evidence was presented at trial or sentencing supporting the restitution worksheet, this Court vacated the trial court's restitution order and remanded for rehearing on the issue. 202 N.C. App. at 552, 688 S.E.2d at 778. Further, in *Moore*, the State argued the victim's testimony for estimated repairs of "thirty-something thousand dollars" was "sufficient to support an award 'anywhere between $30,000.01 and $39,999.99.' " 365 N.C. at 285-86, 715 S.E.2d at 849. Our Supreme Court disagreed, concluding while "there was 'some evidence'

to support an award of restitution . . ., the evidence was not specific enough to support the award of $39,332.49." *Id.* at 286, 715 S.E.2d at 849. Thus, the Supreme Court remanded the matter to the trial court "to calculate the correct amount of restitution." *Id.* at 286, 715 S.E.2d at 849-50.

Here, the State introduced no evidence—testimonial or documentary—concerning the value of the gun. Although there was testimony regarding the gun itself, including some of its modifications, there was no indication of its purchase price or market value. These facts are distinguishable from *Cousart*, where the victim specifically testified to the item's purchase price, and from *Hillard*, where the victim impact statements were viewed together the accompanying documentation.[1] The only evidence offered in this case as to the value of the firearm was the restitution worksheet, which this Court has expressly held is insufficient

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1. Indeed, the victim impact statement in this case was neither included in the Record on appeal nor submitted to the trial court for consideration. Recognizing the victim impact statement was not in the Record on appeal, the State filed a Record Supplement pursuant to Rule 9(b)(5) of the North Carolina Rules of Appellate Procedure containing the victim impact statement. *See* N.C. R. App. P. 9(b)(5)(a) (2024) ("If the record on appeal as settled is insufficient to respond to the issues presented in an appellant's brief, . . . the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9.") and 9(d) (2024) ("Exhibits and other items that have been filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be included in the record on appeal under this subsection if a party believes that they are necessary to understand an issue on appeal."). Defendant subsequently filed a Motion to Strike the Supplement, arguing the victim impact statement was not an appropriate supplement under Rule 9. Although both sides agree the victim impact statement was not filed, served, admitted, or made the subject of an offer of proof, the State argues it "may have been submitted for consideration" based on the following exchange: At sentencing, the State's attorney told the trial court he had "a restitution worksheet in the amount of $1,000 *for what was put on the victim impact statement* as the cost and value of that Colt 1911 pistol. May I approach?" (emphasis added). The trial court replied that he could. Thus, the Record reflects that the victim impact statement was not submitted—only the restitution worksheet was.

Further, there is no evidence the State sought judicial settlement of this issue under our Rule of Appellate Procedure 11. Rather, the Record reflects "The Record on Appeal has been settled pursuant to Rule 11 of the North Carolina Rules of Appellate Procedure because the time has expired for the State of North Carolina to serve a notice of approval of the Proposed Record on Appeal served 29 August 2024, or objections, amendments, or an alternative Proposed Record on Appeal." *See* N.C. R. App. P. 11(b) (2024) ("If all appellees within the times allowed them . . . fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal."). Thus, there is no evidence the victim impact statement was submitted to the trial court for consideration or that its inclusion in the Record was an issue the State sought to address in settling the Record on appeal. Therefore, the victim impact statement is not an appropriate supplement to the Record under Rule 9(b)(5). Consequently, we allow Defendant's Motion to Strike the State's Rule 9(b)(5) Supplement.

when not supported by additional evidence. *See*, *e.g.*, *Moore*, 365 N.C. at 285, 715 S.E.2d at 849. Thus, the State's evidence is insufficient to support the restitution award of $1,000.00.

Defendant requests this Court vacate the restitution award while the State asks us to vacate and remand for rehearing. Where "there is 'some evidence' to support an award of restitution, but 'the evidence was not specific enough to support the award,' the 'appropriate course here is to remand for the trial court to determine the amount of damage proximately caused by [the] defendant's conduct and to calculate the correct amount of restitution.' " *State v. Villarreal*, 296 N.C. App. 136, 144, 907 S.E.2d 80, 87 (2024) (quoting *Moore*, 365 N.C. at 286, 715 S.E.2d at 849-50). As in *Villarreal*, there is "some evidence" in the instant case to support an award of restitution, but the evidence is not specific enough to support the amount the trial court awarded. Thus, we must vacate the restitution order and remand for rehearing solely on the amount of restitution due.

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's restitution award and remand for rehearing on restitution.

VACATED AND REMANDED.

Chief Judge DILLON and Judge ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
LUTHER MELVIN JOHNSON, II

No. COA24-1029

Filed 2 July 2025

Probation and Parole—probation revocation—absconding from supervision—evidence sufficient—failure to exercise discretion

Where defendant—a resident of Virginia at the time he received a suspended sentence with 24 months of supervised probation after pleading guilty in North Carolina to two counts of obtaining property by false pretenses—was approved to transfer his North Carolina probation, first to Virginia (where he was already on probation) and then to West Virginia, before returning to Virginia without notifying his North Carolina probation officer and later failing to heed the officer's order to return to North Carolina, the evidence was sufficient to reasonably satisfy the trial court that defendant willfully violated or violated without lawful excuse a valid condition of his probation by absconding from supervision. However, the transcript of the revocation hearing revealed that the trial court failed to exercise its discretion in deciding to revoke defendant's probation, as evidenced by the court's remark that "it looks like the only alternative that I have at this particular time is to revoke [defendant's] probation." Accordingly, the trial court's order was vacated and the matter was remanded for the trial court to determine, in its discretion, whether or not to revoke defendant's probation.

Judge GRIFFIN concurring in part and dissenting in part.

Appeal by Defendant from judgment entered 6 May 2024 by Judge Bob R. Cherry in New Hanover County Superior Court. Heard in the Court of Appeals 21 May 2025.

Attorney General Jeff Jackson, *by Assistant Attorney General Janon M. Harris*, *for the State-Appellee.*

Appellate Defender Glenn Gerding, *by Assistant Appellate Defender Candace Washington*, *for Defendant-Appellant.*

COLLINS, Judge.

Defendant Luther Melvin Johnson, II, appeals from a judgment revoking his probation and activating his sentence. Defendant argues that the trial court erred by revoking his probation where there was insufficient evidence tending to show he had absconded from supervision. We conclude the trial court did not abuse its discretion in determining that Defendant had absconded. However, the trial court failed to exercise its discretion to decide whether to revoke Defendant's probation. Accordingly, we vacate the trial court's revocation of Defendant's probation and remand the matter to the trial court.

I. Factual and Procedural Background

Defendant pled guilty on 12 July 2022 to two counts of obtaining property by false pretenses. Pursuant to the plea agreement, he was sentenced to 11 to 23 months in prison, suspended for 24 months of supervised probation. At this time, he was also on probation in Virginia, and his residence was located in Abingdon, Virginia. Defendant sought to have his North Carolina probation transferred to Virginia under the Interstate Compact for Adult Offender Supervision. Defendant's application was approved, and he returned to Virginia. Defendant then applied on 25 August 2022 to have his North Carolina probation transferred to West Virginia. Defendant's application was again approved, and he moved to West Virginia.

At some point, Defendant committed some misdemeanors in West Virginia and served some jail time. After having been in West Virginia for about a year, Defendant returned to Virginia. Defendant did not notify his North Carolina probation officer, Officer Daniel Mattlin, of his return to Virginia. Defendant testified that he thought his probation had been successfully transferred to Virginia.

Mattlin did not learn Defendant had moved back to Virginia until he was notified by someone other than Defendant on or around 27 October 2023, about two months after the fact. Mattlin sent a "request for reporting instructions" to Virginia, asking Virginia to supervise Defendant again. Virginia denied the request because "they wanted time to investigate whether [Defendant] had a verifiable residence and employment" in Virginia.

Mattlin and Defendant had been in regular contact, and on 17 December 2023, Mattlin ordered Defendant to return to North Carolina. Mattlin testified,

> I told him that the request for reporting instructions were denied and to advise him to report back to North Carolina Monday at 4:00 until transfer process can be completed.

> And at that point he responded he has no money or no vehicle.

Defendant testified that he told Mattlin his probation officer in Virginia was telling him to stay in Virginia, and he had no money and no car because he had just had a car accident. Mattlin thought he and Defendant "spoke a couple more times after that."

Defendant did not return to North Carolina as ordered. Mattlin filed a probation violation report on 3 January 2024, alleging, among other violations, that Defendant had absconded supervision. Mattlin sent the case to an investigative team to further investigate Defendant's whereabouts and to communicate with him. The investigative team spoke with Defendant's Virginia probation officer, and at one point, "probation in Virginia went to [Defendant's] given address and he wasn't there." Defendant testified, "I work. I might not have been there when they showed up at my place."

On or around 6 February 2024, the investigative team contacted Defendant and told him to report to his Virginia probation officer. Defendant made some phone calls to some friends in law enforcement in Virginia and West Virginia and learned a warrant was issued for his arrest in North Carolina. Defendant testified, "I was worried to death but I went ahead and reported . . . knowing that was the only way I could get to North Carolina." When Defendant reported to the probation officer, he was arrested.

After hearing the evidence, the trial court was reasonably satisfied that Defendant had violated his probation by, among other ways, absconding. The trial court announced, "The absconding being the one that revocation could be had, it looks like the only alternative that I have at this particular time is to revoke his probation." The trial court thus revoked Defendant's probation on 6 May 2024 and activated his sentence. Defendant timely appealed.

II. Discussion

Defendant argues that the trial court abused its discretion by revoking his probation because there was insufficient evidence to show that he absconded.

A hearing to revoke a defendant's probation requires that the evidence be such as to "reasonably satisfy" the trial court "in the exercise of [its] sound discretion" that the defendant has "willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended."

State v. Young, 190 N.C. App. 458, 459 (2008) (citation and quotation marks omitted). "If the trial court is then reasonably satisfied that the defendant has violated a condition upon which a prior sentence was suspended, it may within its sound discretion revoke the probation." *State v. Terry*, 149 N.C. App. 434, 438 (2002) (citation omitted). When the State presents "competent evidence establishing a defendant's failure to comply with the terms of probation, the burden is on the defendant to demonstrate through competent evidence an inability to comply with the terms." *State v. Talbert*, 221 N.C. App. 650, 652 (2012) (quotation marks and citation omitted).

"We review a trial court's decision to revoke a defendant's probation for abuse of discretion." *State v. Melton*, 258 N.C. App. 134, 136 (2018) (citation omitted). A trial court abuses its discretion "when a ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Maness*, 363 N.C. 261, 279 (2009) (quotation marks and citation omitted). A misapprehension of the law suffices to show abuse of discretion. *See State v. Tuck*, 191 N.C. App. 768, 771 (2008).

A trial court may revoke a defendant's probation only if the defendant (1) commits a criminal offense in any jurisdiction, (2) absconds from supervision, or (3) has already served two periods of confinement for violating other conditions of probation. N.C. Gen. Stat. § 15A-1344(a) (2024); *State v. Williams*, 243 N.C. App. 198, 199-200 (2015). A defendant absconds by "willfully avoiding supervision or by willfully making [his] whereabouts unknown to the supervising probation officer." N.C. Gen. Stat. § 15A-1343(b)(3a) (2024).

A. Relevant time period

Defendant first argues that "[t]he trial court should have only considered the relevant period of 18 December 2023 through 3 January 2024 in determining whether [Defendant had] absconded." The State, on the other hand, asserts that "[t]he trial court correctly considered 27 October 2023 through 3 January 2024 as the relevant period in determining whether Defendant absconded."

Both sides cite *State v. Melton* for the proposition that, in determining whether a defendant absconded, the relevant time frame for the trial court is limited to the dates alleged in the violation report until the date the violation report is filed. *See Melton*, 258 N.C. App. at 137.

Here, the probation violation report alleges that Defendant willfully violated:

> Regular Condition of Probation: General Statute 15A-1343(b)(3a) "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that,
>
> ON OR ABOUT 10/27/23, IT WAS FOUND THAT OFFENDER FAILED TO NOTIFY NC THAT HE HAD MOVED FROM WEST VIRGINIA TO VIRGINIA, WITHOUT PERMISSION AND HAS FAILED TO REPORT BACK TO NORTH CAROLINA AS DIRECTED FOR SUPERVISION. OFFENDER FAILED TO REPORT TO NORTH CAROLINA AS DIRECTED ON 12/18/23, BY 4PM.

This paragraph plainly alleges that Defendant's failure to notify North Carolina that he had moved from West Virginia to Virginia, which was discovered on 27 October 2023, was behavior supporting allegations Defendant had absconded. The probation violation report was filed on 3 January 2024. Accordingly, under *Melton*, the relevant period is 27 October 2023 to 3 January 2024.

B. Sufficiency of the evidence

Defendant next argues that the State presented insufficient evidence that Defendant willfully avoided supervision or willfully made his whereabouts unknown to his supervising probation officer. Defendant specifically argues that the allegations in the report "only amounted to a failure to report under [N.C. Gen. Stat.] § 15A-1343(b)" or "a mere technical violation of the Interstate Compact for Adult Offender Supervision Rules." We disagree.

A defendant absconds by either "willfully avoiding supervision" or by "willfully making [his] whereabouts unknown to the supervising probation officer." N.C. Gen. Stat. § 15A-1343(b)(3a). A defendant's mere failure to report as directed to his probation officer, in violation of section 1343(b)(3a), does not, without more, constitute absconding. *See State v. Johnson*, 246 N.C. App. 139, 146 (2016) (holding that a defendant's failure to report for an appointment with his probation officer "does not, without more, violate N.C. Gen. Stat. § 15A-1343(b)(3a) when these exact actions violate the explicit language of a wholly separate regular condition of probation which does not allow for revocation and activation of a suspended sentence") (citations and emphasis omitted). However, a defendant's behavior can "independently serve as the bases for both violating the regular conditions of probation as codified in [N.C.

Gen. Stat. §] 15A-1343(b)(3) and the revocable violation of absconding . . . ." *State v. Crompton*, 380 N.C. 220, 227 (2022).

"As a practical matter, th[e] conditions laid out in Section 15A-1343(b)(3) make up the necessary elements of 'avoiding supervision' or 'making one's whereabouts unknown.' " *Id.* (brackets and citation omitted). For example, "[a] defendant cannot avoid supervision without failing to report as directed to his probation officer at reasonable times and places. Neither can a defendant make his whereabouts unknown without failing to answer reasonable inquiries or notify his probation officer of a change of address." *Id.* (citation omitted).

In *State v. Thorne*, we determined that the trial court did not abuse its discretion by revoking the defendant's probation for absconding where the defendant was asked to provide a drug test, but he left the probation office and did not return. 279 N.C. App. 655, 658, 662 (2021). There, the State presented evidence that the defendant's probation officer "was twice unable to locate [the d]efendant at his last known address," the defendant failed to report to his probation officer "despite a message left with his family requesting that he do so," and the defendant "otherwise failed to contact or make his whereabouts known" to his probation officer for a twenty-two-day period. *Id.* at 662.

Like the defendant in *Thorne*, Defendant here relies on *State v. Williams*, 243 N.C. App. 198 (2015), to support his argument that his actions did not amount to absconding. In *Williams*, we concluded that even though the defendant had missed home and office contacts, traveled back and forth between North Carolina and New Jersey, and failed to return his probation officer's messages, revocation was improper because his probation officer knew his whereabouts through their phone conversations. 243 N.C. App. at 203-05.

Similarly, in *State v. Melton*, we held that the defendant's failure to attend meetings and the probation officer's inability to reach defendant for a span of two days was not sufficient evidence that the defendant absconded. 258 N.C. App. at 140. While some of the facts in *Williams* and *Melton* are present here, key differences make this case distinguishable from those cases and are more similar to *Thorne*.

Here, Defendant applied to have his probation transferred from North Carolina to Virginia and then from North Carolina to West Virginia, demonstrating his knowledge and understanding of the transfer process. Yet, when Defendant moved from West Virginia to Virginia, he failed to apply for a transfer of his North Carolina probation. Additionally, like the defendant in *Thorne*, Defendant was not located at his last known

address. Unlike the defendant in *Williams*, Defendant failed to notify Mattlin of his return to Virginia and his new address and remained in Virginia under their probation supervision for more than sixty days without contacting Mattlin, an even longer period of time than the twenty-two-day period in *Thorne*. It was not until Mattlin contacted Defendant that Defendant apprised Mattlin of his whereabouts in Virginia.

Furthermore, although Mattlin told Defendant to report to North Carolina on 18 December 2023, like the defendant in *Thorne*, Defendant failed to do so. Mattlin and Defendant spoke after that, but Defendant still had not returned to North Carolina more than two weeks later. As a result, Mattlin filed a probation violation.

Defendant emphasizes portions of his testimony where he offered reasons why he failed to contact Mattlin upon moving from West Virginia to Virginia and why he could not report in person to North Carolina. However, the trial court sat as the fact finder in the probation revocation hearing, N.C. Gen. Stat. § 15A-1345(e), and had discretion to determine the weight and credibility of the evidence, *Sellers v. Morton*, 191 N.C. App. 75, 79 (2008).

Accordingly, as the State presented competent evidence that Defendant willfully avoided supervision or willfully made his whereabouts unknown to Mattlin, the trial court did not abuse its discretion by being reasonably satisfied Defendant that had violated the condition of probation to not abscond.

It is apparent from the transcript, however, that the trial court did not exercise its discretion in deciding to revoke Defendant's probation and instead acted under a misapprehension of law believing that it was constrained to do so. After finding that it was reasonably satisfied that Defendant had violated his probation by, among other ways, absconding, the trial court announced, "The absconding being the one that revocation could be had, *it looks like the only alternative that I have at this particular time is to revoke his probation*." (emphasis added).

Because it is within the trial court's "sound discretion [to] revoke the probation" of a Defendant who has absconded, *Terry*, 149 N.C. App. at 438, we vacate Defendant's probation revocation and remand the case to the trial court to exercise its discretion to make this determination.

III. Conclusion

Defendant has failed to show the trial court abused its discretion in determining that Defendant had absconded. Because the trial court did not exercise its discretion in deciding whether to revoke Defendant's

probation, we vacate the trial court's order and remand the case to the trial court to exercise its discretion.

VACATED AND REMANDED.

Judge TYSON concurs.

Judge GRIFFIN concurs in parts and dissents in part by separate opinion.

GRIFFIN, Judge, concurring in part and dissenting in part.

I concur with the majority in affirming the trial court's finding Defendant willfully absconded from probation. I disagree with their holding that the trial court abused its discretion by operating under a misapprehension of the law.

The majority hangs their hat on one statement from the trial judge: "The absconding being the one [count] that revocation could be had, it looks like the only alternative that I have at this particular time is to revoke [Defendant's] probation." However, given the context of the probation violation hearing, I would not hold the judge misapprehended the law.

The trial court found Defendant willfully absconded from probation. It also found he willfully committed three additional probation violations. The court plainly and regretfully acknowledged Defendant was not a good candidate for probation. The majority asks us to believe a trial court judge, who has served as a prosecutor, district court judge, and superior court judge, abused his discretion by misapprehending the law—based on one inconclusive statement. I respectfully dissent from the majority decision to vacate and remand the revocation and would affirm the trial court.

STATE v. STIDHAM

[299 N.C. App. 741 (2025)]

STATE OF NORTH CAROLINA
v.
LINDA STIDHAM

No. COA24-353

Filed 2 July 2025

1. Sentencing—prior record level—point added for committing offense while on probation—notice neither given nor waived—improper but not prejudicial error

After defendant was found guilty on drug-related charges, the trial court erred by sentencing her as a prior record level III offender for her conviction of possession of methamphetamine after adding a point under N.C.G.S. § 15A-1340.14(b)(7) for committing the offense while on probation for another crime. First, the State never gave defendant the statutorily-required written notice that it was seeking an additional point under subsection (b)(7), since the sentencing worksheet submitted to defendant was insufficient on its own to satisfy the notice requirement. Second, because defendant never admitted to committing the offense while on probation, she did not waive her right to receive notice under the statute. Third, the court did not make the requisite inquiry into whether notice was given or whether defendant waived her right to notice. Nevertheless, the court's sentencing error was not prejudicial where the minimum sentence imposed by the court was the highest minimum sentence in the presumptive range at both prior record levels II and III. Although the court could have sentenced defendant to a lesser minimum term under the erroneous prior record level, it did not; therefore, defendant failed to show a reasonable possibility that she would have received a lesser punishment had the court sentenced her as a prior record level II.

2. Evidence—expert witness testimony—Rule 702 reliability requirements—only some Daubert factors addressed—plain error review

In defendant's appeal from her convictions for possession of methamphetamine and possession of drug paraphernalia, the Court of Appeals applied plain error review to defendant's argument that testimony from a forensic scientist—tendered at trial by the State, without objection, as an expert in using forensic chemistry to detect narcotics—did not meet the reliability requirements of Evidence Rule 702(a). In doing so, the appellate court found no error—much

less plain error—where the witness satisfied Rule 702's requirements by describing a two-part test he used to identify controlled substances, which was generally accepted in the scientific community, and then by explaining how he applied that testing method to the white crystalline material seized from defendant's purse during her arrest. Furthermore, the witness's failure to testify as to all of the reliability factors identified in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), did not render his testimony unreliable or inadmissible.

Judge FREEMAN concurring in part and dissenting in part.

Appeal by Defendant from judgments entered 28 September 2022 by Judge Forrest D. Bridges in Cleveland County Superior Court. Heard in the Court of Appeals 23 April 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Sean K. Lloyd, for the State-Appellee.

Mikayla Mann for Defendant-Appellant.

COLLINS, Judge.

Defendant Linda Stidham appeals from the judgments entered upon a jury's guilty verdicts of possession of methamphetamine and possession of drug paraphernalia. Defendant argues that the trial court erred by sentencing her as a prior record level III instead of a prior record level II, and plainly erred by admitting certain expert testimony under North Carolina Rule of Evidence 702. Although the trial court erred by sentencing Defendant as a prior record level III, Defendant has failed to show that the error was prejudicial. Additionally, because the state's expert witness sufficiently explained the procedures he employs when identifying controlled substances and how he applied those procedures to the facts of the instant case, the trial court did not err by admitting his expert opinion testimony.

I. Background

Defendant was pulled over on 17 February 2022 while driving her car by Officer Steven Hawkins with the Shelby Police Department who ran her vehicle's tag and discovered that her license was revoked. Officer Hawkins called for K-9 Officer Andrew Sumner to come to the scene and began issuing Defendant a citation for "[n]o operator license."

Officer Sumner arrived soon after, and his K-9 alerted on Defendant's vehicle. Officer Hawkins then searched the vehicle and found a "crystal-like substance which tested positive for methamphetamine" in a blue coin purse. Officer Hawkins arrested Defendant. Defendant told Officer Hawkins that "she was on probation at that time[.]"

At trial, the State tendered and the trial court received Thomas Rockhold, a forensic scientist at the North Carolina State Crime Lab, as an expert in the field of forensic chemistry, without objection. Rockhold spoke to his extensive background in forensic science and chemistry, his experience with testing for controlled substances, and how he has testified in court over twenty times. Rockhold described the "two-part test" that the North Carolina State Crime Lab routinely conducts when analyzing potential controlled substances. Rockhold then testified that he used the same procedure to test the substance found in the coin purse in Defendant's vehicle and ultimately concluded that the material found in Defendant's car was 3.21 grams of methamphetamine. The official lab report with Rockhold's findings was entered into evidence. Defendant did not object to the admission of Rockhold's testimony.

The jury found Defendant guilty of possession of methamphetamine and possession of drug paraphernalia. At the sentencing hearing, the State tendered Defendant as a prior record level III "as stipulated by the defendant and her counsel." The State pointed out that Defendant had "recently been convicted of another meth charge," and that Defendant "received this while she was out on bond for that one." The State asked the trial court to sentence Defendant at the top of the presumptive range. Defense counsel argued that Defendant should receive a suspended sentence and asked for the payment of attorney's fees. The trial court then ordered the following:

> In the Class 1 misdemeanor, possession of drug paraphernalia, the defendant has stipulated to the convictions shown on the prior record worksheet. Four of those convictions were on the same date. That will be three convictions, making her a prior conviction level 2 for misdemeanor purposes. For felony purposes, she has 6 prior record points, making her a record level 3.

Defendant did not object to either record level classification. The State provided defense counsel with the prior record worksheet containing six felony sentencing points, which defense counsel signed. The trial court sentenced Defendant to 45 days in Cleveland County jail for her misdemeanor conviction. The trial court sentenced her to 6 to 17

months of imprisonment, suspended for 18 months of supervised probation with the special condition that she serve 60 days in confinement, for her felony conviction. Defendant appeals.

II. Discussion

A. Prior Record Level

[1] Defendant first argues that the trial court erred by adding a prior record level point for Defendant having been on probation when she committed the offense in this case and thus sentencing her as a prior record level III for her felony conviction.

"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. Martin*, 230 N.C. App. 571, 572 (2013) (citation omitted). A defendant's argument that the trial court erred in calculating the defendant's prior record level is preserved for appellate review as a matter of law; the defendant need not have objected on that basis at the sentencing hearing. *See* N.C. Gen. Stat. § 15A-1446(d)(18) (2023); *State v. Ray*, 274 N.C. App. 240, 243-44 (2020).

1. Notice Requirement & Waiver

"The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court, or with respect to subdivision (b)(7) of this section, the jury, finds to have been proved in accordance with this section." N.C. Gen. Stat. § 15A-1340.14(a) (2023). Subsection (b)(7) of the statute assigns one point "[i]f the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision[.]" N.C. Gen. Stat. § 15A-1340.14(b)(7) (2023).

If the State intends to assign a prior record level point pursuant to subsection (b)(7), "[t]he State must provide a defendant with written notice of its intent . . . at least 30 days before trial[.]" N.C. Gen. Stat. § 15A-1340.16(a6) (2023). However, a "defendant may waive the right to receive such notice." *Id.* In either scenario, the trial court must specifically "determine whether the State seeks a finding that a prior record level point should be found under [subsection] [](b)(7)." N.C. Gen. Stat. § 15A-1022.1(a) (2023). The trial court must also determine "whether the State has provided the [required] notice to the defendant" or "whether the defendant has waived his or her right to such notice." *Id.*

Where the defendant seeks to admit to the existence of a prior record level point under subsection (b)(7), N.C. Gen. Stat. § 15A-1022.1

sets out additional procedures the trial court must follow. *See* N.C. Gen. Stat. § 15A-1022.1(b) (2023). The trial court "shall address the defendant personally and advise the defendant" that "she is entitled to have a jury determine the existence of any . . . points under [subsection] (b)(7)" and that "she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge." *Id.* Additionally, "the court shall determine that there is a factual basis for the admission[] and that the admission is the result of an informed choice by the defendant." *Id.* § 15A-1022.1(c) (2023). The trial court is required to abide by these provisions "unless the context clearly indicates that they are inappropriate." *Id.* § 15A-1022.1(e) (2023); *see State v. Scott*, 287 N.C. App. 600, 608 (2023).

Here, the record does not support the State's assertion that it provided the requisite notice to Defendant. The State argues that it satisfied the notice requirement because "Defendant's counsel [] signed the Sentencing Worksheet to indicate his acknowledgment and agreement with the worksheet, which listed the extra point for probation." However, it is well-settled that a sentencing worksheet, without more, is insufficient to establish notice under N.C. Gen. Stat. § 15A-1340.16(a6). *See State v. Crook*, 247 N.C. App. 784, 797 (2016) ("At most, this prior record worksheet constituted a possible calculation of Defendant's prior record level and did not provide affirmative notice that the State intended to prove the existence of the prior record point . . . as required by N.C. Gen. Stat. § 15A-1340.16(a6).") (citation omitted).

The State further contends that even if it failed to give proper notice, Defendant waived her right to notice by stipulating to having committed the offense while on probation. Defendant, however, did not so stipulate. At trial, Defendant testified about crimes she had previously been convicted of, but Defendant never admitted that she was on probation while she committed the offenses she was on trial for in this case.

Therefore, the State did not provide Defendant with notice and Defendant did not waive her right to notice under N.C. Gen. Stat. § 15A-1340.16(a6).

Furthermore, at the sentencing hearing, the State tendered Defendant as a prior record level III after adding a prior record level point under subsection (b)(7), and the following colloquy ensued:

> [THE STATE]: Your Honor, the State is tendering [Defendant] as a record level 3 as stipulated by the defendant and her counsel. . . .

> THE COURT: Okay. What do you want to say?
>
> [THE STATE]: Your Honor, [Defendant], as you can see, has recently been convicted of another meth charge last month. She received this while she was out on bond for that one. . . .
>
> I would ask the Court to sentence her at the top of the presumptive range.

Despite the State's claim that Defendant committed this offense while she was "out on bond" for a previous offense, the trial court made no inquiry into whether written notice was given or whether Defendant waived her right to notice. The only instance in which the trial court personally addressed Defendant was regarding Defendant's ability to pay her attorney's fees. The procedures outlined in N.C. Gen. Stat. § 15A-1022.1 were not followed by the trial court in this case. Furthermore, the context does not clearly indicate that such procedures were unnecessary. *See* N.C. Gen. Stat. § 15A-1022.1(e); *see also Scott*, 287 N.C. App. at 608. The trial court thus erred by failing to follow them.

Accordingly, the trial court erred by adding a prior record level point under N.C. Gen. Stat. § 15A-1340.14(b)(7). As the addition of this prior record level point elevated Defendant from a prior record level II to a prior record level III, the trial court erred by sentencing Defendant as a prior record level III.

2. Prejudice

Nonetheless, Defendant has failed to show that the trial court's sentencing error was prejudicial.

A defendant bears the burden of showing not only error in the trial court's calculation of her prior record level, but prejudice resulting from that error. N.C. Gen. Stat. § 15A-1443(a) (2023); *see State v. Lindsay*, 185 N.C. App. 314, 315-16 (2007) ("This Court applies a harmless error analysis to improper calculations of prior record level points.") (citations omitted). "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a).

The sentence imposed by the trial court "shall contain a sentence disposition specified for the class of offense and prior record level, and its minimum term of imprisonment shall be within the range specified

for the class of offense and prior record level, unless applicable statutes require or authorize another minimum sentence of imprisonment." *Id.* § 15A-1340.13(b) (2023).

There are three kinds of sentence dispositions: active punishment, intermediate punishment, and community punishment. *Id.* An active punishment is a sentence that "requires an offender to serve a sentence of imprisonment and is not suspended." *Id.* § 15A-1340.11(1) (2023). An intermediate punishment is a sentence that "places an offender on supervised probation" and "may include" recovery court, special probation, and one or more community or intermediate probation conditions. *Id.* § 15A-1340.11(6) (2023). A community punishment is a sentence that does not include an active punishment, recovery court, or special probation but "may include" one or more community or intermediate probation conditions. *Id.* § 15A-1340.11(2) (2023).

The block on the felony punishment chart for a class I felony for a prior record level II authorizes a community or an intermediate punishment and a minimum presumptive range sentence of 4-6 months. *Id.* § 15A-1340.17 (2023). The block for a class I felony for a prior record level III authorizes only an intermediate punishment and a minimum presumptive range sentence of 5-6 months. *Id.*

Here, the trial court sentenced Defendant as a prior record level III to an intermediate punishment of 6 to 17 months imprisonment, suspended for 18 months of supervised probation with the special condition that she complete 60 days in confinement.

This 6-month minimum was the highest minimum sentence in the presumptive range for a class I felony at both prior record levels II and III. *See id.* § 15A-1340.17. Although the trial court could have sentenced Defendant to a minimum of 5 months in prison at the erroneous prior record level III, it did not do so. Accordingly, Defendant has failed to show that there is a "reasonable possibility" that the trial court would have sentenced Defendant to a minimum term of 5 or 4 months had it sentenced Defendant at the correct prior record level II. *See id.* § 15A-1443(a).

This case is therefore distinguishable from *State v. Williams*, 355 N.C. 501 (2002). There, the trial court incorrectly sentenced defendant as a prior record level VI instead of V for several noncapital felony convictions. *Id.* at 587. The trial court imposed the highest minimum sentence allowed in the presumptive range for all but one of the convictions. *Id.* Had the trial court considered defendant's prior record level to be V rather than VI, the trial court "could not have imposed

minimum sentences of [the] duration" it did for those convictions. *Id.* On the remaining noncapital felony conviction, the trial court sentenced defendant to a minimum term that was less than the highest minimum term. *Id.* The State argued that this lesser sentence indicated that "the trial court may have been somewhat lenient" with the sentence such that "defendant has not suffered any harm" by the improper prior record level calculation. *Id.* The Supreme Court rejected this argument, explaining that "[i]f the trial court was lenient with regard to sentencing defendant" on that charge, "then that is for the trial court to determine, not the State." *Id.* Accordingly, the Supreme Court sent the case back for resentencing on all defendant's noncapital felony convictions. *Id.*

Unlike in *Williams*, the minimum sentence imposed in this case was the highest minimum sentence in the presumptive range at both prior record levels II and III. Also unlike in *Williams*, the trial court in this case could have sentenced Defendant to a lesser minimum term at the erroneous prior record level, but did not. Accordingly, *Williams* does not control this case.

Furthermore, although the trial court was authorized to impose a special condition of probation as part of an intermediate punishment at the erroneous prior record level III, it was not *required* to do so. *See* N.C. Gen. Stat. § 15A-1340.11(6) (An intermediate punishment is a sentence that "places an offender on supervised probation" and "may include" special probation.). Accordingly, there is no reasonable possibility that the trial court would have imposed a lesser intermediate punishment or a community punishment had it sentenced Defendant at the correct prior record level II.

For these reasons, Defendant has failed show prejudice resulting from the trial court's error in calculating her prior record level.

B. Rule 702

[2] Defendant next contends that the trial court plainly erred by admitting Rockhold's expert opinion testimony because it failed to meet the reliability requirements of Rule 702. Specifically, Defendant argues that Rockhold "did not demonstrate that his opinions were the product of reliable principles and methods that he reliably applied to the facts of this case."

1. Preservation & Standard of 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). In criminal cases, "an issue that was not preserved by objection noted at trial . . . 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). Generally, "[a] trial court's ruling on Rule 702(a) is reviewed for abuse of discretion." *State v. Phillips*, 268 N.C. App. 623, 634 (2019). However, "an unpreserved challenge to the performance of [the] trial court's gatekeeping function under Rule 702 in a criminal trial is subject to plain error review." *State v. Stephen*, 910 S.E.2d 911, 916 (N.C. Ct. App. 2024) (quoting *State v. Gray*, 259 N.C. App. 351, 354 (2018) (citation omitted)).

Our Supreme Court has applied plain error review to the admission of evidence under Rule 702. *See State v. Clark*, 380 N.C. 204, 209 (2022); *State v. Jones*, 358 N.C. 330, 346-47 (2004); *State v. Stancil*, 355 N.C. 266, 267 (2002). Although our Supreme Court has recently reiterated that "plain error review is unavailable for issues that fall 'within the realm of the trial court's discretion,' " *State v. Gillard*, 386 N.C. 797, 821 (2024) (citation omitted), that case, and the cited supporting cases, all concern a trial court's discretionary ruling under Rule 403. *Id.* Furthermore, *Gillard* does not specifically disavow its own plain error review of Rule 702 arguments in *Clark*, *Jones*, or *Stancil*.

This Court has issued conflicting opinions on whether a trial court's unchallenged admission of expert testimony under Rule 702 may be reviewed for plain error. *Compare State v. Hunt*, 250 N.C. App. 238, 246 (2016) (holding that "an unpreserved challenge to the performance of a trial court's gatekeeping function in admitting opinion testimony in a criminal trial is subject to plain error review in North Carolina state courts") *with State v. Norton*, 213 N.C. App. 75, 80-81 (2011) (noting that as "our Supreme Court has held that discretionary decisions of the trial court are not subject to plain error review," and because the trial court's decision to allow expert testimony under Rule 702 is discretionary, this Court did not address the issue) (citing *State v. Steen*, 352 N.C. 227, 256 (2000)). Given the lack of clarity on whether and when plain error review is available for a ruling under Rule 702(a), in the interest of ensuring that Defendant received a fair trial free from prejudicial error, and because Defendant specifically and distinctly argued plain error on appeal, we address the merits of her argument.

For a trial court's error to amount to plain error, "a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518 (2012) (citation omitted). A fundamental

error is one that prejudices the defendant, meaning "that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (quotation marks and citations omitted). "[B]ecause plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* (cleaned up).

2. Admissibility of Expert Testimony Under Rule 702

"Whether expert testimony is admissible under Rule 702(a) is a preliminary question" that is to be decided by the trial court. *State v. McGrady*, 368 N.C. 880, 892 (2016) (citations omitted). Rule 702(a) provides a three-part test for determining whether a witness can be qualified as an expert:

> 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). These three requirements together make up the reliability inquiry discussed in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *McGrady*, 368 N.C. at 890.

"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.* (citation omitted). "In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability. . . ." *Id.* at 890-91 (citing *Daubert*, 509 U.S. at 593-94). The trial court may consider the *Daubert* factors when "they are reasonable measures of the reliability of expert testimony." *Id.* at 891 (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)). The *Daubert* factors "are part of a flexible inquiry,

so they do not form a definitive checklist or test, [a]nd the trial court is free to consider other factors that may help assess reliability . . . ." *Id.* (quotation marks and citations omitted).

Here, Defendant challenges the second and third elements of the Rule 702 test for reliability, and in doing so emphasizes that Rockhold failed to address several of the *Daubert* factors. Rockhold was tendered and received, without objection, as an expert "in the field of forensic chemistry for the purposes of determining narcotics or controlled substances." Regarding the second element of the Rule 702(a) test, which includes the reliability of Rockhold's principles and methods, the following exchange took place between the prosecutor and Rockhold:

> Q: Okay. And what types of controlled substances would those be?
>
> A: It includes methamphetamine, heroin, [and] fentanyl. It comes in all shapes and sizes; powders, pills, crystal material.
>
> Q: Can you describe for the jury how you go about testing those substances?
>
> A: Generally, we use a two-part test. The first test is a preliminary test. That's usually a color test where we will take a small amount of the sample material that we are testing and place it in a spot well. I will add the material to the spot well with the reagent and look for a color reaction. Based on that reaction and the material I am dealing with, I will then do a confirmatory test which uses instrumentation to analyze the material.
>
> Q: And is that generally accepted in the scientific community as a way to test substances for narcotics?
>
> A: Yes, it is.

Rockhold testified that when evidence is delivered to the crime lab, it is in a secure location at all times and documented on a chain of custody.

Rockhold then satisfied the third element of the Rule 702(a) test by explaining how he applied his principles and methods to the facts of the instant case in the following exchange:

> Q: . . . [W]hat kind of testing did you do on this evidence?
>
> A: So once I receive the material, I compare the information on the packaging to the [request for examination] to

> make [sure] that I have the right evidence. I then remove the Ziploc plastic bag from State's Exhibit No. 5, the blue purse. And then I remove the white crystalline material from that Ziploc plastic bag. I placed it on a scale to get a net weight of just the crystal material itself.
>
> After that, I used a color test reagent for my preliminary test. I used a marquee color test which is a chemical that I prepare myself at the crime lab and did a quality control to check to make sure it functioned properly before I use it in case work. I added a small amount of the material to the marquee chemical in a spot well and observed an orange color reaction.
>
> From there, I went on to my confirmatory test and measured the material on the infrared spectrometer, or IR. That instrument measures the material and generates a graph of peaks. I compared those peaks to our library of drug standards. And based on that comparison and the color test, I formed an opinion as to what the material contained.
>
> . . . .
>
> The preliminary test, the colors we see can give us an idea of a certain class of drug. Orange can indicate drugs including [] methamphetamine. . . . It gives me an idea of what I might be dealing with and then I move on to my confirmatory test.
>
> Q: And that is the infrared spectrometer?
>
> A: Yes.
>
> . . . .
>
> So as the material is measured, the instrument looks at how the light interacts. It uses light to measure the material. And the material interacts with that light and the instrument detects those changes and creates a graph of peaks. Those graphs are unique for each substance and then we compare those to known drug standards.

As a result of the application of these tests to the facts of this case, Rockhold "determined that State's Exhibit No. 4 was a plastic Ziploc bag found to contain methamphetamine with a net weight of material of 3.21 plus or minus 0.06 grams." The State also submitted as evidence,

without objection, Rockhold's laboratory report that accurately represents the analysis he performed and the conclusions he generated.

Rockhold explained in detail the procedures he routinely employs when identifying controlled substances and how he applied those procedures to the facts of the instant case. His failure to testify as to all of the *Daubert* factors does not render his testimony unreliable or inadmissible. *See McGrady*, 368 N.C. at 891. Therefore, the trial court did not err, much less plainly err, by admitting Rockhold's testimony.

III. Conclusion

For the foregoing reasons, the trial court did not commit prejudicial error by sentencing Defendant as a prior record level III and did not err, much less plainly err, by admitting Rockhold's expert testimony under Rule 702.

NO PREJUDICIAL ERROR; NO ERROR.

Judge MURRY concurs.

Judge FREEMAN concurs in part and dissents in part by separate opinion.

FREEMAN, Judge, concurring in part and dissenting in part.

I concur with the majority opinion with the sole exception of the application of plain error review to the trial court's discretionary Rule 702 determination. In my view, because the admittance of expert testimony is a discretionary decision of the trial court, plain error review is unavailable and the merits of defendant's arguments concerning this testimony may not be considered. Accordingly, I respectfully dissent from that portion of the majority opinion.

Our Supreme Court rejected application of plain error review for discretionary decisions in *State v. Steen*, stating that "this Court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion, and we decline to do so now." 352 N.C. 227, 256 (2000). Although our Supreme Court later deviated from this principle in *State v. Stancil*, 355 N.C. 266 (2002), *State v. Jones*, 358 N.C. 330 (2004), and *State v. Clark*, 380 N.C. 204 (2022), none of those cases mentioned *Steen* or its principle. Further, our Supreme Court has recently reiterated that "plain error is unavailable for issues that fall 'within the realm

of the trial court's discretion' " and applied that principle in declining review of the trial court's Rule 403 determinations. *State v. Gillard*, 386 N.C. 797, 821 (2024) (quoting *Steen*, 352 N.C. at 256).

My colleagues correctly note that "*Gillard* does not specifically disavow its own plain error review of Rule 702 arguments in *Clark*, *Jones*, or *Stancil*." However, because *Steen*'s rule, recently reiterated in *Gillard*, does not provide for any exceptions, it does not appear that Rule 702 determinations are exempt from the plain error review bar. This case may provide our Supreme Court an opportunity to clarify whether the rule announced in *Steen* and reiterated in *Gillard* applies to all discretionary trial court decisions, including Rule 702 determinations, or whether it applies exclusively to the trial court's discretionary decisions made under Rule 403.

STATE OF NORTH CAROLINA
v.
BRYAN SCOTT TADLOCK

No. COA24-459

Filed 2 July 2025

1. Criminal Law—rape and kidnapping—defenses—voluntary intoxication—jury instruction—unnecessary

In a prosecution for charges—including first-degree kidnapping and first-degree forcible rape—arising from a domestic violence incident between defendant and his wife, defendant was not entitled to a jury instruction on voluntary intoxication where, although some evidence indicated that he had been drinking for several hours before the incident, the remaining evidence did not show that he was unable to control himself or was so intoxicated that he could not form the specific intent to commit the charged crimes. Firstly, there was no evidence that defendant had difficulty speaking or walking, or that he had engaged in inexplicable behavior immediately prior to attacking his wife. Moreover, after the incident, defendant helped his wife up from the floor, helped to clean her up, brought her pain medication, and apologized to her, all of which indicated his ability to appreciate the nature of his actions.

2. Appeal and Error—preservation of issues—sufficiency of evidence—supporting two separate assault charges—issue raised by trial court

In an appeal from multiple convictions arising from a domestic violence incident, where defendant argued that the trial court erred in submitting two assault by strangulation charges to the jury where the State presented insufficient evidence of two separate assaults, but where defendant expressly excluded both assault by strangulation charges from his general motion to dismiss for insufficiency of the evidence, defendant's appellate argument was still preserved because the trial court had raised the issue at the hearing on defendant's motion, heard arguments from defendant and the State, and then ruled on the issue.

3. Assault—by strangulation—sufficiency of evidence—supporting two separate assault charges—distinct interruptions

In a prosecution for multiple crimes arising from a domestic violence incident between defendant and his wife, the trial court did not err in submitting two separate charges of assault by strangulation to the jury where, viewed in the light most favorable to the State, there was sufficient evidence from which the jury could have found that defendant committed two separate assaults: first, by choking his wife with his hands as they moved across the kitchen, and second, by strangling his wife with his arm after she fell to the floor. Based on the evidence showing changes in both the location and the method of attack, the jury could have found a distinct interruption separating defendant's strangulation of his wife into two different assaults.

4. Assault—by strangulation—two charges—injuries caused by each assault—not specified in jury instructions—right to unanimous jury verdict—not violated

In a prosecution for multiple crimes arising from a domestic violence incident between defendant and his wife, the trial court did not plainly err when instructing the jury on two separate charges of assault by strangulation, where its failure to distinguish the injuries caused by each charged assault did not violate defendant's right to a unanimous jury verdict on the number of assaults he had committed. To begin with, the number of counts against him was equal to the number of assaults presented in the evidence, which was also equal to the number of indictments against defendant for assault by strangulation. The trial court also instructed the jury on assault by strangulation twice—once for each charge—and told the jurors that they could not reach a verdict by majority vote. Further, the verdict sheets presented each charge separately and differentiated them by including the words "alleged by hands" or "alleged by arm"

in bold font. Finally, the State presented ample evidence of the victim's injuries, including photographs along with testimony from both the victim and the doctor who treated her after the assaults.

5. Criminal Law—prosecutor's closing argument—remarks about functioning alcoholics—not grossly improper

In a prosecution for multiple crimes arising from a domestic violence incident, where some evidence indicated that defendant had been drinking for several hours before attacking his wife, the trial court did not abuse its discretion by failing to intervene ex mero motu during the State's closing argument, when the prosecutor made several statements about how alcoholics can "still function" and "know right from wrong" even with a high blood alcohol concentration. The prosecutor's statements were, at most, inappropriately speculative, but not grossly improper considering that, viewed in their full context, they were used to highlight the lack of spelling errors in the text messages defendant sent after the incident rather than to indicate that defendant was a functioning alcoholic.

6. Sentencing—rape and kidnapping—$25,000 fine—defendant's finances not considered—no abuse of discretion

In a prosecution for charges including first-degree kidnapping and first-degree forcible rape, the trial court did not abuse its discretion by imposing a $25,000 fine at sentencing without first taking defendant's financial situation into account. Firstly, the court was not required to consider defendant's finances or any of the other factors under N.C.G.S. § 15A-1340.36, which solely concerns the payment of restitution. Secondly, the court's assessment of the fine was not unreasonable under N.C.G.S § 15A-1362(a), which requires trial courts to consider a defendant's financial resources when determining the method of payment—not the amount—of a fine. Lastly, the fine imposed was appropriate in light of the nature of the crimes of which defendant was convicted.

Judge FREEMAN concurring in part and dissenting in part.

Appeal by Defendant from Judgments entered 26 October 2023 by Judge Gary M. Gavenus in Haywood County Superior Court. Heard in the Court of Appeals 16 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Danielle M. Orait, for the State.

Phoebe W. Dee for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Bryan Scott Tadlock (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty of First-Degree Kidnapping, two counts of Assault by Strangulation, Assault with a Deadly Weapon Inflicting Serious Injury, and First-Degree Forcible Rape. The Record before us, including evidence presented at trial, tends to reflect the following:

On 11 July 2022, Defendant was indicted for First-Degree Kidnapping, First-Degree Forcible Rape, Assault with a Deadly Weapon with Intent to Kill or Inflict Serious Injury, two counts of Assault by Strangulation, and Attempted First-Degree Murder.

The matter came on for trial on 23 October 2023. At trial, the State's evidence tended to show Defendant and the victim, K.S., were married and lived together with K.S.'s teenaged daughter, T.S.[1] During the week of 13 March 2022, Defendant began acting "[v]ery distant and quiet." On the evening of 18 March 2022, K.S. picked Defendant up from work and the two arrived home at approximately 11:00 p.m. T.S. had left earlier in the day to stay with her biological father for the weekend. Once inside, Defendant began drinking. Due to Defendant's "demeanor", K.S. went to bed "as soon as [they] got home."

K.S. testified she woke up at "about 1:30 [a.m.]" when Defendant entered their bedroom screaming at her. When K.S. ignored Defendant, he left the room and went outside. Defendant returned a few minutes later with a loaded gun and pointed it at K.S. as she laid in bed. He told her to "[g]et up or I'm going to make you get up." K.S. complied and Defendant "held the gun against [her] head," demanding K.S. go get a necklace they had given to T.S. for her birthday. K.S. retrieved the necklace from the living room and brought it into the kitchen at Defendant's behest. Defendant told K.S. to get a hammer. When K.S. resisted, Defendant "grabbed [K.S.] by [her] hair and kind of dragged [her] . . . to go get the hammer." Defendant "pinned [K.S.'s head] down to the stove" and screamed for her to destroy the necklace. After Defendant forced the gun's barrel into the back of her throat, K.S. "started hitting the necklace with the hammer." The two began to fight, and Defendant "wrapped his hands around [K.S.'s] neck" from behind and "started choking [her]

1. We use initials to protect the privacy of the victim and her minor daughter.

and just wouldn't stop." K.S. described a struggle between herself and Defendant, during which the two fell to the floor. Defendant continued to strangle K.S. with his hands. "At some point" Defendant set the gun down, and K.S. "threw it across the room." Defendant proceeded to use his arm around K.S.'s throat to strangle K.S. until she fell unconscious.

When K.S. regained consciousness, Defendant helped her off the floor. Defendant apologized to K.S., found painkillers for her, and helped her clean herself up. He alleged T.S. had made sexual advances toward him when the family watched a movie together in the week prior, and K.S. "had to be taught a lesson[.]"

Around 4:30 a.m., Defendant told K.S. she "needed to go get some rest and that he would sleep on the couch." K.S. asked Defendant to join her in bed instead, "[b]ecause if he's on the couch, [she] can't get to the door." When the pair laid down, Defendant initiated sex with K.S. K.S. testified, in the hope she "would live through what [she] thought [she] wasn't going to live through," she "did whatever [Defendant] wanted[.]" Eventually, Defendant fell asleep and K.S. "ran out" to go to the hospital.

At the close of the State's evidence, defense counsel moved to dismiss the charges of Attempted First-Degree Murder, First-Degree Forcible Rape, Assault with a Deadly Weapon with Intent to Kill, and First-Degree Kidnapping. Defense counsel expressly chose not to challenge the two charges of Assault by Strangulation, stating: "Now, with respect . . . to the assault by strangulation, I can't stand here in good faith and ask the court to dismiss those." The trial court denied defense counsel's Motion. Defense counsel renewed its Motion at the close of all evidence. The trial court, *sua sponte*, requested both sides present arguments as to whether the evidence supported two separate charges of Assault by Strangulation. For its part, defense counsel said it would leave the issue in the trial court's discretion:

> [Defense Counsel]: Judge, the only thing, in both of the indictments, the language is talking about and/or, you know, how the assaults occurred. It could have been conceivably consolidated into one indictment. I can see how you break it down. I can see how you could have added an extra "and/or" and just consolidated into one indictment that way. But I'll just leave it in the court's discretion, Judge. I think you know more about this than I do. I'll leave it in the court's discretion about how you want to proceed on it.

The trial court denied defense counsel's Motion again, finding "sufficient evidence of each and every element of each and every crime to submit to this jury."

Defense counsel also requested the trial court instruct the jury on the defense of voluntary intoxication. The trial court denied this request. During closing arguments, the prosecutor argued

> the thing about alcoholics is they can drink and they can drink and they can drink and they can drink. They can blow super high blood alcohol levels and still function. They can still know right from wrong. They still know what they're doing. And how do you know that he knew what he was doing? "I'm sorry. I'm sorry. You're not going to call the cops, are you?" In those text messages, did you see any typos? When somebody's drunk and they're typing, there's usually some typos. None. This is methodical. It's thought out. It's planned. He knows exactly what he's doing. But the common excuse and the way to diminish the bad behavior is, "I was drunk. I'm sorry. You know I didn't mean it, honey. I just had too much to drink. I love you. I'm going to protect you. I'll never do it again." And a wife is going to hope and pray that that's true.

Defense counsel raised no objections.

On 26 October 2023, the jury returned verdicts finding Defendant guilty of First-Degree Kidnapping, both charges of Assault by Strangulation, Assault with a Deadly Weapon Inflicting Serious Injury, and First-Degree Forcible Rape. The jury found Defendant not guilty of Attempted First-Degree Murder. The trial court entered Judgments in accordance with the verdicts and sentenced Defendant to 73 to 100 months imprisonment for Kidnapping; 6 to 17 months imprisonment for each charge of Assault by Strangulation; 25 to 42 months imprisonment for Assault with a Deadly Weapon Inflicting Serious Injury; and 240 to 348 months imprisonment for First-Degree Forcible Rape. The trial court ordered all sentences to run consecutively. The trial court also ordered Defendant to register as a sex offender for his natural life and to pay a $25,000 fine. Defendant orally gave Notice of Appeal in open court.

Issues

The issues on appeal are whether the trial court erred by: (I) refusing to instruct the jury on the defense of voluntary intoxication; (II) denying Defendant's Motion to Dismiss one charge of Assault by Strangulation; (III) failing to distinguish between the injuries caused by each Assault by Strangulation; (IV) failing to intervene *ex mero motu* during the State's closing arguments; (V) assessing a $25,000 fine against Defendant at sentencing.

Analysis

I. Voluntary Intoxication Instruction

[1] Defendant first argues the trial court erred in denying his request to instruct the jury on voluntary intoxication. Defendant contends he was entitled to a jury instruction on voluntary intoxication because the evidence, taken in the light most favorable to Defendant, tended to show he had been drinking for at least three hours, drank at least half of a fifth of whiskey, was behaving abnormally, broke a glass, was too impaired to have sex, ultimately passed out after assaulting K.S., and there were numerous bottles of alcohol in the part of the home where Defendant had been that evening. Thus, Defendant asserts, there was substantial evidence supporting the conclusion he could not form the specific intent to support his convictions for First-Degree Kidnapping and First-Degree Forcible Rape,[2] such that he was entitled to an instruction on voluntary intoxication.

"A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence." *State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (2001) (citing *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988)). We review whether a defendant was entitled to a jury instruction on voluntary intoxication de novo to determine whether the evidence supported such an instruction when considered in the light most favorable to the defendant. *State v. Mercer*, 373 N.C. 459, 462, 838 S.E.2d 359, 362 (2020) (citing *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988)).

"In certain instances voluntary drunkenness, while not an excuse for a criminal act, may be sufficient to negate the requisite intent element. However, no inference of the absence of [specific intent] arises from intoxication, as a matter of law." *Mash*, 323 N.C. at 347, 372 S.E.2d at 537 (alteration, citations and quotation marks omitted). The burden is on the defendant to "produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form" the requisite intent. *Id.* at 346, 372 S.E.2d at 536.

"Evidence of mere intoxication, however, is not enough to meet defendant's burden of production." *Id.* "The evidence must show that at

2. Defendant was charged with four specific-intent crimes—First-Degree Kidnapping, First-Degree Forcible Rape, Attempted First-Degree Murder, and Assault with a Deadly Weapon with Intent to Kill—but convicted only of First-Degree Kidnapping and First-Degree Forcible Rape.

the time of the [crime] the defendant's mind and reason were so completely intoxicated and overthrown as to render [her] utterly incapable of forming [specific intent]." *State v. Meader*, 377 N.C. 157, 162, 856 S.E.2d 533, 538 (alterations in original) (quoting *Mash*, 323 N.C. at 346, 372 S.E.2d at 536). Absent such evidence, a trial court is not required to instruct the jury on voluntary intoxication. *Id.*

Although the Record indicates Defendant had been drinking for several hours before the incident in question, evidence of mere intoxication is insufficient to require a jury instruction on voluntary intoxication. *Mash*, 323 N.C. at 346, 372 S.E.2d at 536. We analyze whether a defendant was unable to form the requisite intent because of his intoxication based on his actions leading up to the incident. *Id.* In *Mash*, the defendant was charged with first-degree murder stemming from an assault on multiple people. *Id.* at 342-43, 372 S.E.2d at 534-35. There, the evidence presented at trial included testimony the defendant had been drinking alcohol for at least seven hours; "swerved" his car while driving to buy more alcohol; his eyes were dilated, and his eyes and face were red; he was "sweating"; and he had difficulty speaking and walking. *Id.* at 340-42, 372 S.E.2d at 533-34. The Court held this evidence was sufficient to warrant a voluntary intoxication instruction. *Id.* at 348, 372 S.E.2d at 538.

Here, there is not substantial evidence Defendant could not control himself or was so intoxicated he could not form the intent for First-Degree Kidnapping and First-Degree Forcible Rape. Unlike the defendant in *Mash*, there was no evidence Defendant had trouble speaking or walking. Also unlike in *Mash*, the Record does not indicate Defendant engaged in inexplicable behavior immediately prior to attacking K.S.; K.S. testified Defendant's demeanor and behavior had been "off" for an entire week leading up to the incident. Moreover, after the incident, Defendant helped K.S. get up from the floor, helped clean her up, brought her pain medication, and apologized, saying, "I'm sorry you had to go through that, but I had to teach you a lesson." Indeed, Defendant's apology tends to indicate he appreciated the nature of his actions. Thus, although there was evidence Defendant was intoxicated, there was not substantial evidence—even taken in the light most favorable to Defendant—Defendant was intoxicated to the point he could not control himself and could not form the specific intent required to support the charges of First-Degree Kidnapping and First-Degree Forcible Rape. *See Meader*, 377 N.C. at 162, 856 S.E.2d at 538. Therefore, the trial court did not err by not instructing the jury as to Defendant's voluntary intoxication.

II. Motion to Dismiss

[2] Defendant argues the trial court erred by denying his Motion to Dismiss one of the charges of Assault by Strangulation. As a threshold matter, we note Defendant did not actually make a motion to dismiss either charge of Assault by Strangulation. Rather, defense counsel moved to dismiss all charges *except* the two charges of Assault by Strangulation. Neither party has addressed preservation of this issue on appeal.

"In a criminal case, a defendant may not make insufficiency of the evidence to prove the crime charged the basis of an issue presented on appeal unless a motion to dismiss the action . . . is made at trial." N.C. R. App. P. 10(a)(3) (2024). Our Supreme Court has held a timely motion to dismiss "preserves all issues related to the sufficiency of the evidence for appellate review[,]" regardless if the defendant stated the grounds for his motion. *See State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020). Here, by contrast, rather than failing to state upon what grounds he was moving to dismiss the charges of Assault by Strangulation, defense counsel expressly excluded the charges of Assault by Strangulation from his Motion to Dismiss.

The trial court, however, raised the issue of whether the evidence was sufficient to support two charges of Assault by Strangulation. At that point, defense counsel argued the charges could have been "consolidated into one indictment." After hearing arguments from the State and defense counsel, the trial court found there was sufficient evidence "of each and every element of each and every crime[,]" such that both charges of Assault by Strangulation should be submitted to the jury.

Although the issue was raised by the trial court—rather than defense counsel—it was ultimately addressed by both the State and defense counsel during arguments on Defendant's Motion to Dismiss and treated as a motion to dismiss one of the charges of Assault by Strangulation. Moreover, the State has not argued the issue is not preserved for our review. Thus, we will address Defendant's arguments as to the sufficiency of the evidence for the charges of Assault by Strangulation on appeal. *Cf. Golder*, 374 N.C. at 246, 839 S.E.2d at 788 ("[U]nder Rule 10(a)(3) and our case law, defendant's simple act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review.").

[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). "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).

"[A]ny person who assaults another person and inflicts physical injury by strangulation is guilty of" assault by strangulation. N.C. Gen. Stat. § 14-32.4(b) (2023). Thus, one of the offense's essential elements is an assault. *Id.* Our Supreme Court has explained, in cases of assault, not every overt act will count as a separate offense; rather, this Court "must look beyond the number of physical contacts with the victim to determine whether more than one assault has occurred such that the State can appropriately charge a defendant with multiple assaults." *State v. Dew*, 379 N.C. 64, 70-71, 864 S.E.2d 268, 274 (2021). In *Dew*, our Supreme Court held "the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults." *Id.* at 72, 864 S.E.2d at 275. A distinct interruption "may take the form of an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another." *Id.*

The victim in *Dew* described a "continuous, nonstop beating" where the defendant "hit her 'over and over,' " which took place in a trailer home while they were away visiting family. *Id.* at 65, 864 S.E.2d at 270. The victim testified, after that assault, she cleaned up the trailer, packed their bags, and got in a car with the defendant to drive home. *Id.* at 66, 864 S.E.2d at 271. The defendant beat the victim again during the "entire

car ride" home. *Id.* The defendant was charged with five discrete assault charges and convicted of three. *Id.* at 69, 864 S.E.2d at 273. On appeal, the defendant argued there was insufficient evidence to support all but one charge of assault. *Id.* at 68, 864 S.E.2d at 272. Our Supreme Court held there was sufficient evidence to support two of the assault charges—one assault in the trailer and one assault in the car. *Id.* at 73-74, 864 S.E.2d at 276. The Court explained: "The process of cleaning up and packing up was an intervening event interrupting the momentum of the attack. In addition, the beating in the trailer was distinct in time and location from the beating in the car." *Id.* at 74. In concluding there was insufficient evidence to support the third assault charge, which stemmed from the attack in the trailer, the Court noted "different injuries or different methods of attack standing alone are insufficient evidence of a distinct interruption" and "all of the evidence" including the victim's testimony, "indicated that it was an ongoing, continuous attack." *Id.*

The Supreme Court revisited this principle in *State v. Robinson*, 381 N.C. 207, 872 S.E.2d 28 (2022). In concluding there was insufficient evidence of a distinct interruption to support multiple charges of assault, the Court observed the evidence presented "a confined and continuous attack in which defendant choked and punched [the victim] in rapid succession and without pause or interruption." *Id.* at 219, 872 S.E.2d at 37. However, the Court acknowledged "one can *imagine* a distinct interruption being described here with additional facts." *Id.* (emphasis in original). "For instance, if the facts indicated that the attack began in the bathroom but then moved to the bedroom, such a change in location may constitute a distinct interruption." *Id.* Likewise, evidence of a "discernable sequence of events" could show a distinct interruption in an attack. *Id.*

Here, the evidence "as it was presented" provides sufficient evidence from which the jury could have found a distinct interruption. *See id.* Unlike in *Dew* and *Robinson*, K.S. testified to a discernable sequence of events, rather than a "confined and continuous attack[.]" *See id.* At trial, K.S. testified Defendant first choked her from behind with his hands. She then described fighting Defendant, turning her body to face towards him, moving across the kitchen "from the stove" to "in front of the refrigerator." K.S. explained Defendant then hit her multiple times with the gun before she fell to the floor; next, she was able to throw the gun across the room, and Defendant strangled her again, now using his arm around her throat. This testimony tends to show not only a discernable sequence of events, but also evidence of a change in location, from the across the kitchen and from standing to lying on the floor—in

addition to the different methods of attack, i.e., Defendant's use of his hands to strangle K.S. versus his arm.

Thus, the State's evidence was more than "different injuries or different methods of attack standing alone[.]" *Dew*, 379 N.C. at 74, 864 S.E.2d at 276. Therefore, viewed in the light most favorable to the State, there was sufficient evidence from which the jury could find a distinct interruption between Defendant's strangulation of K.S. with his hands and his strangulation of K.S. with his arm. Consequently, the trial court properly denied Defendant's Motion to Dismiss.

III. Physical Injuries

[4] Defendant contends the trial court plainly erred by "failing to distinguish the injuries caused" by each charge of Assault by Strangulation. Specifically, Defendant argues neither the indictments, jury instructions, nor jury verdict sheets "specified what injury was associated with each of" the two charges of Assault by Strangulation.

At trial, Defendant did not object to the trial court's jury instructions. Thus, he is limited to arguing plain error. N.C. R. App. P. 10(a)(4) (2024) ("In criminal cases, an issue that was not preserved by objection noted at trial . . . 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."); *see also State v. Bowman*, 292 N.C. App. 290, 898 S.E.2d 27 (2024) (reviewing for 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, 224 (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 findings that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). In other words, plain error requires a defendant to meet 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 seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Reber, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024) (citations and quotation marks omitted).

In addition to an assault, Assault by Strangulation requires the infliction of a "physical injury." *See* N.C. Gen. Stat. § 14-32.4(b) (2023). Defendant argues because "none of the injuries were tied specifically to either strangulation," his "right to a unanimous verdict was jeopardized[.]" In so arguing, Defendant relies on *Bowman* and *State v. Bates*, 172 N.C. App. 27, 616 S.E.2d 280 (2005).

It is worth noting this Court's decision in *Bates*, cited by Defendant, was remanded by our Supreme Court for reconsideration in light of *State v. Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006). *See State v. Bates*, 360 N.C. 537, 634 S.E.2d 218 (2006). On remand—contrary to its original decision—this Court held the defendant's right to a unanimous verdict was *not* violated. *See State v. Bates*, 179 N.C. App. 628, 634, 634 S.E.2d 919, 923 (2006), *disc. rev. denied*, 361 N.C. 696, 653 S.E.2d 2 (2007). In so holding, the Court considered four factors: "(1) the evidence; (2) the indictments; (3) the jury charge; and (4) the verdict sheets." *Id.* at 633, 634 S.E.2d at 922.

> Concerning the evidence and indictments, we looked to determine whether "it is possible" to match guilty verdicts with specific incidents. Concerning the jury instructions, we looked to whether the "instructions were adequate to ensure that the jury understood that it must agree unanimously as to each verdict on each charge." And concerning the verdict sheets, we looked to whether "the presentation of the charges on the verdict sheets was adequate for the jury to distinguish the charges based on the evidence presented at trial."

Bowman, 292 N.C. App. at 294, 898 S.E.2d at 31 (internal citations omitted) (quoting *Bates*, 179 N.C. App. at 633-34, 634 S.E.2d at 922-23).

As to the evidence and indictments, the Court observed the defendant was charged with eleven counts of first-degree sexual offense, but evidence was presented of "only six to ten incidents." *Bates*, 179 N.C. App. at 633, 634 S.E.2d at 922 (noting the Courts in *Lawrence* and *State v. Wiggins*, 161 N.C. App. 583, 589 S.E.2d 402 (2003), *disc. rev. denied*, 358 N.C. 241, 594 S.E.2d 34 (2004) "found no unanimity problem" where the number of counts equaled the number of incidents presented as evidence). Nonetheless, it was not "impossible to match the jury verdict to the evidence." *Id.* As to the jury instructions, the trial court instructed the jury separately as to each count and instructed the jurors they must

reach a unanimous verdict. *Id.* Lastly, as to the verdict sheets, although the case numbers were not provided on the sheets, each charge was listed separately with a notation of the felony charged, had "date ranges for the different counts to differentiate the charges for the jury[,]" and some of the counts had descriptors next to the charges, "reducing the risk that the jurors considered different incidents in reaching their verdict and increasing the likelihood of unanimity." *Id.* at 634, 634 S.E.2d at 922-23. Thus, the Court concluded "it [was] possible to match the jury's verdict of guilty with specific incidents presented in evidence and in the trial court's instructions." *Id.* at 634, 634 S.E.2d at 923.

More recently, in *Bowman*, this Court considered these factors in concluding the trial court plainly erred in instructing the jury only once where the defendant was charged with two counts of first-degree sexual offense. 292 N.C. App. at 294, 898 S.E.2d at 31. While the trial court "advised the jury that its verdict must be unanimous as to each charge," the Court was particularly concerned the verdict sheet "did not specify which sexual act was to be considered for each charge." *Id.* Thus, it was "impossible to know if the jury convicted Defendant of the *particular* offense[s] charged in the warrant or bill of indictment." *Id.* at 295, 898 S.E.2d at 32 (emphasis and alteration in original) (citation and quotation marks omitted). Consequently, the trial court's failure to "differentiate counts by the type of alleged sexual act" jeopardized the defendant's right to a unanimous verdict. *Id.*

Here, as in *Bates*, the number of counts equals the number of incidents presented in evidence. Likewise, there were two indictments for Assault by Strangulation. *See Bates*, 179 N.C. App. at 633, 634 S.E.2d at 922 ("Where the number of incidents equal the number of indictments, the risk of a non-unanimous verdict is substantially lower."). The trial court instructed the jury twice—once for each charge of Assault by Strangulation. And like in *Bates*, the trial court instructed the jurors they could not reach a verdict by majority vote. Lastly, the verdict sheets presented each charge separately and identified the felony charged by name and case number. Unlike in *Bowman*, the sheets further differentiated each offense by including the words "alleged by hands" or "alleged by arm" in bold font.

Moreover, the State published to the jury a series of photographs taken of K.S.'s injuries. *See State v. Little*, 188 N.C. App. 152, 157, 654 S.E.2d 760, 764 (2008) (photographs showing bruises on victim's neck were sufficient evidence of physical injury for assault by strangulation). K.S. identified swelling, bruising, and marks on her throat that were not there prior to Defendant's assault. She also used her hands to illustrate

to the jury where Defendant had placed his hands on her neck. Doctor Jan Feltowicz, who treated K.S. while she was at the hospital, testified K.S. had "abrasions" on her neck and "spasm in the upper neck, which is consistent with . . . being assaulted and strangled." Thus, we cannot agree with Defendant that "there was ambiguity in what evidence the jury should consider regarding the physical injury caused [by] each instance of alleged strangulation[.]" Therefore, the trial court did not err by not distinguishing the physical injuries for the jury.

IV. Closing Arguments

[5] Defendant contends the prosecutor's remarks regarding alcoholics in her closing argument constituted gross impropriety, making it an error for the trial court to fail to intervene *ex mero motu*. Because defense counsel did not object to the prosecutor's statements at trial, our review is conducted under a heightened standard:

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted). In conducting this review, we must analyze "(1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017).

"Grossly improper" is an "exceedingly high bar." *Reber*, 386 N.C. at 163, 900 S.E.2d at 789. "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144, 157 (1986) (citation and quotation marks omitted). "In order to determine whether the prosecutor's remarks are grossly improper, the remarks must be viewed in context and in light of the overall factual

circumstances to which they refer." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995) (citation omitted).

Further, even when an argument is deemed so improper, the defendant has the burden of demonstrating prejudice. *See Huey*, 370 N.C. at 186, 804 S.E.2d at 474. Additionally, when the Supreme Court of North Carolina "has found the existence of overwhelming evidence against a defendant, [it has] not found statements that are improper to amount to prejudice and reversible error." *Id.* at 181, 804 S.E.2d at 470.

"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). Here, the prosecutor made several statements about alcoholism in her closing argument, including that alcoholics can "still function" and "know right from wrong" with a high blood alcohol level. Defendant argues the prosecutor, in making these statements, impermissibly argued facts not in evidence and inserted her unsupported opinion about how alcohol affected—or did not affect—Defendant's behavior. Presuming, without deciding, the prosecutor's statements and argument thereon was improper, Defendant cannot show the argument was so grossly improper, in light of the full context and the evidence presented against Defendant, that his "right to a fair trial was prejudiced by the trial court's failure to intervene." *Huey*, 370 N.C. at 180, 804 S.E.2d at 469-70 (citing *Jones*, 355 N.C. at 133, 558 S.E.2d at 107).

In *State v. Cole*, 343 N.C. 399, 471 S.E.2d 362 (1996), the defendant was convicted of first-degree murder and involuntary manslaughter. Testimony given at trial indicated the defendant had been drinking at the time of the killings. *Id.* at 419, 471 S.E.2d at 372. However, the defendant testified he did not know how much he had to drink on the night in question and no evidence was admitted as to his blood alcohol level. *Id.* at 418-19, 471 S.E.2d at 371-72. During closing arguments, the prosecutor made speculative statements about the defendant's level of intoxication:

> Their last straw is this alcohol thing. That's it for them. They have conceded and admitted everything else in the face of overwhelming evidence. That's where they are. That's all they've got left. Don't let them fool you. Had he been drinking? Clearly from the testimony he had. Clearly had. Moderate odor of alcohol, officer said, strong odor of

> alcohol. Shouldn't he have been arrested for driving while impaired? Maybe. He'd blown an eight or nine? Maybe. He consumed some alcohol. The only way we know that is we've heard people talk about odors and we've heard him say how much he consumed.

Id. at 418, 471 S.E.2d at 371. Our Supreme Court agreed with the defendant the argument was improper because it was speculative, but nonetheless held it was "not so grossly improper that the trial court abused its discretion by not intervening *ex mero motu*." *Id.* at 419, 471 S.E.2d at 372.

Here, as in *Cole*, the prosecutor's statements were, at most, inappropriately speculative. Moreover, for the reasons explained regarding Defendant's request for a voluntary intoxication instruction, *supra*, there was not substantial evidence Defendant could not control himself or was so intoxicated he could not form the specific intent required to convict him. Indeed, the prosecutor's statements, viewed in full context, were used to highlight a lack of "typos" in text messages Defendant sent after the incident in question—rather than to indicate Defendant was a functioning alcoholic. Thus, we cannot agree the prosecutor's comments were prejudicial. Therefore, Defendant has not established the State's closing argument was so grossly improper the trial court was required to intervene *ex mero motu*. Consequently, the trial court did not plainly err by not intervening in the State's closing argument.

V. Sentencing

[6] Lastly, Defendant argues the trial court erred by imposing a $25,000 fine on him at sentencing. We review sentencing decisions for abuse of discretion. *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 abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play."). To show an abuse of discretion, the defendant "must demonstrate that the trial court's action was so arbitrary that it could not have been the result of a reasoned decision." *State v. Cannon*, 341 N.C. 79, 87, 459 S.E.2d 238, 243 (1995) (citation and quotation marks omitted).

Under N.C. Gen. Stat. § 15A-1361, "[a] person who has been convicted of a criminal offense may be ordered to pay a fine as provided by law." As to felony sentencing, "the amount of the fine is in the discretion of the court." *Id.* § 15A-1340.17(b) (2023). "In exercising its discretion, the trial court must take into account the nature of the crime, the

level of the offense, and the aggravating and mitigating factors, just as it would in setting the length of imprisonment for a defendant." *State v. Sanford Video & News, Inc.*, 146 N.C. App. 554, 557, 553 S.E.2d 217, 218 (2001), *disc. rev. denied*, 355 N.C. 221, 560 S.E.2d 359 (2002).

Defendant argues he has no ability to pay the fine and will likely never be able to pay the fine. He argues the trial court did not take his financial situation into consideration when it imposed the fine, as required by statute. Defendant cites *State v. Mucci*, 163 N.C. App. 615, 594 S.E.2d 411 (2004) in support of his argument. There, the Court remanded the case for a new sentencing hearing in part because the trial court did not consider the statutory factors outlined in N.C. Gen. Stat. § 15A-1340.36. *Id.* at 627-28, 594 S.E.2d at 419-20. Section 15A-1340.36, however, is concerned with payment of restitution. Here, by contrast, Defendant was ordered to pay a fine—and the statutory obligations of Section 15A-1340.36 do not apply to the trial court's assessment of a fine. *See* N.C. Gen. Stat. § 15A-1340.36 (2023).

Defendant also argues the trial court's assessment of the fine was unreasonable under N.C. Gen. Stat. § 15A-1362(a), which provides: "In determining the method of payment of a fine, the court should consider the burden that payment will impose in view of the financial resources of the defendant." This argument was expressly rejected by this Court in *State v. Zubiena*:

> We are also unpersuaded by Defendant's argument that the trial court erred by failing to consider her resources when it imposed the fine. The statute Defendant cites for this proposition, N.C. Gen. Stat. § 15A-1362, states that "[i]n determining the *method of payment* of a fine, the court should consider the burden that payment will impose in view of the financial resources of the defendant." N.C. Gen. Stat. § 15A-1362(a) (2015) (emphasis added). As its plain language indicates, this statute relates to the method of payment of the fine rather than its amount.

251 N.C. App. 477, 489, 796 S.E.2d 40, 49 (2016). It is the same here. We are unable to identify any basis for determining the trial court's imposition of the $25,000 fine against Defendant constituted an abuse of discretion or was otherwise unlawful—particularly in light of the nature of the crimes of which Defendant was convicted. *See Sanford Video & News, Inc.*, 146 N.C. App. at 557, 553 S.E.2d at 218. Thus, Defendant has not shown the trial court abused its discretion in assessing a $25,000 fine against him. Therefore, the trial court did not err in ordering Defendant to pay a $25,000 fine.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the Judgments of the trial court.

NO ERROR.

Judge GORE concurs.

Judge FREEMAN concurs in part and dissents in part by separate opinion.

FREEMAN, Judge, concurring in part and dissenting in part.

I concur in full with the majority opinion with the sole exception of its conclusion that there was substantial evidence of two separate assaults to survive defendant's motion to dismiss one of the two assault by strangulation charges.

This case requires us to determine whether the trial court properly determined there was substantial evidence of a distinct interruption in the overall assault to support two separate assault by strangulation charges. Prior to a recent decision from our Supreme Court in *State v. Dew*, 379 N.C. 64 (2021), this Court issued conflicting opinions on how to determine whether a distinct interruption occurred. Under one analytical framework, this Court looked for "evidence of a clear and significant break or demarcation within the assaultive episode." *State v. Robinson*, 381 N.C. 207, 217 (2022) (citing *State v. McPhaul*, 256 N.C. App. 303, 317–18 (2017)). Under the other framework, however, this Court used the factors set out in *State v. Rambert*, 341 N.C. 173 (1995), to determine whether (1) the defendant employed a separate thought process before each act, (2) each act was distinct in time, and (3) each act resulted in a discrete, identifiable injury. *E.g.*, *State v. Dew*, 270 N.C. App. 458, 462–63 (2020).

Here, defendant choked the victim with his hands until she broke free. Subsequently, the victim "went from the stove across the kitchen," ending up by the refrigerator. Defendant then hit her on the head with a gun, causing her to drop to the floor, where defendant continued attacking the victim. Defendant choked her again with one hand while he pressed the gun to her head with the other. The victim then grabbed the gun and tossed it away. Defendant then choked her for a third time: he

used his bodyweight to press his arm into her throat until she became unconscious. When she regained consciousness, defendant "helped [her] off the floor, and he walked [her] over to the chair at his computer desk and sat [her] down."

The State argues that there was a distinct interruption to support separate assault by strangulation charges because there was enough time for defendant for "form separate thought processes. There was a break in time, and a separate assault with the firearm separating" the different strangulations. Indeed, under the *Rambert* factors, this is enough to support a distinct interruption. Defendant first decided to strangle the victim; then he decided to hit the victim over the head with the gun after she broke free from the first chokehold; and once the gun was out of his control, he decided to choke the victim again with his arm.

However, our Supreme Court did away with the *Rambert* framework for determining whether there was a distinct interruption between assaults in *State v. Dew*. There, the Court held that "the State may charge a defendant with multiple counts of assault only when there is substantial evidence that a distinct interruption occurred between assaults." 379 N.C. at 72. The Court elaborated that appropriate factors to consider are "an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another." *Id.* Additionally, "different injuries or different methods of attack standing alone are insufficient evidence of a distinct interruption." *Id.* at 74.

This rule was carried forward in a more recent Supreme Court case, where the Court emphasized that when the facts show "a confined and continuous attack" of hitting and choking, there must be a "clear break delineating the end of one assault and the beginning of another." *Robinson*, 381 N.C. at 219.

In *Dew*, for example, there was single assault when the defendant hit the victim in a "continuous, non-stop beating for at least two hours" at their shared trailer, where the defendant "hit her upside the head and ear, on each side, kicked her in the chest, hit her nose and her ear puncher her in the nose, headbutted her twice, and strangled her until vomiting." 379 N.C. at 65, 73. The victim then cleaned up their trailer and put luggage in their car, while the defendant put his daughter in car seat in the backseat of the car. *Id.* at 73–74. Once they were in the car, the beating began again for another two hours. *Id.* at 74. The Court held that this was "substantial evidence of a distinct interruption between

the occurrences in the trailer and those in the car." *Id.* However, it held that the assault in the trailer was one continuous assault, and the assault in the car was a second continuous assault. *Id.*

In *Robinson*, the defendant assaulted the victim while holding her captive in their shared home for three days. 381 N.C. at 219. However, the Court concluded that this was one continuous assault with no clear break in the violence. *Id.* The defendant "grabbed the victim around the neck, punched her several times in the face and chest, and strangled her while holding her down on a bed." *Id.* at 208. Had there been something like a change in location, or multiple attacks over the course of the three-day captivity, there would have been a distinct interruption to support multiple assault convictions. *Id.* at 219. But because no such evidence existed, the Court held that this was one continuous assault. *Id.*

Since *Dew* and *Robinson*, this Court has held there was substantial evidence of a distinct interruption to support multiple assault charges where there was a five-hour long break between the assaults and the assaults occurred in different parts of the house. *State v. Martin*, 292 N.C. App. 505, 508–09 (2024). In *Martin*, the defendant choked the victim "at least twice" in a single assaultive episode where "he got on top of her, wrapped his hand around her neck, and choked her." *Id.* at 508. The victim tried to fight back, and subsequently the defendant choked her until she became unconscious. *Id.* at 509. However, the defendant was only charged with a single count of assault by strangulation. *Id.* at 507.

In another case, we held there was substantial evidence of a distinct interruption where the defendant choked the victim, left the room and attacked another person, then quickly returned to choke the first victim again. *State v. Tucker*, 291 N.C. App. 379, 389–90 (2023).

There is no such interruption in the present case. The three strangulations happened in short succession, in the same room, and while defendant was exclusively focused on attacking the victim. Though defendant used different methods of attack and had time to form a separate thought process before choking the victim again, there is no clear break in the action to definitively show where one assault ended and the other began. Even in the light most favorable to the State, there is not substantial evidence of a distinct interruption to support two separate assault by strangulation charges.

I agree with the majority that the victim's testimony showed a discernable sequence of events; however, that is not the test. Cases like *Dew* and *Martin* illustrate that there can be a discernable sequence of events—and even multiple strangulations—within a single assault. And

so too here. While there is evidence of defendant's distinct actions within the assault, the only apparent distinct interruption occurred when the victim fell unconscious after defendant choked her for the third time. Therefore, I would hold that the trial court erred in denying defendant's motion to dismiss one of the two assault by strangulation charges.

STATE OF NORTH CAROLINA
v.
JOSALYN RAHSHELL UPCHURCH

No. COA24-460

Filed 2 July 2025

1. Criminal Law—motion to sever—co-defendants in first-degree murder and intentional child abuse trial—no error or abuse of discretion

The trial court did not err in denying defendant's motion to sever her trial on charges of first-degree murder and intentional child abuse, arising from the death of her one-year-old son, from that of her co-defendant (the other person who was present when the abuse was inflicted) where: (1) "finger pointing" at trial between the co-defendants about who inflicted the abuse did not deprive defendant of a fair trial; and (2) the cross-examinations by the co-defendants did not illustrate a conflict between their defenses, much less a high degree of conflict. Further, remarks made by the trial court—about previous denials by other judges of defendant's earlier motions to sever—showed that the trial court understood it had the discretion to revisit those decisions, although it ultimately also elected to deny defendant's motion. Defendant's related arguments that the trial court erred in precluding evidence she sought to introduce (out of concern for protecting the co-defendant's rights) lacked merit.

2. Evidence—character evidence—door opened by defendant's cross-examination—properly admitted

In a prosecution on charges of first-degree murder and intentional child abuse (arising from the death of defendant's one-year-old son), the trial court properly admitted character evidence (that defendant cheated on the child's father while pregnant with the child) where defendant "opened the door" to such testimony

by asking the father, on cross-examination, whether defendant had "been a good woman" to the father during their relationship.

3. Evidence—hearsay—pre-trial statements—corroborative of trial testimony—properly admitted

In a prosecution on charges of first-degree murder and intentional child abuse (arising from the death of defendant's one-year-old son), the trial court properly admitted pre-trial statements by the child's father—that he did not believe defendant's version of the events which resulted in their child's death—where the challenged statements corroborated, and tended to add weight and credibility to, the father's trial testimony.

Appeal by Defendant from judgments entered 3 November 2022 by Judge Keith O. Gregory in Chatham County Superior Court. Heard in the Court of Appeals 9 April 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Sherri Horner Lawrence, for the State-Appellee.

Joseph P. Lattimore for Defendant-Appellant.

COLLINS, Judge.

Defendant Josalyn Rahshell Upchurch appeals from judgments entered upon a jury's guilty verdicts of first-degree murder under the felony murder rule and intentional child abuse inflicting serious bodily injury. Defendant asserts that the trial court erred by denying her motions to sever her trial from her co-defendant's trial and by admitting certain evidence. We find no error.

I. Procedural History

Defendant and her co-defendant, Ricky Adams, were each indicted on one count of first-degree murder and one count of intentional child abuse inflicting serious bodily injury stemming from the death of Defendant's one-year-old child, De'Andre. The State's motion to join the cases for trial was granted on 28 October 2019, over Defendant's objection, and the matter was set for trial on 12 July 2021. Defendant moved to sever her trial from Adams' trial on 28 June 2021. Prior to hearing Defendant's motion to sever, the trial court continued the trial due to Covid.

Defendant's motion to sever was heard on 30 August 2021. At the conclusion of the hearing, the State agreed to conduct a review pursuant

to *Bruton v. United States*, 391 U.S. 123 (1968), for out-of-court statements made by either Defendant or Adams that directly referenced the guilt of the other party for the crimes charged. The State agreed that such statements would not be admitted during the State's case in chief absent consent of the party against whom it would be admitted. The trial court denied Defendant's motion to sever by order entered 12 October 2021.

Defendant renewed her motion to sever on 31 May 2022. The motion was denied. On 23 September 2022, in response to Defendant's motion to Prohibit Co-Defendant Ricky Adams' Extrajudicial Incriminating Statements,[1] the trial court ordered "that statements made by either defendant that '*I didn't do it*' or similar language, as well as statements that '*it must have been him/her*' are subject to *Bruton* and shall be redacted or otherwise not admissible."

Defendant renewed her motion to sever prior to trial on 26 September 2022. The motion was denied. Defendant and Adams were jointly tried. At the conclusion of all of the evidence and prior to final arguments, Defendant renewed her motion to sever. The motion was denied. After closing arguments were given and the jury charged, Defendant moved to sever and for a mistrial. The motion was denied.

The jury convicted Defendant of first-degree murder based on the felony murder rule and intentional child abuse inflicting serious bodily injury. The jury acquitted Adams of both charges. Defendant timely appealed.

II. Factual Background

The evidence at the trial tended to show the following: Defendant gave birth to De'Andre in April 2016. Defendant, De'Andre, and De'Andre's father, Darius Cotton, resided at an apartment together until De'Andre was around 2-3 months old. Defendant had custody of De'Andre, and Cotton had him on alternating weekends.

On Sunday, 16 July 2017, Defendant had De'Andre and called Chatham County 911 at 1:48 p.m. for assistance. Officer Samuel Bradburn with the Pittsboro Police Department and John Burkett and Kenneth Perry with the Pittsboro Fire Department responded. When they arrived at the scene at 1:55 p.m., they found De'Andre lying on the floor while Defendant gave him emergency breaths. It was immediately obvious to the first responders that De'Andre was dead because he had no pulse, was cold to the touch, and his joints, wrists, and elbows were seized up.

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1. This motion does not appear in the record but is referenced in the order ruling on it.

When Burkett placed an AED device on De'Andre to shock his heart back into normal rhythm, it indicated "no shock was needed" because no pulse was detected. An EKG revealed no heart activity. As a result, the first responders did not perform CPR on De'Andre.

Defendant was not crying and was described by Burkett as not very emotional. Adams was sitting on the couch watching television. *Burckett* described Adams as acting "way more interested in what was going on on the TV than what was going on in the room." Defendant told the first responders that she had checked on De'Andre "around 12:00," and "he was unresponsive then."

A. Alene Cameron's Testimony

Alene Cameron, a Paramedic Supervisor with FirstHealth with training and certification in cardiac life support, also responded to the scene because the 911 call was a cardiac arrest call. When she arrived, De'Andre had no pulse, was cool to the touch, and had a rigid jaw. She noticed that De'Andre was not "as flaccid as you would expect to find" a child who had gone into "a witnessed [cardiac] arrest." According to Cameron, this aligned with delayed reporting. Cameron told Defendant De'Andre was dead. Defendant leaned into Adams; she said she "felt numb" and "really didn't have any more questions."

Defendant told Cameron that she tried to give De'Andre some milk around 10:00 a.m. and then checked on him at 11:00 a.m. and 12:00 p.m. that day, but he did not want anything or was sleeping. Defendant then checked on him again, and that is when she called 911. Cameron noticed De'Andre had some bruising along his abdomen, which did not appear to be a result of CPR, and a little mark above his right eye.

B. Nick Victorino's Testimony

Nick Victorino, the county medical examiner, examined De'Andre's body at the scene. Victorino observed bruises on De'Andre's face and chest/abdomen, a swollen right eye, and discoloration behind the right ear. De'Andre was cold to the touch and undergoing rigor mortis. According to Defendant, De'Andre had been healthy and had nothing wrong with him. Defendant said she put De'Andre to bed around 10:30 p.m. the night before; when she went into his room to check on him around 12:00 a.m., he was sleeping. Defendant heard De'Andre on the baby monitor moving around at 2:00 a.m., but he went back to sleep.

Defendant went into his room at 10:00 a.m. to try to feed him, but he did not want anything and went back to sleep. Defendant checked on De'Andre at 12:00 p.m.; she found him sleeping on his back and

attempted to feed him again. At 1:40 p.m., Defendant went in and found De'Andre cold and unresponsive. Defendant stated De'Andre's diaper had been changed the evening before. Victorino noted De'Andre's diaper was lightly soiled with no odor.

Adams told Victorino that De'Andre had been put to bed at 10:30 p.m. or 11:00 p.m. Defendant woke him up yelling that she needed help because De'Andre was ill.

C. Officer Bradburn's Testimony

Defendant told Officer Bradburn that she put De'Andre to bed at 10:30 p.m., checked on him around midnight, and woke up around 10:00 a.m. and tried to feed De'Andre, but he would not eat. She put De'Andre back to bed, checked on him around 12:00 p.m. and then again right before she called 911. Defendant stated she found De'Andre in the bed and put him on the living room floor to attempt CPR. Officer Bradburn noticed Defendant was talking calmly and clearly, but seemed slightly flustered.

D. Gene Harris's Testimony

EMT Gene Harris, Jr., overheard Defendant give a timeline of the events leading up to her calling 911. She said she checked on De'Andre at 10:00 a.m. to attempt to feed him, but he did not want food. She checked on him again at noon. Defendant stated De'Andre was "cold as bricks" when she checked on him at 1:00 p.m. According to Harris, Defendant was calm, was not crying, and seemed traumatized, in shock, or indifferent.

E. Darius Cotton's Testimony

Defendant called Cotton, and his wife, Melissa, at around 1:55 p.m. on 16 July 2017 to tell them they needed to get to her house because De'Andre was cold and unresponsive. According to Cotton, Defendant sounded worried and frantic. Defendant said De'Andre wasn't sick. Defendant told them she laid De'Andre down for a nap and he was "cold as ice" when she went to check on him.

When Cotton and Melissa had De'Andre the weekend before, he was healthy and did not have any injuries. De'Andre usually woke up at 4:30 a.m. or 5:00 a.m. to play or for a bottle, went back to sleep around 7:30 a.m. or 8:00 a.m., and then woke up no later than 9:30 a.m. De'Andre never slept until 11:00 a.m. or 1:00 p.m.

On 31 May 2017, about six weeks before De'Andre's death, Defendant posted on her Facebook page, "If this son of mines headbutt me in my breasts 1 more time imma throw him into the wall! What in the world is wrong with him[.]"

F. Detective Delanie Womack's Testimony

Detective Delanie Womack of the Pittsboro Police Department was the lead detective assigned to the investigation into De'Andre's death. She interviewed Defendant on 18 July 2017, 26 July 2017, and 15 March 2018. Defendant was also interviewed by the SBI on 1 August 2017. Defendant's story of the events leading up to De'Andre's death changed in each interview.

Detective Womack noted significant changes in Defendant's statement about who laid De'Andre down on 15 July 2017. Initially, Defendant wrote in her statement and stated in her first interview that she put De'Andre to bed that night. In her last interview, Defendant for the first time stated that she was sure Adams put De'Andre to bed that night.

On 26 July 2017, Defendant told Detective Womack that she heard a noise on the monitor at 12:00 a.m. and went to check on De'Andre; he was fine. Around 1:00 a.m. or 1:30 a.m., she checked on De'Andre and changed his diaper. Defendant later told Detective Womack in the second interview that she got up around 12:00 a.m., checked on De'Andre because she heard a noise on the monitor and changed his diaper at the same time, rather than doing it separately at 1:00 a.m.

Adams told Detective Womack that he left Defendant and De'Andre at the apartment around 6:30 p.m. to go to Durham and returned around 9:00 p.m. Adams changed De'Andre's diaper, and Defendant later put De'Andre to bed. Adams had seen Defendant hit De'Andre on the leg or hand, but he did not see anything that night. Defendant often stated De'Andre was clingy and spoiled and that people needed to stop holding him.

G. Dr. Susan Venuti's Testimony

Dr. Susan Venuti, associate chief medical examiner with the Office of the Chief Medical Examiner, testified as an expert in forensic pathology. Dr. Venuti performed De'Andre's autopsy and observed multiple injuries: three rib fractures with hemorrhaging, six distinct bruises to the stomach/abdomen area, a large liver laceration, abdominal cavity bleeding, two bruises on the top of his head corresponding to the hemorrhaging in the periosteum, hemorrhaging in the adrenal glands, bruising on the right side of his face from his chin to just above his right eye, contusions like a black eye under his right eye with a slight amount of edema, an abrasion on the lateral right eyebrow, bruising behind the ear, cheek bruising, bruising along and below the costal margin where the ribs end on the right side of the body, bruising in the middle of the chest nipples (below the xiphoid or below the rib in the middle), bruising in the abdomen, a pressure mark on the right side of the body, and

petechiae in lower eyelid of the right eye. When De'Andre was found, his jaw was locked and his arms and legs were stiffening up, indicating rigor mortis, which normally starts within a couple of hours of death.

Dr. Venuti opined that De'Andre's cause of death was blunt force trauma to the chest and abdomen, and the manner of death was homicide. Dr. Venuti opined that based on De'Andre's chest and abdomen injuries, his death may have been caused by one or multiple recent impacts in the abdomen. Dr. Venuti stated that the liver laceration injury "would require a pretty significant amount of force." Dr. Venuti equated the amount of force needed to cause De'Andre's liver laceration to "injuries that we typically would see in motor vehicle crashes where there is a large impact stopping at a high rate of speed." Dr. Venuti also equated the significant amount of force needed to cause a liver laceration injury like De'Andre's to a heavy and large older-generation television falling on top of a child. Dr. Venuti opined that the presence of rigor mortis in the jaw and extremities indicate that the child was deceased when emergency personnel arrived.

III. Discussion

A. Joint Trial

[1] Defendant first argues that the trial court erred by denying her motions to sever her trial from Adams' trial.

North Carolina "has a strong policy of favoring consolidated trials of defendants accused of collective criminal behavior." *State v. McKeithan*, 140 N.C. App. 422, 430 (2000) (citation omitted). N.C. Gen. Stat. § 15A-926(b)(2)(a) "authorizes joinder of defendants where the state seeks to hold each defendant accountable for the same crimes[.]" *State v. Rasor*, 319 N.C. 577, 581 (1987). "The propriety of joinder depends upon the circumstances of each case and is within the sound discretion of the trial judge." *State v. Pickens*, 335 N.C. 717, 724 (1994). "Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed." *State v. Nelson*, 298 N.C. 573, 586 (1979) (citations omitted). Nevertheless, pursuant to N.C. Gen. Stat. § 15A-927(c)(2), "the trial court must deny a joinder for trial or grant a severance of defendants whenever it is necessary to promote a fair determination of the guilt or innocence of one or more defendants." *Pickens*, 335 N.C. at 724.

"The existence of antagonistic defenses will not, standing alone, warrant a severance." *Id.* at 725 (citation omitted). "On the other hand, the fact that the evidence may be substantial against a defendant will not preclude severance where joinder denies a defendant a fair trial."

Id. (citations omitted). "The test is whether the conflict in defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, defendants were denied a fair trial." *State v. Lowery*, 318 N.C. 54, 59 (1986) (quoting *Nelson*, 298 N.C. at 587).

1. Antagonistic Defenses

Defendant argues that "[t]he defenses in this case were diametrically opposed to one another," as illustrated by the defendants' respective closing arguments. Defendant's counsel told the jury, "If you believe that there has been proof beyond a reasonable doubt of who committed a crime, that somebody is Ricky Adams . . . ." Adams' counsel, on the other hand, told the jury that Adams was in Durham when Defendant inflicted De'Andre's injuries. While each defendant sought to implicate the other, such a potential for "finger pointing" does not necessitate separate trials. *See*, *e.g.*, *State v. Harrington*, 171 N.C. App. 17, 22-23 (2005) (holding the trial court did not err in joining defendants' cases for trial even where "each of their defense counsel had to deflect blame from his respective client by casting blame on the other" while examining witnesses); *Lowery*, 318 N.C. at 60-61 (rejecting misjoinder claim even though both defendants denied involvement in the crime and the strategy employed by the attorney for one defendant was to suggest the other defendant killed the victim); *State v. Cook*, 48 N.C. App. 685, 687 (1980) (holding joinder was proper in homicide trial even where "only one defendant logically could have fired the fatal shots"). Here, even with a conflict in defendants' respective positions, considering all the evidence at trial, Defendant has failed to show she was deprived of a fair trial.

2. Conflicting evidence

Defendant also argues that "[i]n terms of the evidence at trial, there was a high degree of conflict between the defenses." Defendant points to the cross-examination of Burkett as an example of this conflict. There, Defendant elicited testimony that when Burkett arrived on the scene, Adams did not appear engaged in any life-saving activities and was more engaged in the television than what was going on with the child. Adams elicited testimony that when Burkett arrived on the scene, Defendant wasn't crying or screaming and appeared oddly calm. These cross-examinations do not illustrate conflict between the defenses, much less a high degree of conflict.

3. Discretionary ruling

Defendant next argues that the trial court erred as a matter of law by denying her motion to sever because "[t]he judge's comments show

that . . . he did not believe he had the discretion to revisit the earlier decision of another judge made before trial." Defendant mischaracterizes the trial court's ruling.

In response to Defendant's motion to sever made at trial, the trial court ruled as follows:

> Mr. Silverman, you -- you mentioned *Melvin*. It's very interesting. I think that -- I agree that the [c]ourt, with the dynamic of a trial, the -- the judges that ruled beforehand, when they are not boots on the ground during the trial, things happen in the trial that can cause maybe that same judge that ruled then to have a different approach at the time the game is actually going on.
>
> That being said, I didn't rule before. I was not a part of that. I'm boots on the ground. And even being boots on the ground, I still feel respectfully that even with -- as you said with *Melvin*, the [c]ourt can make -- still -- decisions; but I still stick to that I don't believe it would be appropriate, based on even the dynamics of this case, for this [c]ourt to step out and say, "Well, I'm going to change a motion to join respectfully."

In this ruling, the trial court acknowledged that prior judges had denied Defendant's motion to sever and that he was not involved in those decisions. The trial court also acknowledged that things can happen in a trial after such a ruling that would cause a judge to have a different approach. The trial court then explained that he was presently involved in the case – "I'm boots on the ground" – and that, based on "the dynamics of the case," he was still going to deny the motion to sever. Contrary to Defendant's argument, nothing in these remarks indicates that the trial court "did not believe he had the discretion to revisit the earlier decision of another judge made before trial."

4. Preclusion of evidence

Defendant next argues that there were several times where Defendant's evidence was erroneously precluded because of the trial court's concerns with protecting Adams' rights.

a. Adams showed a gun

Defendant first argues that the trial court erred by excluding certain evidence she sought to elicit on the cross examination of Cotton where Adams objected but the State did not. This is not an accurate reflection of the transcript.

Defendant attempted to elicit that Adams showed Cotton a .45 caliber handgun just before De'Andre's funeral. Both Adams and the State immediately objected, and the jury was asked to step out of the court room. At that point, the State said, "And, Your Honor, I wasn't clear if the [c]ourt heard that the State also lodged an objection to that." The trial court responded, "Yes." The State then reiterated, "There is a lot going on. I just wanted the record to be clear that the State also objected to elicitation -- to the eliciting of the information about the gun." The trial court responded, "All right. Let me -- and that record --the record shall reflect that." Adams explained his objection was because of the evidence's potential to "associate him with a violent firearm." The State explained that it did not elicit that information "because with the context, it did not appear to be relevant to any particular material fact."

Defendant's assertion that the State did not object to the testimony is simply not accurate. Furthermore, Defendant's assertion that she "probably could have gotten that in[to evidence]" is unsupported. Defendant makes no argument as to why this evidence was relevant and would have been admissible at trial had Defendant been tried separately. *See* N.C. Gen. Stat. § 8C-1, Rule 401 (2021) (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); *id.* § 8C-1, Rule 402 (2021) ("Evidence which is not relevant is not admissible."). Accordingly, the trial court's exclusion of this evidence was not erroneous, and Defendant's argument thus lacks merit.

b. Defendant's statements

Defendant next argues that, as a result of the trial court's *Bruton* ruling, Defendant was prevented from offering portions of her statements made to Detective Womack.

Detective Womack interviewed Defendant several times between 18 July 2017 and 15 March 2018. At trial, Detective Womack testified to the general contents of those interviews and to a timeline of events she constructed from those interviews. Recordings redacted to comply with the *Bruton* rulings were played for the jury. Defendant contends that she was precluded from introducing the following statements: Detective Womack noted in her report that "[Defendant] then looked at me and put her hand on her chest while stating, 'I don't -- I mean, I know I didn't do anything, so I don't know what could have been the cause of that. I don't have any idea.' " Detective Womack also noted, "I then ask[ed] [Defendant] how De'Andre got all the injuries listed; and she stated, 'I

don't know. I didn't do it.' " Counsel for Defendant also pointed out that, on multiple other occasions, Defendant told Detective Womack, "I didn't abuse my child" and "I don't put nothing past nobody."

Defendant has failed to show how these statements were admissible. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2021). "Hearsay is not admissible except as provided by statute or by these rules." *Id.* § 8C-1, Rule 802 (2021). Defendant fails to argue why these statements are not hearsay or point to an exception that would allow their admission. Although these statements could potentially have come into evidence to corroborate her in-court testimony, Defendant did not testify at trial and makes no argument that she would have taken the stand had she been tried separately. Accordingly, Defendant has failed to show that she was prevented from offering portions of her statements "as a result of" the trial court's *Bruton* ruling.

5. Summary

Defendant's arguments as to why the trial court erred by denying her motion to sever her trial from Adams' trial lack merit. Defendant has failed to show that the conflict in defendants' respective positions at trial were "of such a nature that, considering all of the other evidence in the case," Defendant was "denied a fair trial." *Lowery*, 318 N.C. at 59 (citation omitted). For these reasons, we reject Defendant's argument that the trial court erred by denying her motions to sever.

B. Character Evidence

[2] Defendant next contends that the trial court erred by admitting character evidence that Defendant cheated on Cotton while she was pregnant with De'Andre. Defendant specifically argues that she did not open the door to that evidence.

"Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion[.]" N.C. Gen. Stat. § 8C-1, Rule 404(a) (2021). However, a trial court may admit otherwise inadmissible evidence "if the opposing party opens the door through cross-examination of the witness." *State v. Thaggard*, 168 N.C. App. 263, 273 (2005) (citation omitted). " 'Opening the door' is the principle where one party introduces evidence of a particular fact and the opposing party may introduce evidence to explain or rebut it, even though the rebuttal evidence would be incompetent or irrelevant, if offered initially." *Id.* (citation omitted).

"A trial court's decision to admit or exclude evidence to which a party has opened the door is subject to review on appeal for abuse of discretion." *State v. McKoy*, 385 N.C. 88, 97 (2023).

Here, during the State's direct examination of Cotton, the State played a video recording of him being interviewed by a detective. Before it was played, the parties agreed to redact his comment to the investigators that Defendant "had sex in our house . . . in our bed while she was pregnant with De'Andre."

On cross examination, Defendant asked, "Did you say during the course of that interview that [Defendant] had been a good woman to you?" Cotton responded, "I guess, yes." Defendant then asked, "And had she been a good woman to you?" Cotton responded, "Yes." On redirect examination, the State asked, "So what happened in your relationship that caused you to end the relationship, understanding all of that that had gone before?" Cotton responded, "She - - she told me that she had slept with someone else while she was pregnant with De'Andre in our home."

By asking Cotton, "And had she been a good woman to you?" Defendant "opened the door" to the State's rebuttal evidence she now challenges. Accordingly, the trial court did not abuse its discretion in overruling Defendant's objection and admitting the evidence.

C. Hearsay

[3] Defendant next argues that the trial court erred by admitting Cotton's pre-trial statements that he did not believe Defendant's version of events. Defendant specifically argues that the statements were inadmissible hearsay. The State, on the other hand, argues that the challenged statements were properly admitted to corroborate Cotton's trial testimony.

"When preserved by an objection, a trial court's decision with regard to the admission of evidence alleged to be hearsay is reviewed *de novo*." *State v. Johnson*, 209 N.C. App. 682, 692 (2011). Hearsay is "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.

"Prior statements admitted for corroborative purposes are not hearsay because they are not offered for the truth of the matter asserted." *State v. Lindsay*, 292 N.C. App. 641, 650 (2021). "Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness." *Id.* (citations omitted). "To

be admissible as corroborative evidence, prior consistent statements merely must tend to add weight or credibility to the witness's testimony." *Id.* (quotation marks and citations omitted). "[S]uch corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates." *Id.* (citations omitted).

At trial, Cotton testified that he had expressed concerns to law enforcement about information Defendant had told him regarding De'Andre's death. He was concerned that the things Defendant told him "were changing as far as her account of what happened." Cotton testified that Defendant told him over the phone when he was on the way to the apartment that "[s]he had laid him down for a nap. And when she went back to get him up, he was cold and unresponsive." He testified, " 'Cold as ice' is her words." Defendant calmly told Cotton's wife that De'Andre was dead. Cotton did not talk to Defendant between the time of De'Andre's death and his funeral when Cotton "was still under the impression that she put him down for a nap and when she went back to check on him or get him up, he was cold and unresponsive."

The video of Cotton's interview with Detective Womack was introduced to corroborate his in-court testimony. As articulated by the State in response to Defendant's objection to the evidence at trial, Defendant's recitation of objected-to statements indicated that "the video and the live testimony of Mr. Darius Cotton were almost perfectly consistent with each other." Moreover, the portions of the objected-to video that were not "almost perfectly consistent with" the live testimony still "tend[ed] to add weight or credibility" to Cotton's testimony. *Id.* Accordingly, the evidence was not hearsay, and the trial court did not err by allowing its admission.

IV. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges HAMPSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
JOHN AKBAR VENABLE, DEFENDANT

No. COA24-707

Filed 2 July 2025

1. Motor Vehicles—driving while impaired—appreciable impairment—blood alcohol concentration—sufficiency of evidence

After defendant crashed his car into a tree while his wife was in the passenger seat, the trial court in defendant's criminal prosecution did not err by denying defendant's motion to dismiss a charge of driving while impaired (DWI), where the State presented sufficient evidence of defendant's impairment at the time of the crash. First, the State showed that defendant was "appreciably impaired" through testimony from one of the officers present at the crash scene who, despite not having personally detected an odor of alcohol on defendant, observed other evidence of impairment, including five empty bottles of brandy inside defendant's car along with defendant's own admission to drinking before driving. Second, the State presented evidence of defendant's blood alcohol concentration about an hour after the crash, which was sufficient in and of itself to support a DWI conviction.

2. Evidence—expert witness testimony—reliability—retrograde extrapolation—blood alcohol concentration—plain error analysis

After defendant crashed his car into a tree while his wife was in the passenger seat, the trial court in defendant's prosecution for charges of felony death by vehicle and driving while impaired did not err by allowing a forensic chemist to give expert testimony about determining defendant's blood alcohol concentration at the time of the crash through a retrograde extrapolation analysis. This testimony met the reliability requirements of Evidence Rule 702 where it was based on sufficient underlying facts—including blood drawn from defendant roughly an hour after the crash, defendant's own statements about drinking before driving, and other evidence found at the crash scene—which in turn supported the witness's assumption that defendant was in a post-absorptive state when he crashed the car. Furthermore, the trial court did not commit plain error in admitting the testimony where the State had presented ample other evidence of defendant's impairment during the crash, meaning that

defendant could not show that the jury would have reached a different result absent the expert's testimony.

3. Motor Vehicles—felony death by vehicle—intervening negligence—jury instruction—final mandate—no plain error

After defendant crashed his car into a tree while his wife was in the passenger seat, the trial court in defendant's prosecution for charges of felony death by vehicle and driving while impaired did not err by failing to read the entire instruction on intervening negligence when instructing the jury on proximate cause or by omitting intervening negligence from its final mandate on the felony charge. The court's instructions sufficiently incorporated the main principles regarding intervening negligence, and its final mandate on felony death by vehicle included the appropriate law on proximate cause. Further, any error here did not amount to plain error where, given the ample evidence presented to support defendant's guilt of the charged crimes, the jury probably would not have reached a different result had the court read the full intervening negligence instruction.

4. Constitutional Law—effective assistance of counsel—no objection to testimony or jury instructions—performance not deficient

After defendant crashed his car into a tree while his wife was in the passenger seat, defendant received effective assistance of counsel during his subsequent trial for charges of felony death by vehicle and driving while impaired. Specifically, defendant failed to show on appeal that his trial attorney's performance was deficient for failure to object to testimony from the State's expert (regarding defendant's blood alcohol concentration after the crash) and from one of the officers present at the crash scene, or for failure to object to the court's jury instruction on intervening negligence; both testimonies were properly admitted, and there was no error in the court's jury instructions.

Appeal by Defendant from judgment entered 9 August 2023 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 8 April 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Kathryne E. Hathcock, for the State.

Stephen G. Driggers for Defendant.

GRIFFIN, Judge.

Defendant John Akbar Venable appeals from the trial court's judgment entered after a jury found him guilty of felony death by vehicle and driving while impaired. Defendant raises four issues on appeal. Defendant contends the trial court erred by (1) denying his Motion to Dismiss for insufficient evidence; (2) admitting expert testimony of retrograde extrapolation; and (3) declining to give the entire civil pattern jury instruction on intervening negligence. Defendant also argues he received ineffective assistance of counsel. We hold the trial court did not err, and Defendant did not receive ineffective assistance of counsel.

I. Factual and Procedural Background

This case arises from a car crash resulting in the death of Lee Venable in Raleigh, North Carolina. The evidence presented at trial tended to show as follows:

Around 7:26 p.m. on 2 August 2021, Defendant crashed his car into a tree at Old Wake Forest Road and Forest Oaks Drive in Raleigh. Defendant's wife, Mrs. Venable, was in the passenger seat of the vehicle. Seth Wood witnessed Defendant drive off Old Wake Forest Road in his red Kia Rio. Defendant crashed into a tree seconds later. Mr. Wood immediately called 911 and went to assist Defendant and Mrs. Venable. Defendant's vehicle was severely damaged and both airbags were deployed. Defendant exited the vehicle to check on Mrs. Venable. Mr. Wood observed Defendant's balance was poor, his speech was difficult to understand, and he appeared disoriented. Defendant walked a short distance away from the car and lay down on the grass while several residents of nearby houses tended to Mrs. Venable. Mr. Wood found Mrs. Venable's oxygen tank behind the passenger seat and attached it to her nose.

Mary Gerow, a registered trauma nurse, was one of the people to help. Ms. Gerow found Mrs. Venable unconscious and potentially not breathing. Ms. Gerow performed CPR on Mrs. Venable until EMS arrived. During this time, Ms. Gerow observed an odor of alcohol on Defendant.

Officer Jenks responded to the scene shortly after the crash. Mr. Wood explained to Officer Jenks what he had witnessed leading up to the crash and indicated Defendant had been driving. Ms. Gerow told Officer Jenks Defendant smelled like alcohol. Officer Jenks and Officer Daniel Egan searched Defendant's vehicle and found five empty airplane bottles of E&J brandy. Local ABC store surveillance video footage later revealed Defendant purchased eight airplane bottles of E&J brandy

and one airplane bottle of Fireball whiskey just after 5:00 p.m. on the day of the crash. Also, inside Defendant's vehicle, officers found Food Lion grocery bags and three Food Lion receipts, two of which were time stamped around an hour prior to the crash. One of the grocery bags contained raw chicken breast.

Paramedic Mark Underhill of Wake County EMS responded to the scene and treated Defendant for chest pain. He found Defendant alert and aware of the situation he was in. Defendant admitted he drank "a few beers" and claimed his wife had "grabbed [his] face," causing him to crash. Defendant and Mrs. Venable were transported to Wake Med Hospital for treatment. Mrs. Venable died at the hospital from blunt force trauma as a result of her injuries in the crash.

At the hospital, Defendant told Officer Egan he had consumed E&J brandy and Fireball whiskey. Defendant stated he drank one of the airplane bottles around forty-five minutes prior to driving. Officer Egan later contacted the witnesses present at the scene. Ms. Gerow stated she "smelled a strong odor of alcohol on [Defendant]," and Mr. Wood stated Defendant was "generally incoherent." After investigating the incident, and through his own observations, Officer Egan believed Defendant was appreciably impaired at the time of the crash due to alcohol consumption.

While at the hospital, a blood sample was collected from Defendant for medical purposes at 8:37 p.m. The blood test reflected an alcohol concentration of 0.0883 grams of alcohol per 100 milliliters of blood. Later that evening, Defendant consented to a chemical analysis blood test, and at 10:43 p.m., a second blood sample was collected from Defendant. The test revealed an estimated alcohol concentration of 0.05 grams of alcohol per 100 milliliters of blood.

Dr. Richard Waggoner, a forensic chemist for the Raleigh-Wake County Bureau of Identification, performed a retrograde extrapolation analysis to determine Defendant's blood alcohol concentration at the time of the accident. Dr. Waggoner extrapolated Defendant's blood alcohol concentration was 0.1078 grams of alcohol per 100 milliliters of blood at the time of the crash.

On 29 November 2021, Defendant was indicted for felony death by vehicle and driving while impaired. Defendant's case came on for trial on 7 August 2023 in Wake County Superior Court.

At trial, Defendant requested the jury receive a civil intervening negligence instruction. A portion of the instruction was given to the jury.

On 9 August 2023, the jury found Defendant guilty of both driving while impaired and felony death by motor vehicle. Defendant timely appeals.

II. Analysis

Defendant contends the trial court erred by (1) denying his Motion to Dismiss for insufficient evidence; (2) admitting expert testimony of retrograde extrapolation; and (3) declining to give the entire civil pattern jury instruction on intervening negligence. Defendant also argues he received ineffective assistance of counsel.

A. Motion to Dismiss

[1] Defendant argues the trial court erred by denying his Motion to Dismiss for insufficient evidence. Specifically, Defendant contends Officer Egan's opinion that Defendant was "appreciably impaired" at the time of the crash was unsupported by the evidence. We disagree.

We review the denial of a motion to dismiss for insufficient evidence de novo. *State v. Tucker*, 380 N.C. 234, 236, 867 S.E.2d 924, 927 (2022) (citation and internal marks 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." *Id.* at 237, 867 S.E.2d at 927. If there is substantial evidence to support each element of the charged crime, the trial court properly denied the motion to dismiss. *Id.* at 236, 867 S.E.2d at 927. Substantial evidence is more than a scintilla of evidence. *Id.* at 237, 867 S.E.2d at 927.

To be found guilty of driving while impaired, "the State must prove beyond a reasonable doubt" the defendant drove a vehicle "upon a public vehicular area" (1) while appreciably impaired "*or* (2) after having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more." *State v. Narron*, 193 N.C. App. 76, 79, 666 S.E.2d 860, 863 (2008) (citation and internal marks omitted) (emphasis added); N.C. Gen. Stat. § 20-138.1(a) (2023). Notably, these are two "separate, independent, and distinct ways" to be convicted of driving while impaired. *State v. Watson*, 286 N.C. App. 143, 149, 879 S.E.2d 355, 360 (2022). Thus, the jury may convict a person of driving while impaired based on appreciable impairment "without proof of the person's blood alcohol concentration." *Id.* Or "[t]he jury may independently convict a person of driving while impaired for driving with an alcohol concentration of 0.08 or more if the State proves that the person's blood alcohol concentration was 0.08 or more." *Id.* Here, there was sufficient evidence to convict Defendant under either prong.

1. Appreciable Impairment

A person is appreciably impaired when their impairment can be "recognized and estimated." *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985).

"[I]t is a well-settled rule that a lay person may give his opinion as to whether a person is intoxicated so long as that opinion is based on the witness's personal observation." *State v. Rich*, 351 N.C. 386, 398, 527 S.E.2d 299, 306 (2000) (citation omitted). This Court has held that "[a]n officer's opinion that a defendant is appreciably impaired is competent testimony and admissible evidence when it is based on the officer's personal observation of an odor of alcohol and of faulty driving *or other evidence of impairment*." *State v. Gregory*, 154 N.C. App. 718, 721, 572 S.E.2d 838, 840 (2002) (emphasis added).

Here, Officer Egan did not personally observe an odor of alcohol on Defendant, but he did observe "other evidence of impairment." *Id*. *See Rich*, 351 N.C. at 399, 527 S.E.2d 299 at 306 (holding an officer's opinion sufficient where it was not solely based on the "odor of alcohol, but also on his investigation of the accident and upon his experience enforcing traffic laws and dealing with intoxicated drivers").

Here, Officer Egan personally observed the collision scene, the roadway marks and Defendant's vehicle found in the trees; found five empty E&J brandy bottles inside Defendant's vehicle; and spoke with Defendant at the hospital. Defendant admitted to Officer Egan he had been drinking before driving. Thus, we hold Officer Egan's personal observations constitute "other evidence of impairment" sufficient to support his opinion testimony.

Moreover, the State's evidence was not limited to Officer Egan's opinion. The State presented ample evidence to support Defendant's impairment at the time of the crash. *See Rich*, 351 N.C. at 398–99, 527 S.E.2d at 306 (holding evidence sufficient to support impairment where an officer "observed the collision scene[,] observed [the] defendant at the hospital, [] two witnesses testified that they saw [the] defendant's car going seventy mph around a curve just before the collision[,] and other witnesses testified as to [the] defendant's odor of alcohol"); *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965) ("The fact that a motorist has been drinking, when considered in connection with faulty driving such as following an irregular course on the highway or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of [section] 20-138.[1(a)]." (citation omitted)).

Here, in addition to Officer Egan's testimony, the jury heard Mr. Wood testify Defendant's balance was poor, his speech was difficult to understand, and he appeared disoriented. Ms. Gerow stated Defendant smelled like alcohol, and Officer Jenks explained what he observed and collected at the scene. Thus, we hold there was sufficient evidence presented to the jury to support Defendant being appreciably impaired at the time of the crash.

2. Alcohol Concentration

In addition to the evidence presented to support Defendant's appreciable impairment, the State presented evidence of Defendant's alcohol concentration at the time of the crash. "The results of a chemical analysis are sufficient to prove a person's blood alcohol concentration." *Watson*, 286 N.C. App. at 150, 879 S.E.2d at 361 (citing N.C. Gen. Stat. § 20-138.1(a)(2)).

Dr. Waggoner extrapolated Defendant's blood alcohol concentration was 0.1078 grams of alcohol per 100 milliliters of blood at the time of the crash. Dr. Waggoner based his analysis on Defendant's blood drawn at the hospital at 8:37 p.m. and 10:43 p.m., Defendant's own statements, and the evidence found at the scene. The crash occurred at 7:26 p.m., and Defendant's blood sample taken at 8:37 p.m., just over an hour after the crash, revealed an alcohol concentration of 0.0883 grams per 100 milliliters of blood. *See State v. Patterson*, 209 N.C. App. 708, 714, 708 S.E.2d 133, 137 (2011) (holding it was not error to admit a blood sample taken three hours after the defendant's arrest). Thus, Defendant's blood alcohol concentration was sufficient in and of itself to convict Defendant of driving while impaired. N.C. Gen. Stat. § 20-138.1(a)(2).

Accordingly, we hold there was sufficient evidence presented to support Defendant's DWI conviction on grounds of appreciable impairment and blood alcohol concentration. As a result, the trial court did not err by denying Defendant's Motion to Dismiss.

B. Retrograde Extrapolation

[2] Defendant alleges the trial court plainly erred by admitting expert testimony of retrograde extrapolation. Specifically, Defendant contends Dr. Waggoner's testimony regarding Defendant's blood alcohol concentration at the time of the crash was unreliable because he made "critical assumptions" unsupported by the record. We disagree.

For this Court to hold a trial court plainly erred, the defendant must satisfy a three-factor test. *State v. Reber*, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024). First, the defendant must demonstrate a "fundamental

error occurred at trial." *Id.* (citing *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)). Second, "that the error had a 'probable impact' on the outcome, meaning that 'absent the error, the jury probably would have returned a different verdict.' " *Id.* (quoting *Lawrence*, 365 N.C. at 518-19, 723 S.E.2d at 334). Third, "that the error is an 'exceptional case' that warrants plain error review . . . showing that the error seriously affects 'the fairness, integrity or public reputation of judicial proceedings.' " *Id.* (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334).

Rule 702(a) of the North Carolina Rules of Evidence " 'incorporates the standard from the *Daubert* line of cases' in federal evidentiary jurisprudence." *State v. Babich*, 252 N.C. App. 165, 167, 797 S.E.2d 359, 361-62 (2017) (quoting *State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016)). Rule 702(a) permits an expert witness to testify in the form of an opinion if: "(1) [t]he testimony is based upon sufficient facts or data[;] (2) [t]he testimony is the product of reliable principles and methods[;] and (3) [t]he witness has applied the principles and methods reliably to the facts of the case." N.C. R. Evid. 702(a) (1–3) (2023).

When the reliability of expert testimony is challenged on appeal, we cannot consider "data or theories . . . which were neither before the trial court when the expert opinion was admitted nor made part of the record on appeal." *State v. Gray*, 259 N.C. App. 351, 351–52, 815 S.E.2d 736, 738 (2018).

On appeal, Defendant does not dispute that retrograde extrapolation is a widely acceptable method of proving blood alcohol content. *See State v. Cook*, 362 N.C. 285, 293, 661 S.E.2d 874, 879 (2008) ("North Carolina courts have consistently regarded blood alcohol retrograde extrapolation as the domain of expert witnesses."); *State v. Davis*, 142 N.C. App. 81, 90, 542 S.E.2d 236, 241 (2001) ("We have accepted the reliability of extrapolation evidence since 1985." (citation omitted)). Rather, Defendant contends Dr. Waggoner's opinion that Defendant was in a post-absorptive state with a blood alcohol concentration of 0.1078 at the time of the crash was unreliable because his analysis "was not properly tied to the facts of the particular case." Defendant contends Dr. Waggoner assumed, based on information unsupported by the record, Defendant was drinking on an empty stomach, and that the crash occurred fifty-one minutes after his last drink.

When an expert performs a retrograde extrapolation analysis, the subject needs to be in a "post-absorptive or post-peak state–meaning that alcohol is no longer entering the subject's bloodstream and thus [his] blood alcohol level is declining." *Babich*, 252 N.C. App. at 168, 797

S.E.2d at 362. Factors, "such as when the person last consumed alcohol (and how much was consumed), and whether the person consumed any food that could delay the alcohol's absorption into the bloodstream" can impact whether a person is in a post-absorptive state. *Id.* at 169, 797 S.E.2d at 362.

This Court has held "when an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive or post-peak state, that assumption must be based on at least some underlying facts[.]" *Id.* at 172, 797 S.E.2d at 364. "This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol." *Id.* "When there are at least some facts that can support the expert's assumption that the defendant is post-peak or post-absorptive, the issue then becomes one of weight and credibility, which is the proper subject for cross-examination or competing expert witness testimony." *Id.* The weight and credibility of the expert testimony is for the jury to decide. *State v. Dew*, 225 N.C. App. 750, 760, 738 S.E.2d 215, 222 (2013) (citation omitted).

Defendant relies on *State v. Babich*, a case where this Court held the trial court abused its discretion by admitting retrograde extrapolation testimony because "the opinion of the State's expert was not sufficiently tied to the particular facts of [the] case[.]" *Babich*, 252 N.C. App. at 167, 797 S.E.2d at 361. There, the expert "conceded [] she had no factual information in [the] case from which she could assume that [the] [defendant] was in a post-absorptive state." *Id.* at 169, 797 S.E.2d at 362. She admitted she had not been provided with any facts or data "whatsoever" "about when [the defendant's] last consumption of alcohol was, or whether [the] [defendant] consumed food . . . prior[.]" *Id.*

Here, unlike in *Babich*, Dr. Waggoner considered several facts in making his calculations and in determining whether Defendant was in a post-absorptive state at the time of the crash. Dr. Waggoner explained he based his analysis on the blood drawn at the hospital at 8:37 p.m. and 10:43 p.m., Defendant's own statements, and the evidence found at the scene. Defendant purchased nine airplane bottles of alcohol just after 5:00 p.m. Defendant admitted he drank three airplane bottles, but seven were found empty. Defendant also admitted he drank an airplane bottle forty-five minutes before driving. Defendant left Food Lion at 6:35 p.m., and the crash occurred at 7:26 p.m. Defendant did not eat or drink anything after the crash, and there was no evidence that he had eaten any of the groceries in the car prior to the crash. Defendant's blood sample,

taken at 8:37 p.m., just over an hour after the crash, revealed an alcohol concentration of 0.0883 grams of alcohol per 100 milliliters of blood. Defendant's second blood sample, taken at 10:43 p.m., revealed an alcohol concentration of 0.05 grams of alcohol per 100 milliliters of blood.

Thus, because Dr. Waggoner based his opinion on underlying facts and explained to the jury what those underlying facts were, we hold the trial court did not err by admitting Dr. Waggoner's opinion testimony.

Moreover, even if it was error to admit Dr. Waggoner's testimony, it does not amount to plain error. Defendant has not shown a reasonable probability that had the alleged error not occurred, a different result would have been reached at trial. *Reber*, 386 N.C. at 158, 900 S.E.2d at 786. *See Babich*, 252 N.C. App. at 173, 797 S.E.2d at 365 (holding retrograde extrapolation testimony error but not prejudicial error because there was ample evidence presented to support the defendant's impairment outside of the challenged testimony); *State v. Taylor*, 165 N.C. App. 750, 758, 600 S.E.2d 483, 489 (2004) (holding "even if the admission of [the] [expert's] testimony was error, the error was not prejudicial" because of the evidence presented to support the defendant's appreciable impairment under the first prong of section 20-138.1). *See also State v. Sigmon*, 74 N.C. App. 479, 482, 328 S.E.2d 843, 846 (1985) (rejecting the defendant's contention that an alcohol concentration of 0.06 must create a presumption that the defendant is not impaired; "substantial evidence, separate and apart from [a] breathalyzer result" can support a conviction on grounds of appreciable impairment).

Here, like in *Babich* and in *Taylor*, as discussed in the section above, there was ample evidence presented to support Defendant's conviction on the basis of appreciable impairment, absent any testimony of Defendant's blood alcohol concentration at the time of the crash. Thus, we hold the trial court did not plainly err by admitting the testimony.

C. Intervening Negligence Jury Instruction

[3] Defendant argues the trial court plainly erred by failing to give the entire jury instruction on intervening negligence and did not include intervening negligence in its final mandate on the charge of felony death by motor vehicle. We disagree.

"The elements of felony death by vehicle are: (1) [the] defendant unintentionally causes the death of another; (2) while driving impaired as defined by N.C. Gen. Stat. §§ 20-138.1 or 20-138.2 [(2023)]; and (3) the impairment was the proximate cause of the death." *State v. Bailey*, 184 N.C. App. 746, 748, 646 S.E.2d 837, 839 (2007) (citing N.C. Gen. Stat. § 20-141.4(a1)).

In *State v. Bailey*, a felony death by vehicle case, the jury was instructed the defendant's negligence need not be the sole proximate cause. *Id.* at 749, 646 S.E.2d at 839. Intervening negligence is found where the negligence of another "break[s] the causal chain of the defendant's negligence[.]" *Id.* (citation and internal marks omitted). If it does not break the causal chain, the defendant's act is still a proximate cause. *Id.* (citation omitted). Here, the trial court properly instructed the jury on proximate cause. The instructions provided:

> A proximate cause is . . . a cause without which the victim's death would not have occurred and one that a reasonably careful and prudent person could foresee would probably produce such injury or some similar injurious result. The defendant's act need not have been the last or nearest cause. It is sufficient if it concurred with some other cause acting at the same time which, in combination with it, proximately caused the victim's death.
>
> A natural and continuous sequence of causation may be interrupted or broken by the negligence of a second person. This occurs when a second person's negligence was not reasonably foreseeable by the first person and causes its own natural and continual sequence which interrupts, breaks, displaces, or supersedes the consequences of the first person's negligence. Under such circumstances, the negligence of the second person . . . insulates the negligence of the first person and would be the sole proximate cause of the incident.

The intervening negligence jury instruction sufficiently incorporated the necessary principles outlined in *Bailey*. Additionally, the trial court's final mandate on felony death by vehicle included the appropriate law on proximate cause.

Moreover, even if it was error for the court not to read the entire jury instruction, the error does not amount to plain error—the jury probably would not have returned a different verdict—based on the evidence presented to support Defendant's guilt. *Reber*, 386 N.C. at 158, 900 S.E.2d at 786. Here, ample evidence, including the testimony of two eyewitnesses, was presented to show Defendant drove off the roadway into a tree while appreciably impaired and caused the single-vehicle crash that resulted in his wife's death.

We hold the trial court did not err in its jury instructions, but even if it did, it does not amount to prejudicial error.

D. Ineffective Assistance of Counsel

[4] Defendant argues he received ineffective assistance of counsel because his trial counsel failed to object to the testimony of Officer Egan and Dr. Waggoner, and because Defense counsel failed to object to the incomplete jury instruction. We disagree.

To challenge a conviction based on ineffective assistance of counsel, a defendant must establish that his counsel's conduct "fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). "[T]o meet this burden, the defendant must satisfy a two-part test." *Id.* at 562, 324 S.E.2d at 248. First, the defendant must prove that 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." *Id.* Second, the defendant must prove his counsel's performance was prejudicial, such that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

As held above, the challenged testimony was not error, nor was the lack of objection to the allegedly incomplete jury instruction on intervening negligence. Thus, Defendant cannot meet the first prong of the ineffective assistance of counsel test and Defendant's argument fails.

III. Conclusion

We hold the trial court properly denied Defendant's Motion to Dismiss, properly admitted Dr. Waggoner's retrograde extrapolation analysis, and properly gave appropriate jury instructions on intervening negligence. Additionally, we hold Defendant did not receive ineffective assistance of counsel.

NO ERROR.

Judges ZACHARY and FLOOD concur.

STATE OF NORTH CAROLINA
v.
KEVIN LEIGH WINGATE

No. COA24-815

Filed 2 July 2025

1. Evidence—expert testimony—sexual offenses against a child—impermissible vouching for victim's credibility—new trial

In a prosecution for multiple charges of taking indecent liberties with a child and first-degree statutory sexual offense, in which no physical evidence of abuse was presented, defendant was entitled to a new trial because two expert witnesses gave testimony that impermissibly vouched for the victim's credibility. First, the victim's treating therapist made several statements indicating her opinion or assumption that abuse had occurred and, more importantly, testified that she had diagnosed the victim with post-traumatic stress disorder and that the symptoms he exhibited were consistent with the trauma he had reported. Second, the doctor who first evaluated the victim testified that the lack of physical findings was consistent with the victim's disclosure of sexual abuse. These errors rose to the level of plain error since, absent the improper evidence, the jury likely would have reached a different verdict.

2. Indictment and Information—defective indictment—first-degree statutory sexual offense charged—sentenced to greater offense

In a sexual offense prosecution, where the Court of Appeals vacated defendant's sentence and remanded for a new trial due to improperly admitted evidence, the appellate court noted an issue with defendant's indictment for consideration on remand. Although defendant's indictment charged him with first-degree statutory sexual offense pursuant to N.C.G.S. § 14-27.29—an offense which requires proof that a defendant is at least four years older than the victim—the trial court had sentenced defendant to the greater offense of statutory sexual offense with a child by an adult under N.C.G.S. § 14-27.28—an offense which requires the additional proof that a defendant was at least eighteen years old at the time of the offense. Although all of the facts needed to convict defendant pursuant to the latter statute were present in the indictment, the various references at trial to both offenses demonstrated a lack of certainty about which offense defendant had been charged with and, therefore, resulted in prejudice to defendant.

Chief Judge DILLON dissenting.

Appeal by defendant from judgment entered 27 July 2023 by Judge Keith O. Gregory in Superior Court, Wake County. Heard in the Court of Appeals 19 May 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Tamika L. Henderson, for the State.

George B. Currin, and Cheshire Parker Schneider PLLC, by Hart Miles, for defendant.

ARROWOOD, Judge.

Kevin Leigh Wingate ("defendant") appeals from judgment following a jury verdict finding him guilty of four counts of indecent liberties with a child and one count of a first degree statutory sex offense, and subsequent imposition of a 364 months minimum, 536 months maximum prison sentence. For the following reasons, we vacate defendant's sentence, and remand this matter to the trial court for a new trial.

I. Factual Background

On 29 January 2018, the Apex Police Department issued three warrants for the arrest of defendant, on two counts of taking indecent liberties with a child under N.C.G.S. § 14-202.1, and one count of first degree statutory sex offense under N.C.G.S. § 14-27.29. Defendant was ultimately indicted on four counts of indecent liberties and one count of first degree statutory sex offense, all under the statutes cited in the arrest warrants. Following his arraignment, defendant pleaded not guilty on 25 July 2018. Defendant's trial began a full five years later on 24 July 2023, lasting four days and concluding on 27 July. The testimony at trial tended to show the following.

Defendant is father to a son, James,[1] who was 12 years old in September 2017. At that time, James' mother was vacationing in Scotland, leaving his father to watch him and his sister. James testified that defendant walked into James' room while he was playing video games and began discussing puberty and adolescence, which James found unusual. Defendant then proceeded to pull his pants down and

1. A pseudonym is used to protect the identity of the victim, who was a minor at the time of the offense and at the time of trial.

told James to touch his penis; when James declined, defendant grabbed James' hand and forced him to pull on defendant's penis. James then pulled his own pants down at defendant's request, and defendant performed what James described as a "doctor's examination," where defendant inspected James' penis, although James was unable to remember if defendant touched it. Defendant then lay on the bed with his penis out and asked James if he had any questions.

Defendant then left the room and James resumed playing video games, only for defendant to return again two hours later. Defendant began to talk to James about his uncles who were gay, and some details about gay relationships; James found this puzzling, as his uncles were not a significant part of his life. Defendant left, then returned an hour later and told James that if he played with defendant the way his uncles played, he would get pizza. James declined, to which defendant responded, "Good job," and gave James a high five. Defendant left and a little while later made a frozen pizza for the children. James testified that there were no more uncomfortable encounters while his mother was in Scotland, but defendant would occasionally wrestle with him.

James did not tell his mother what defendant had done when she arrived home, as he thought it could have simply been a normal experience. However, during a health class covering instances of abuse, James testified that he realized that what defendant had done was not actually normal. Then, the first weekend after his mother had returned home, she and James' sister were downstairs, while he was upstairs in his room playing video games. James testified that defendant came in and began wrestling with James as he had in the past; but defendant proceeded to overpower James, who was wearing cotton pajama pants, and he said he felt defendant's penis go inside his anus about 12 times. James brought his arm forward to try and get off the bed, but defendant grabbed and pulled on his arm. After James began to cry, defendant let him go, and James went downstairs to tell *him* mother that defendant had hurt his shoulder.

James did not initially tell his mother about anything that defendant had done other than hurt his shoulder; he testified that immediately afterwards, his mind was "clouded with the fact that my shoulder was hurting and I was crying," and that he was unsure whether what had just happened was a type of wrestling move. He eventually told his mother that defendant had made James touch his penis, but not about the anal penetrations; he testified that he was unsure why he did not tell his mother this. James' mother had him visit her own therapist, then James spoke with Kennedy Ganyo ("Mr. Ganyo"), an intake social worker with

Child Protective Services, on 25 October 2017. Mr. Ganyo testified at trial that James told him about the incident of defendant pulling his pants down and trying to force James to touch his penis. Mr. Ganyo did a home visit to defendant that same day, where defendant admitted to pulling down his pants and showing James his penis, but denied forcing him to touch it. Defendant agreed to move out of the home due to his admitted exposing himself.

James met with Leigh Howell ("Ms. Howell"), a child abuse evaluation specialist at SAFEchild, a child advocacy center, on 28 November 2017, where she conducted a forensic interview. At trial, Ms. Howell was deemed an expert in the diagnostic interviewing of children and the disclosure process for child sexual abuse. During this interview, James told Ms. Howell that he never touched his father's penis, nor did he disclose the anal penetrations. That same day, James received a physical examination from Dr. Elizabeth Witman ("Dr. Witman"), a general pediatrician on staff at Wake Medical Children's Hospital. Dr. Witman testified that the results of this exam were normal, including the genital/anal exam. She testified that it did not surprise her that James' exam was normal, as abnormal physical findings in cases of child sexual abuse are exceptional, in about five percent of cases. Dr. Witman stated that the lack of physical findings were consistent with James' disclosure of sexual abuse.

James began seeing therapist Miriane Portes ("Ms. Portes") on 1 December 2017. Ms. Portes had a bachelor's degree in psychology, a master's degree in social work, a certification in Eye Movement Desensitization and Reprocessing (EMDR) therapy (a trauma-treatment therapy), and was deemed by the trial court to be an expert in trauma therapy. James met with Ms. Portes regularly over the ensuing months, and began to relate to her in a piecemeal fashion what he remembered while engaging in EMDR. It is not entirely clear from Ms. Portes' testimony how or when James disclosed the alleged anal penetrations; on 22 January 2018, he described defendant coming into the room and thrusting his genitals towards him and pulling his arm back. He continued to discuss feelings of guilt from the experience over the next few sessions. On 5 June, Ms. Portes attempted to create a chronology of the abuse James suffered; at this session, James told her that defendant penetrated him 8–9 times. Sometime in the spring of 2018, Ms. Portes diagnosed James with PTSD; she testified that the symptoms he was experiencing were consistent with the trauma he had reported.

Defendant did not present any witnesses during the trial, and evidence closed at the end of Ms. Portes' testimony. Defendant moved to dismiss all charges, which the trial court denied. The jury found

defendant guilty on all charges, and he was subsequently sentenced to 364 months minimum, 536 months maximum active prison sentence. Defendant gave notice of appeal 7 August 2023.

On 22 April 2025, the State filed a Motion to Correct Error in Appellate Brief. We exercise our discretion to allow the motion and incorporate the correction into the State's argument on appeal.

II. Discussion

Defendant raises five issues on appeal: (1) whether the indictment provided sufficient notice that defendant had been charged with the offense of which he was ultimately convicted; (2) whether the trial court erred in sentencing defendant to the mandatory 300 month minimum sentence for a sexual offense with a child by an adult, since he was not indicted for this offense; (3) whether the trial court committed plain error by allowing expert testimony that vouched for the credibility of the victim and constituted an improper opinion of guilt; (4) whether the trial court committed reversible error by denying defendant's motion to dismiss the charge of first degree statutory sexual offense; and (5) whether defendant's trial counsel rendered ineffective assistance of counsel.

A. Standard of Review

In order to preserve an issue for appellate review, a party must object before the trial court; otherwise, the issue is deemed waived. N.C. R. App. P. 10(a)(1). However, in criminal cases, even if an issue is unpreserved, it may be raised for the first time on appeal on the basis of plain error. *Id.* Rule 10(a)(4). Plain error is a fundamental error that so affected the trial proceedings that the jury would have returned a different verdict absent the error. *State v. Lawrence*, 365 N.C. 506, 518 (2012). Plain error is to be applied cautiously and reserved for exceptional cases. *Id.* Where we find plain error to have affected a jury verdict, the appropriate remedy is to order a new trial. *See*, *e.g.*, *State v. Towe*, 366 N.C. 56, 63 (holding that testimony characterizing a victim as sexually abused amounted to plain error, and ordering a new trial). Because defendant counsel did not object to the testimony of the expert witnesses at trial, we review this issue for plain error.

B. Impermissible Vouching

[1] "Our appellate courts have consistently held that the testimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219 (1988) (citations omitted). The application of this holding to cases involving the alleged sexual abuse of children has produced

the rule that an expert witness, in the absence of physical evidence, may not testify that sexual abuse actually occurred. *State v. Stancil*, 355 N.C. 266, 266–67 (2002); *see also State v. Chandler*, 364 N.C. 313 (2010) ("And for expert testimony presenting a definitive diagnosis of sexual abuse, an adequate foundation requires supporting physical evidence of the abuse."). Improper testimony need not take form of an explicit statement by the expert witness that the alleged victim was sexually abused: we have held that a doctor testifying that a child's "disclosure" was "consistent with sexual abuse" was impermissible vouching, where the "disclosure" was the child's description of abuse. *State v. Frady*, 228 N.C. App. 682, 685–86 (2013). *But see State v. Betts*, 267 N.C. App. 272, 281 ("*Frady* does not stand for the proposition that use of the word 'disclosure' was error. Rather, the expert's testimony in *Frady* that the victim's description of the abuse 'was consistent with sexual abuse' was the equivalent of testifying the victim was credible.").

1. Miriane Portes

In the case *sub judice*, Ms. Portes made a number of statements during her testimony that communicated to the jury her own belief that James had been sexually abused by defendant, thereby engaging in impermissible vouching. Ms. Portes testified that "since there's a lot of avoidance with trauma, I knew that there was a lot of things that [James] hadn't reported yet . . . ." The entire basis for Ms. Portes' belief that there were "things" James had not yet reported was her belief that James had been sexually abused, as she almost explicitly states. In subsequent testimony, she stated, "I started understanding that some things [defendant did] were part of the grooming behavior before it escalated to the wrestling incident." When Ms. Portes described the beginning of her therapy sessions with James, she stated that she "already knew why he was there because he had been referred by a colleague of mine, so I already knew that he was seeking therapy for sexual abuse." Ms. Portes does not use the term "alleged" or "reported" sexual abuse; rather, her testimony indicates that James was in therapy for sexual abuse that actually occurred. The State contends that this was merely a description of the referral process rather than vouching. Even assuming this is true, Ms. Portes should not have testified in this way, given the implication of the actual occurrence of abuse.

Finally, and perhaps most importantly, we address Ms. Portes' testimony that she diagnosed James with PTSD. Our Supreme Court has held that "evidence that a prosecuting witness is suffering from post-traumatic stress syndrome should not be admitted for the substantive purpose of proving that a rape has in fact occurred." *State v. Hall*,

330 N.C. 808, 821 (1992). The process for diagnosing PTSD is a therapeutic process, rather than a fact-finding one, and the jury may accord too much weight to this therapeutic diagnosis. *Id.* at 820. However, a PTSD diagnosis may be introduced for other purposes, such as corroboration or as explanation for delays in reporting. *Id.* at 822.

Ms. Portes testified that she eventually diagnosed James with PTSD, and that the symptoms with which he presented were consistent with the trauma that he had reported. This testimony is of the precise sort forbidden by *Hall*, and by extension, *Frady* and *Stancil*: by stating that these PTSD symptoms were consistent with James' disclosures of the trauma of sexual abuse, Ms. Portes was in effect stating that these disclosures were more credible, because James had these symptoms. Not all of Ms. Portes' references to PTSD were necessarily in error, given that *Hall* permits the introduction of a PTSD diagnosis for the purposes of explaining delays in reporting. Because James's report of defendant's anal penetration came much later than his reports of defendant's other behaviors, a PTSD diagnosis would be useful in explaining this delay. Instead, however, Ms. Portes's testimony that she diagnosed James with PTSD was used as substantive evidence to bolster James' reports of abuse, which is impermissible.

2. Dr. Elizabeth Witman

Dr. Witman's interaction with James was limited to her physical evaluation of him as part of the SAFEchild Advocacy Center, however at trial she stated that the lack of physical findings was consistent with James' disclosure of sexual abuse. This testimony was in error.

"Whether sufficient evidence supports expert testimony pertaining to sexual abuse is a highly fact-specific inquiry." *Chandler*, 364 N.C. at 313. In *State v. Warden*, our Supreme Court reaffirmed the rule that a definitive diagnosis of sexual abuse was impermissible without supporting physical evidence, but declined to specify what would qualify as a "diagnosis" or whether a lack of physical evidence could be incorporated into an expert opinion. *See* 376 N.C. 503, 506–07 (2020).

In *State v. Davis*, this Court held that it was "impermissible for an expert to offer an opinion that a lack of physical evidence *is consistent with* sexual abuse . . . " while recognizing that "it may permissible for the State to offer expert testimony that the lack of physical evidence *does not necessarily rule out* that sexual abuse may have occurred." 265 N.C. 512, 517 (2019) (emphasis in original). On the other hand, in *State v. Perdomo*, we concluded that expert witness testimony that a girl's disclosure of sexual abuse was consistent with a lack of physical finding

was not in error, since her testimony was based on her expertise and "provided the jury with an opinion, based on her expertise, that a lack of physical findings of sexual abuse does not generally correlate with an absence of sexual abuse." 276 N.C. App. 136, 141–42 (2021).

Here, Dr. Witman stated that her findings, specifically the absence of physical signs of abuse, were nevertheless consistent with James's disclosure of sexual abuse. She did not clarify that the lack of evidence did "not necessarily rule out" abuse, or provide a general opinion that the lack of physical findings does not generally correlate with an absence of sexual abuse, both of which may have been permissible under *Davis*. Instead, she described the lack of physical findings as "consistent" with a disclosure of sexual abuse, which is impermissible under *Davis*. Therefore, Dr. Witman's testimony amounted to impermissible vouching.

C. Plain Error

Because defense counsel never objected to Ms. Portes' or Dr. Witman's testimony, we review only for plain error. Applying the framework of *State v. Ryan*, we hold that impermissible vouching from this testimony rose to the level of plain error, requiring a new trial.

Expert testimony that amounts to impermissible vouching often draws no objection during trial, leading to a significant number of cases that have consequently reviewed this issue for plain error. *See, e.g.*, *State v. Couser*, 163 N.C. App. 727 (2004) (holding that the physical evidence was insufficient to support the expert witness' opinion of sexual abuse, and other evidence was lacking such that the testimony was plain error); *State v. Crabtree*, 249 N.C. App. 395 (holding that one of the expert witnesses impermissibly vouched for the victim, but eyewitness testimony prevented this from rising to plain error). Our review of many of these cases has produced a useful framework for evaluating plain error under these circumstances:

> Notably, a review of relevant case law reveals that where the evidence is fairly evenly divided, or where the evidence consists largely of the child victim's testimony and testimony by corroborating witnesses with minimal physical evidence, especially where the defendant has put on rebuttal evidence, the error is generally found to be prejudicial, even on plain error review, since the expert's opinion on the victim's credibility likely swayed the jury's decision in favor of finding the defendant guilty of a sexual assault charge.

State v. Ryan, 223 N.C. App. 325, 337 (2012) (citations omitted).

In this case, there was no physical evidence indicating that an assault occurred, as Dr. Witman's testimony emphasized. The State's evidence was primarily the testimony of James himself, with Mr. Ganyo, Dr. Witman, Ms. Howell and Ms. Portes serving as witnesses corroborating James's story. Ms. Portes was the only one who testified that James had told her that defendant penetrated him, and it was her testimony that attempted to explain why it took James as long as he did to actually disclose the anal penetrations. Ms. Portes saw James for many months, and had more significant interactions with him on this matter than anyone else in his life, as James shared more memories with Ms. Portes than he did his own mother.

The errors of Ms. Portes's testimony are compounded when viewed in the context of Dr. Witman's testimony concerning the physical exam. Dr. Witman's testimony placed more weight and significance on the corroborating testimony of Ms. Portes. She also impermissibly vouched for the credibility of the allegations as previously discussed. Given the crucial role Ms. Portes played in the trial coupled with the vouching and de-emphasis of the lack of physical evidence from Dr. Witman's testimony, it is apparent from the transcript that their testimony "likely swayed the jury's decision in favor of finding the defendant guilty of a sexual assault charge." *Ryan*, 223 N.C. App. at 337. Because the jury would have reached a different verdict absent this impermissible testimony, we order defendant's sentence to be vacated and this case remanded to the trial court for a new trial.

D. Sufficiency of Defendant's Indictment

[2] We briefly address defendant's argument that the indictment under which he was eventually convicted of statutory sex offense on a child by an adult was insufficient to place him on notice that he had been charged with that offense. We agree and address this issue to ensure that defendant is properly indicted and arraigned, and thereby properly placed on notice, before the commencement of his new trial.

Although defendant failed to raise the issue of a defective indictment before the trial court, a defendant may raise the issue of jurisdiction at any point, including for the first time on appeal. *See State v. Harwood*, 243 N.C. App. 425, 427–28 (2015). "On appeal, we review the sufficiency of an indictment *de novo*." *State v. McKoy*, 196 N.C. App. 650, 652 (2009).

A sufficient indictment requires the following:

> (1) The offense is charged in a plain, intelligible, and explicit manner; (2) The offense is charged properly so as

> to avoid the possibility of double jeopardy; and (3) There is such certainty in the statement of the accusation as to enable the accused to prepare for trial and to enable the court, on conviction or plea of Nolo contendere or guilty to pronounce sentence according to the rights of the case.

State v. Reavis, 19 N.C. App. 497, 498 (1973) (citation omitted). If these requirements are met, a reference to the wrong statute, and the caption of the indictment referring to the name of the wrong offense, is not fatal to the sufficiency of the indictment. *Id.*; *State v. Billinger*, 213 N.C. App. 249, 257 (2011).

The indictment at issue listed the offense as "First Degree Statutory Sex Offense," and cited N.C.G.S. § 14-27.29 as the statute violated. At defendant's arraignment, the State read the charge as "one count of first degree statutory sex offense," to which defendant pled not guilty. The jury verdict sheet listed the offense with this same name, and the trial court initially sentenced defendant under § 14-27.29 before the State noted that it was "the big B1." While defendant was ultimately sentenced in accordance with the minimum sentence required under § 14-27.28, statutory sex offense on a child by an adult, his judgment and commitment sheet read that he was convicted under § 14-27.29.

At trial, the State announced that defendant had been charged with first degree statutory sex offense with a child by an adult, although later that day the trial court referred to the charge as first degree statutory sex offense. During a motion conference, the State again referred to the charge as sex offense with a child by an adult, and during the charge conference and jury, the trial court referred to the offense in this way and read the proper elements of that offense, including the element that the defendant must be over 18. However, defendant was announced in open court of having been convicted of first-degree statutory sex offense.

It is clear from this summary of the various references to defendant's charge that the indictment violates the third requirement of the *Reavis* test: "such certainty" in the indictment to allow the defendant to prepare for trial and the court to pronounce sentence. We read the holdings of *Reavis* and *Billinger* relating to statute references and captions not as permission to ignore as a rule these portions of the indictment, but as guidance that when an indictment is otherwise clear, these aspects will not render an indictment fatally flawed. Contained within defendant's indictment were all the facts necessary to convict under § 14-27.28; however, § 14-27.29 is a lesser-included offense, as it contains all the same elements except the adulthood of the defendant. It was *uncertain* under

the indictment with which offense defendant had been charged, as was made clear by the confusion of the trial court.

Under *State v. Singleton*, our Supreme Court requires that a defendant raising the issue of an insufficient indictment must show prejudice. 386 N.C. 183, 210 (2024). Here, defendant was prejudiced by the insufficient indictment; the difference in length of the sentences he could receive under the two different offenses is significant, and, at the very least, may well have played a role in his decision to plead not guilty at his arraignment. Therefore, while we ultimately hold that defendant is entitled to a new trial due to the plain error of the expert witness testimony at trial, we also place the State and the trial court on notice that defendant's conviction would have been vacated if we were required to rule on the sufficiency of the indictment, and urge them to ensure that any errors of notice are addressed.

III. Conclusion

For the foregoing reasons, we vacate the sentence of the trial court, and remand for a new trial on these charges.

VACATED AND REMANDED.

Judge HAMPSON concurs.

Chief Judge DILLON dissents by separate opinion.

DILLON, Chief Judge, dissenting.

The majority's mandate is to vacate the judgment and remand for a new trial. For the reasoning below, my vote is to vacate the judgment sentencing Defendant under N.C.G.S. § 14-27.28 and remand, not for a new trial, but rather for entry of judgment sentencing Defendant based on the jury's verdict convicting Defendant of first-degree statutory sex offense under N.C.G.S. § 14-27.29. Accordingly, I respectfully dissent.

The majority reaches its result based on its conclusion that the vouching of the victim's credibility by two witnesses for the State constituted plain error. I certainly agree that the vouching was not competent evidence to prove Defendant's guilt. However, I conclude *the trial court* did not commit plain error concerning the vouching testimony for two independent reasons.

First, I do not believe *the trial court* erred at all concerning the vouching testimony, much less plainly erred.

Our Supreme Court recently explained that a defendant mounting a challenge on appeal based on plain error must show three things, including that "a fundamental error occurred at trial." *State v. Reber*, 386 N.C. 153, 158 (2024). In other cases, that Court has instructed that the fundamental error must be "error *by the trial court*." *State v. Duke*, 360 N.C. 110, 138 (2005) (emphasis added). *See also State v. Cummings*, 352 N.C. 600, 636 (2000); *State v. Walker*, 316 N.C. 33, 39 (1986). For instance, a defendant is entitled to plain error review where his attorney fails to object to evidence offered at trial where the trial court previously made a ruling outside the presence of the jury that the evidence was admissible. *See State v. Williams*, 370 N.C. 526 (2018) (adopting dissenting opinion in 253 N.C. App. 606 (2017)). And a defendant may be entitled to plain error review where his attorney fails to object to trial testimony but where the trial court had an affirmative duty to intervene *ex mero motu* when the evidence was being offered. *See*, *e.g.*, *State v. Jones*, 355 N.C. 117, 133 (2002) (holding the trial court errs by failing to intervene during a prosecutor's closing when the prosecutor makes grossly improper remarks).

However, where the error in allowing improper vouching testimony or other inadmissible evidence is simply that of a defendant's attorney failing to object, the defendant's remedy is to file a motion for appropriate relief alleging ineffective assistance of counsel. In such a case, the defendant has failed to meet the first prong of showing plain error, that a fundamental error was committed *by the trial court*.

In the present case, it may be that Defendant's attorney chose *not* to intervene based on trial strategy. Perhaps Defendant's trial counsel did not want to draw extra attention to the improper vouching statements by objecting to them. In any event, this mystery can only be resolved in a hearing on a motion for appropriate relief.

Second, even assuming the trial court had a duty to intervene to address the improper vouching statements, I conclude such error by the trial court did not rise to the level of plain error. The statements were, indeed, prejudicial to Defendant. However, Defendant has failed to demonstrate that the jury "probably" would have reached a different verdict, but for the vouching. *See Reber*, 386 N.C. at 160. Specifically, there was evidence of Defendant's guilt apart from the vouching statement, including the victim's first-hand account of Defendant's acts.

My vote, though, is to vacate the trial court's judgment and remand for entry of a new judgment. I agree with the majority in its *dicta* contained in the section of its opinion titled "Sufficiency of Defendant's Indictment" that the trial judge should have sentenced under N.C.G.S. § 14-27.29 rather than under N.C.G.S. § 14-27.28.

The indictment states that Defendant was being charged for violating N.C.G.S. § 14-27.29, which requires proof that the defendant is at least four years older than his child victim. N.C.G.S. § 14-27.28, though, requires extra proof that the defendant is, in fact, at least 18 years of age.

Admittedly, there is no question Defendant was at all times relevant to this matter over 18 years of age and that the jury would have had no issue making this additional finding sufficient to convict Defendant under N.C.G.S. § 14-27.28. And I am not contending that the defect was jurisdictional. However, I agree with the majority that Defendant suffered prejudice by the pleading deficiency in the indictment as carried forward in subsequent proceedings. *See State v. Singleton*, 386 N.C. 183, 210 (2024). As noted by the majority, at his arraignment, Defendant was never asked to plead to a charge under N.C.G.S. § 14-27.28. He was merely asked to plead to a charge under N.C.G.S. § 14-27.29. And the jury's verdict sheet shows that they were convicting Defendant for violating N.C.G.S. § 14-27.29.

Defendant's belief that he was being prosecuted under N.C.G.S. § 14-27.29 may have played a role in his pleading "not guilty" at his arraignment and otherwise not negotiating a plea bargain, as a conviction under N.C.G.S. § 14-27.28 carries the possibility of a substantially greater sentence than the charge for which he thought he was being prosecuted. Surely, it is within the discretion of the prosecutor to charge a defendant with a lesser crime if (s)he so chooses, though the prosecutor may have evidence of the defendant's guilt of a greater crime.

Accordingly, my vote is to vacate the judgment convicting Defendant of and sentencing him under N.C.G.S. § 14-27.28 and remand with instructions that the trial court enter judgment convicting Defendant of violating N.C.G.S. § 14-27.29 and sentence him accordingly.

MAJOR WHITE, LINDA PERRY WHITE, PLAINTIFFS
v.
RONALD BOATWRIGHT, DEFENDANT

No. COA24-780

Filed 2 July 2025

Child Custody and Support—grandparents' complaint for child custody—motion to dismiss for lack of standing—reviewed under wrong standard

After plaintiff-grandparents filed a complaint seeking custody of their minor grandson, an order granting defendant-father's motion to dismiss for lack of standing—seemingly filed pursuant to Civil Procedure Rule 12(b)(6)—was reversed and the matter was remanded because the trial court had reviewed the motion under the wrong standard. Specifically, the court should not have considered defendant-father's testimony at the hearing on the motion to dismiss, but instead should have focused solely on the sufficiency of the complaint, viewing all allegations as true and in the light most favorable to plaintiff-grandparents. Under the correct standard of review, the complaint sufficiently established plaintiff-grandparents' standing to bring a custody claim, since it alleged that defendant-father acted inconsistently with his constitutionally protected rights as a parent and included specific allegations regarding his failure to provide for and establish a relationship with the child.

Appeal by plaintiffs from order entered 26 February 2024 by Judge Alyssa M. Levine in District Court, Mecklenburg County. Heard in the Court of Appeals 27 February 2025.

McDonald Williams, PLLC, by Simoné A. Williams, for plaintiffs-appellants.

No brief filed for defendant-appellee.

STROUD, Judge.

Plaintiffs appeal from the trial court's order dismissing their complaint for custody of their grandson, Tom.[1] Because the trial court

1. A pseudonym is used to protect the identity of the minor child.

applied the wrong standard for reviewing Defendant's motion to dismiss the complaint, we reverse the order dismissing the complaint.

I. Factual and Procedural Background

On 12 December 2023, Plaintiffs Major White and Linda Perry White ("Grandparents") filed a complaint for child custody and attorney's fees against Tom's father, Defendant Ronald Boatwright ("Father"). According to Grandparents' verified complaint, their daughter—Shonté White—was the mother of Tom, who was born in 2016. Defendant and Tom's mother never married. Tom lived with his mother in Cabarrus County, North Carolina, and had some weekend visits with Father, who lived in Mecklenburg County, North Carolina. Grandparents resided in South Carolina. In August of 2023, Tom's mother became ill and was hospitalized, and Grandparents moved in with Tom and his mother to assist in caring for both of them during her illness. On 11 November 2023, Tom's mother died. Grandparents continued to care for Tom in Cabarrus County until 1 December 2023, when Grandparents allowed Tom to visit with Father for the weekend. Father refused to allow Tom to return to Grandparents after this visit. They filed their complaint for custody about two weeks later.

Grandparents' complaint also alleged the following:

> 17. At all times since [Tom's] birth in 2016, [Father] has acted inconsistent with his constitutional right as a parent in that he has failed and refused to establish and maintain a consistent relationship with [Tom] and failed to provide for [Tom]'s basic physical, emotional and developmental needs.
>
> 18. [Father] does not have an adequate living environment for [Tom]. Upon information and belief, [Father] resides in a three-bedroom apartment with a roommate and her two adult children. On the few occasions when [Tom] has stayed overnight with [Father], [Tom] has slept on a couch as there is no bedroom or bed available for [Tom].
>
> . . . .
>
> 33. [Father] is not a fit and proper person to be awarded physical and/or legal custody of [Tom] and it is in the best interests of [Tom] for [Grandparents] to be awarded physical or legal custody of [Tom].

Grandparents alleged they "have been an integral part of [Tom's] life since his birth" and they "have a close, loving and significant relationship" with Tom.

On 8 January 2024, Father filed a *pro se* motion to dismiss Grandparents' complaint for child custody and attorney's fees. In the motion, Father alleged: "I am seeking dismissal of the filing. I am the child's biological father with his best interest [sic] mentally, emotionally and for the child's welfare." Father further alleged, as the reason he wanted the court to grant his motion, that "the child is in a safe environment and very stable. The child is happy and continues to excel in his educational and sport environments. The child does not lack in any areas of his life." Father also scheduled the motion to dismiss for hearing; Father checked the box indicating his motion was filed to "dismiss under Rule 12" in the "notice of motion" form.

On 26 February 2024, the trial court held a hearing on Father's motion to dismiss. Father represented himself and appeared at the hearing; Grandparents' counsel appeared but Grandparents did not. Grandparents' attorney noted that the hearing was scheduled for Father's motion to dismiss pursuant to Rule 12(b)(6). The attorney argued that because the motion to dismiss was filed under Rule 12(b)(6), the trial court was required to consider the allegations of the complaint as true and in the light most favorable to Grandparents. She pointed out that Grandparents had alleged that they had a significant relationship with Tom and that Father had acted inconsistently with his constitutionally protected rights as a parent. For those reasons, Grandparents' attorney argued that the complaint stated a claim upon which custody could be awarded to Grandparents and the motion to dismiss should be denied.

The trial court allowed Father to testify at the hearing. Father testified generally that many of the allegations of the complaint were not true. He testified that he had been involved in Tom's life since his birth and he had provided financial support and was providing good care for Tom.

The trial court entered an order dismissing Grandparents' complaint with prejudice on the same day as the hearing. The reason for dismissal was stated as follows: "[Grandparents]' [a]ttorney Simone Williams appeared. [Grandparents] did not appear. [Father] appeared. [Father]'s motion to dismiss is hereby granted." (Capitalization altered.) Grandparents appeal.

II. Analysis

Grandparents argue the trial court erred in granting Father's motion to dismiss because Father's motion failed to set forth any basis to dismiss Grandparents' complaint under Rule 12 of the North Carolina Rules of Civil Procedure, the trial court erred in granting Father's motion pursuant to Rule 12(b)(6), and the trial court failed "to making findings of fact and conclusions of law sufficient to support an order of dismissal with prejudice[.]" (Capitalization altered.)

Although Father's motion to dismiss did not state a particular rule under which it was filed, the notice of hearing referenced "Rule 12." A motion to dismiss under Rule 12(b) of the Rules of Civil Procedure "shall be heard and determined before trial on application of any party, unless the judge orders that the hearing and determination thereof be deferred until the trial." N.C. Gen. Stat. § 1A-1, Rule 12(d) (2023). At the hearing, Grandparents' attorney noted that the motion appeared to be under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. She also noted that Father's motion was really more like an answer than a motion to dismiss, as he addressed the facts alleged in the complaint and he alleged he was providing appropriate care for Tom.

From a review of the record and transcript, Father's motion to dismiss could be considered as falling under either Rule 12(b)(1) or Rule 12(b)(6) of the North Carolina Rules of Civil Procedure:

> b) . . . Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> (1) Lack of jurisdiction over the subject matter,
>
> . . . .
>
> (6) Failure to state a claim upon which relief can be granted[.]

N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), (b)(6) (2023). However, whether the trial court considered the motion to dismiss as falling under Rule 12(b)(1) or Rule 12(b)(6), the result here would be the same, as we use the same standard of review for both. *See United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 624, 881 S.E.2d 32, 43 (2022) ("This Court reviews a trial court's decision to grant or deny a motion to dismiss for lack of standing using a de novo standard of view, under which it views the allegations as true and the supporting record in the light most favorable to the non-moving party, with this being the applicable standard of review regardless of whether the complaint is dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or for failure to state a claim upon which relief could be granted pursuant to Rule 12(b)(6)[.]" (citation, quotation marks, and brackets omitted)). It is well established that we review an order regarding a motion to dismiss *de novo*:

> At the motion to dismiss stage, all factual allegations in the pleadings are viewed in the light most favorable to the plaintiff, granting the plaintiff every reasonable inference. We review de novo whether a plaintiff has standing to bring a claim.
>
> [North Carolina General Statute Section] 50-13.1(a) provides that any parent, relative, or other person claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child. N.C. Gen. Stat. § 50-13.1(a) (2019). The statute grants grandparents the broad privilege to institute an action for custody. Although grandparents have the right to bring an initial suit for custody, they must still overcome the parents' constitutionally protected rights.
>
> To survive a motion to dismiss for lack of standing, grandparents must allege both that they are the grandparents of the minor child and facts sufficient to demonstrate that the minor child's parent is unfit or has engaged in conduct inconsistent with their parental status. *See, e.g.*, *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 276, 710 S.E.2d 235, 241-42 (2011) ("The plaintiffs had standing to proceed in an action for custody pursuant to N.C. Gen. Stat. § 50-13.1(a) as they alleged they are the grandparents of the children and that the defendant had acted inconsistently with her parental status and was unfit because she had neglected the children.") (citation omitted); *Grindstaff*, 152 N.C. App. at 292, 567 S.E.2d at 432 ("Grandparents alleging unfitness of their grandchildren's parents have a right to bring an initial suit for custody.").

Thomas v. Oxendine, 280 N.C. App. 526, 530-31, 867 S.E.2d 728, 733-34 (2021) (citations, quotation marks, brackets, and ellipses omitted).

Grandparents' arguments on appeal can be resolved by applying the appropriate standard of review for a motion to dismiss under Rule 12(b)(6). At the hearing on Father's motion to dismiss, the trial court allowed Father to testify. Normally, it is not appropriate to consider testimony at a hearing on a motion to dismiss under Rule 12(b)(6), because a motion to dismiss is based only on the sufficiency of the complaint. *See Sterner v. Penn*, 159 N.C. App. 626, 628, 583 S.E.2d 670, 672 (2003) ("A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." (citation omitted)). Also, Rule 12(d) states that the motion to dismiss "*shall* be heard and determined before trial on application of any party, unless

the judge orders that the hearing and determination thereof be deferred until the trial." N.C. Gen. Stat. § 1A-1, Rule 12(d) (emphasis added). Here, the trial court allowed Father to testify instead of hearing the motion to dismiss on the pleadings. But in any event, for purposes of a motion to dismiss, the trial court must accept all of the complaint's material factual allegations as true. *See Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428 (2007) ("On a motion to dismiss, the complaint's material factual allegations are taken as true." (citation omitted)).

The allegations in the complaint, taken as true, would establish Grandparents' standing to bring a custody claim for Tom. *See Thomas*, 280 N.C. App. at 531, 867 S.E.2d at 733-34. Grandparents alleged that Father acted in a manner inconsistent with his constitutionally protected rights as a parent and made specific allegations regarding his failure to provide for Tom, to establish a relationship with Tom, and to be able to provide an adequate home for Tom. *See id*. It is entirely possible—as the trial court apparently concluded—that these allegations are not entirely true and that Father is a fit and proper parent, but that would be a factual determination contrary to the allegations of the complaint. For purposes of *de novo* review of a motion to dismiss under Rule 12(b)(6), we are required to consider the allegations as true. *See Burgin*, 181 N.C. App. at 512, 640 S.E.2d at 428. Therefore, Grandparents' complaint adequately stated a claim upon which relief can be granted and the allegations of the complaint, taken as true, establish Grandparents' standing to bring a claim under North Carolina General Statute Section 50-13.1. *See Deanes v. Deanes*, 294 N.C. App. 29, 33, 901 S.E.2d 880, 883 (2024) ("Before addressing [the g]randparents' arguments directly, we first note a procedural issue complicating our review. Standing to bring a custody claim should be based upon the allegations of the pleadings." (citation omitted)).

Grandparents also argue that the trial court should have made findings of fact or conclusions of law to explain the rationale for the dismissal of the claim. However, the trial court's order clearly granted Father's motion to dismiss. Beyond dismissing the complaint, the order only noted that Father was present and that Grandparents were not. Grandparents' counsel was present and a motion to dismiss is normally heard upon the pleadings. The motion to dismiss is required to be heard before a trial on the merits according to Rule 12(d) "*unless* the judge orders that the hearing and determination thereof be deferred until the trial." N.C. Gen. Stat. § 1A-1, Rule 12(d) (emphasis added). Here, the trial court did not order "that the hearing and determination of the motion to dismiss be deferred until the trial" and there would be no reason for Grandparents to be present to testify at the hearing on a motion

to dismiss under Rule 12(b)(1) or (b)(6). *See id.* There is generally no need for findings of fact in a motion either allowing or denying a motion to dismiss under Rule 12(b)(6) since this motion merely tests the sufficiency of the pleading and the trial court must consider the allegations as true. *See Maynard v. Crook*, 289 N.C. App. 357, 367, 890 S.E.2d 164, 172 (2023) ("The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact, to make clear what was decided for purposes of res judicata and estoppel, and to allow for meaningful appellate review." (citations omitted)).

Although we are reversing the trial court's order of dismissal, we note that on remand the trial court may fully consider the evidence presented by the parties at a properly noticed hearing, and the trial court may rule upon the custody claim based upon its findings of fact and conclusions of law. This opinion addresses *only* the issue of whether Grandparents' complaint was sufficient to state their claims for custody and their standing to bring a custody claim under North Carolina General Statute Section 50-13.1, and based on the allegations of the complaint, which we must consider as true, they have standing. Beyond this, we express no opinion as to the merits of the case on remand.

III. Conclusion

For the reasons stated above, the trial court's order granting Father's motion to dismiss is reversed. This matter is remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

Judges GRIFFIN and FLOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 JULY 2025)

CHARLOTTE CHRISTIAN ASSEMBLY OF THE END TIME MESSAGE, INC. v. ROMANELLI No. 24-1023	Mecklenburg (22CVS000076)	Affirmed
IN RE A.B.W.-H. No. 24-626	Pitt (21JA000008)	Reversed
IN RE A.E.A. No. 25-10	Mecklenburg (23JA000169-590)	Affirmed
IN RE A.G. No. 24-1032	Chatham (21JT000040-180) (21JT000041-180) (21JT000042-180) (21JT000043-180)	Affirmed
IN RE A.R. No. 25-48	Forsyth (23JT000012-330) (23JT000011-330)	Affirmed
IN RE D.A.-R.H. No. 24-993	Mecklenburg (23JA000061-590) (24JT000026-590)	Affirmed
IN RE E.W.P. No. 24-643	Avery (13SPC000068-050)	Affirmed
IN RE G.T.N. No. 24-678	Stokes (19JT000008) (19JT000009)	Affirmed
IN RE H.M.D. No. 24-1108	Wake (19JA000156-910)	Affirmed.
IN RE I.M.W. No. 24-1064	Gates (22JT000003-360)	Affirmed
IN RE J.E.K. No. 24-988	Stokes (22JT000075) (22JT000076) (22JT000077)	Affirmed
IN RE J.S.N.R. No. 24-1000	Rowan (24JT000068)	Affirmed

IN RE M.L.G. No. 24-504	Chatham (22JT000007)	Remanded
IN RE O.J. No. 25-42	Mecklenburg (24JA000063-590) (24JA000064-590) (24JA000065-590) (24JA000062-590)	Affirmed
IN RE S.R.-H. No. 24-1055	Guilford (20JT000748-400)	Affirmed
IN RE Z.G. No. 24-763	Scotland (24JB000001)	Affirmed
LOWREY v. CHOICE HOTELS INT'L, INC. No. 24-900	Durham (19CVS003400)	Affirmed
PORTER v. GOODYEAR TIRE & RUBBER CO. No. 24-808	N.C. Industrial Commission (17-034676)	Affirmed
PRICE v. YUENGLING No. 24-522	Durham (18CVS001380-310)	Dismissed
STATE v. COLEY No. 24-1079	Wake (23CR225054-910)	No Error
STATE v. CURRY No. 25-76	Davie (23CR000064-290) (23CR223478-290)	Dismissed
STATE v. FONVILLE No. 24-985	Onslow (22CRS053002) (22CRS053003)	DISMISSED IN PART; REMANDED FOR CORRECTION OF JUDGMENT.
STATE v. GREENE No. 24-1057	Watauga (24CRS000168)	Vacated
STATE v. HEWITT No. 17-1157-3	Catawba (11CR003822-170) (11CR003823-170) (11CR004077-170) (11CR051398-170) (11CR051400-170) (11CR051401-170)	No Error

STATE v. JENKINS No. 24-693	Guilford (19CR068242-400) (19CR068243-400) (19CR068244-400) (22CR026016-400)	No Error
STATE v. NUNEZ No. 24-1034	Cumberland (22CRS010133)	No Plain Error In Part, and No Error In Part
STATE v. SHEILDS No. 24-1005	Moore (21CRS051122-24) (22CRS000786)	Dismissed
STATE v. SMITH No. 24-1017	Iredell (23CRS314427) (23CRS314428) (24CRS216718) (24CRS216754)	Dismissed
STATE v. WILSON No. 24-1084	Rutherford (23CRS000546)	No Error.
STATE v. YARBOROUGH No. 24-490	Franklin (20CR050072-340)	No Error

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ANIMALS

Protection of Animals Act—poultry production process exempt—motion to dismiss proper—The trial court properly dismissed a complaint brought by a nonprofit entity against defendants (businesses engaged in the raising and slaughtering of chickens for consumption) for failure to state a claim upon which relief could be granted where the legislation that defendants were alleged to have violated, section 19A-1 of the General Statutes (the Protection of Animals Act), specifically exempted "lawful activities" conducted for the production of poultry and for the primary purpose of providing food for human or animal consumption. Whether defendants were exempt from suit under the Act was a question of statutory interpretation and, thus, a question of law properly resolved by the court at the pleading stage. Further, plaintiff's argument that some of the systems and steps defendants employed in their poultry-production operation were either unlawful or not for the purpose of producing poultry or food for consumption failed because the plain meaning of "lawful activities" is one's collective acts not contrary to law; accordingly, the legislation's exemption was directed at the entire series of steps undertaken in producing poultry, rather than requiring consideration of the lawfulness or purpose of any individual step in the process. **Legal Impact for Chickens v. Case Farms, LLC, 43.**

APPEAL AND ERROR

Appellate jurisdiction—order from State Bar Disciplinary Hearing Commission—timely notice of appeal—The Court of Appeals had jurisdiction to review an attorney's appeal from an order of discipline entered against him by the State Bar Disciplinary Commission, where the attorney timely filed his notice of appeal within thirty days of the order's entry in compliance with N.C.G.S. § 7A-29(a) (allowing appeals from any final order of the State Bar) and Rule 18(b)(2) of the Rules of Appellate Procedure (governing the timing for appeals from administrative tribunal decisions). **N.C. State Bar v. Musinguzi, 410.**

Child visitation—disability accommodation for mother—failure to raise issue in trial court—waiver—In a neglect and dependency matter in which the trial court awarded custody of the minor child to paternal relatives, where the mother argued for the first time on appeal that the trial court failed to adequately accommodate her disability as required by the Americans with Disabilities Act (with regard to the location of her visits with the child), the issue was waived for not having been raised at the trial level. **In re A.J.J., 616.**

Defective notice of appeal—petition for writ of certiorari granted—discretionary decision—In a criminal case in which defendant was found guilty of assault on a female, where defendant's oral notice of appeal was defective because it was made prematurely (prior to entry of the final judgment), the appellate court lacked jurisdiction to hear defendant's appeal. However, because defendant clearly expressed an intent to appeal and lost his right to appeal without fault, the appellate court exercised its discretion to grant defendant's petition for writ of certiorari to consider the merits of his arguments and to prevent manifest injustice. **State v. Gardner, 251.**

Frivolous appeal—multiple assertions of nonexistent jurisdiction—sanctions imposed—In a case in which plaintiff took a voluntary dismissal without prejudice of a claim for workers' compensation (which he had filed after his wife was shot and killed by a co-worker), which divested the Industrial Commission of subject matter jurisdiction over the matter, where defendants (the wife's employer and its insurance company) thereafter repeatedly submitted forms and filings to the

APPEAL AND ERROR—Continued

Commission and asserted that the Commission had jurisdiction to grant their requests for relief, the appellate court determined that defendants' appeal of the Commission's order denying defendants' filings was frivolous and taken to harass and cause an unnecessary increase in the cost of litigation. Therefore, the appellate court decided in its discretion to impose sanctions, pursuant to Appellate Rule 34, by taxing defendants the costs of the appeal and attorney's fees incurred by plaintiff in defending the appeal. **Marlow v. TCS Designs, Inc., 680.**

Interlocutory appeal—governmental and public official immunity—denial of Civil Procedure Rule 12(b) motion—substantial right—In a tort action brought by the parents of a child who was sexually assaulted during a private after-school language program that used the facilities of a public school system to conduct its business, the interlocutory appeals of defendants (the school system and three of its employees) from the denials of their motions to dismiss the claims pursuant to Civil Procedure Rule 12(b)(2) and (b)(6) were properly before the appellate court because the motions asserted governmental and public official immunity. Those forms of immunity, which are not mere affirmative defenses to liability, but rather shield defendants entirely from having to answer for their conduct in a civil suit for damages, implicate personal jurisdiction and, thus, affect a substantial right. **Brady v. Charlotte-Mecklenburg Bd. of Educ., 560.**

Mootness—intervention in contested case—settlement of controversy—Where appellants (a nonprofit entity dedicated to preserving William B. Umstead State Park and a couple who owned a home adjacent to the Park) sought to intervene in a contested case between the North Carolina Department of Environmental Quality (NCDEQ) and respondent (a company operating a quarry near the Park and seeking to modify a mining permit to expand its operations), the superior court properly affirmed the denial of appellants' motions to intervene by the administrative law judge. Even if appellants arguably should have been permitted to intervene in the contested case, appellants' claims were moot by the time of the superior court's order because the relief appellants sought was no longer available. By settling the dispute with respondent and voluntarily issuing the requested permit, NCDEQ ended the controversy from which appellants would have appealed to the superior court (had they been allowed to intervene in the matter). **N.C. Dep't of Env't Quality v. Wake Stone Corp., 403.**

Petition for writ of certiorari—voluntariness of guilty plea—no probable error—In an appeal from judgment entered upon defendant's guilty plea to multiple sexual offenses against a minor and obstruction of justice, defendant's petition for writ of certiorari—in which he asserted that his plea was not knowingly, intelligently, and voluntarily made—was denied. Defendant failed to demonstrate probable error by the trial court when advising defendant during the plea colloquy of his right to appeal the denial of his pretrial motion to suppress. Contrary to defendant's assertion that he was led to believe he could appeal from the denial of all of his pretrial motions—some of which were not appealable—the full colloquy demonstrated that the nature and consequences of the plea were explained to defendant in open court and that he received the benefit of his bargain. **State v. Hannah, 266.**

Preservation of issues—affidavit treated as a pretrial order—failure to object at hearing—In a proceeding for equitable distribution, alimony, and child support, plaintiff's appellate argument—that the trial court erred in ordering that defendant's equitable distribution affidavit be treated as a pretrial order—was not preserved for appellate review where plaintiff did not raise a timely objection to the

APPEAL AND ERROR—Continued

trial court's decision (because plaintiff, while duly noticed, did not attend the hearing or timely submit his own equitable distribution affidavit). **Theuerkorn v. Heller, 534.**

Preservation of issues—constitutional issues not raised at trial—waiver—lack of extraordinary circumstances—In an appeal from defendant's conviction of assault on a female, where defendant failed to raise two constitutional issues at trial—that the statute under which he was convicted is constitutionally vague and that the provision under which he was convicted impermissibly discriminates on the basis of sex—those issues were waived. The appellate court determined that defendant did not show extraordinary circumstances to support invoking Appellate Rule 2 (suspending the appellate rules in order to reach the merits). **State v. Gardner, 251**.

Preservation of issues—denial of motion to suppress—probable cause grounds sufficiently raised—In an appeal from judgment entered upon defendant's guilty plea to multiple sexual offenses against a minor and obstruction of justice, defendant preserved for appeal his argument that the trial court erred by denying his pretrial motions to suppress the content of his phone, based on defendant's contention that there was no probable cause for his continued detention at the time he gave consent for his phone to be searched. Defendant sufficiently raised probable cause and relevant search and seizure law in his motions before the trial court. **State v. Hannah, 266.**

Preservation of issues—motion to dismiss granted on one basis—no ruling obtained on second basis—second issue dismissed—In an appeal from the trial court's order granting defendants' motion to dismiss plaintiff's negligence action pursuant to Civil Procedure Rule 12(b)(1), where the trial court did not rule on defendants' motion to dismiss pursuant to Civil Procedure Rule 12(b)(6), plaintiff's argument regarding Rule 12(b)(6) was not properly before the appellate court and was dismissed. **Nelson v. Smith, 51.**

Preservation of issues—sufficiency of evidence—supporting two separate assault charges—issue raised by trial court—In an appeal from multiple convictions arising from a domestic violence incident, where defendant argued that the trial court erred in submitting two assault by strangulation charges to the jury where the State presented insufficient evidence of two separate assaults, but where defendant expressly excluded both assault by strangulation charges from his general motion to dismiss for insufficiency of the evidence, defendant's appellate argument was still preserved because the trial court had raised the issue at the hearing on defendant's motion, heard arguments from defendant and the State, and then ruled on the issue. **State v. Tadlock, 754.**

Record on appeal—insufficient for meaningful review—trial court judgment affirmed—In a case arising from alleged defects in the construction of plaintiffs' home (and the efforts undertaken to remediate them), the trial court's denial of plaintiffs' motions—for directed verdict, to reconsider, for judgment notwithstanding the verdict, and for a new trial—were affirmed where plaintiffs failed to provide the record on appeal necessary to properly review (much less support) their appellate arguments and because the appellate court was unable to discern any error in the trial below. **Thompson v. Rock Barn Props., Inc., 143.**

ASSAULT

Assault on a female—evidence that defendant is a male—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss the charge of

ASSAULT—Continued

assault on a female where the State presented sufficient evidence, even if circumstantial, from which a jury could infer that defendant was a male person for purposes of the offense under N.C.G.S. § 14-33(c)(2). All parties, including defense counsel, referred to defendant using "Mr." and the pronouns "he" and "him"; defense counsel asked the prosecuting witness whether defendant was "not a large man"; and defense counsel raised no objection to any characterization of defendant as a male. **State v. Gardner, 251.**

Assault with deadly weapon inflicting serious injury—gunshot—serious injury element—sufficiency of evidence—In defendant's trial for assault with a deadly weapon with intent to kill inflicting serious injury (defendant was ultimately convicted of the lesser included offense of assault with a deadly weapon inflicting serious injury) arising from an incident in which defendant shot the victim in the leg, the trial court properly denied defendant's motion to dismiss where the State presented substantial evidence from which a jury could infer that the victim suffered a serious injury. The victim suffered a physical or bodily injury as a result of defendant's assault with a revolver; although the victim did not go to a hospital for treatment, his gunshot wound was treated at the scene after an ambulance was called; he experienced "a lot of pain" and took daily pain medication after the incident; with his wife's help, he cleaned the wound with hydrogen peroxide and changed "nasty bandages" regularly; he had trouble sitting, walking, and laying down; and he was out of work for over a month. **State v. Maloye, 283.**

Assault with deadly weapon with intent to kill inflicting serious injury—intent element—sufficiency of evidence—In a prosecution of multiple charges arising from an altercation in which two people were shot, one fatally (for which defendant was found guilty of second-degree murder), the State presented substantial evidence to support the charge of assault with a deadly weapon with intent to kill inflicting serious injury; specifically, the evidence supported an inference of defendant's intent to kill, including that defendant raised her loaded and cocked gun and shot at the second victim, who was running toward defendant immediately after the first victim was shot. **State v. Swinson, 496.**

By strangulation—sufficiency of evidence—supporting two separate assault charges—distinct interruptions—In a prosecution for multiple crimes arising from a domestic violence incident between defendant and his wife, the trial court did not err in submitting two separate charges of assault by strangulation to the jury where, viewed in the light most favorable to the State, there was sufficient evidence from which the jury could have found that defendant committed two separate assaults: first, by choking his wife with his hands as they moved across the kitchen, and second, by strangling his wife with his arm after she fell to the floor. Based on the evidence showing changes in both the location and the method of attack, the jury could have found a distinct interruption separating defendant's strangulation of his wife into two different assaults. **State v. Tadlock, 754.**

By strangulation—two charges—injuries caused by each assault—not specified in jury instructions—right to unanimous jury verdict—not violated—In a prosecution for multiple crimes arising from a domestic violence incident between defendant and his wife, the trial court did not plainly err when instructing the jury on two separate charges of assault by strangulation, where its failure to distinguish the injuries caused by each charged assault did not violate defendant's right to a unanimous jury verdict on the number of assaults he had committed. To begin with, the number of counts against him was equal to the number of assaults presented in

ASSAULT—Continued

the evidence, which was also equal to the number of indictments against defendant for assault by strangulation. The trial court also instructed the jury on assault by strangulation twice—once for each charge—and told the jurors that they could not reach a verdict by majority vote. Further, the verdict sheets presented each charge separately and differentiated them by including the words "alleged by hands" or "alleged by arm" in bold font. Finally, the State presented ample evidence of the victim's injuries, including photographs along with testimony from both the victim and the doctor who treated her after the assaults. **State v. Tadlock, 754.**

Multiple assaults—sufficiency of evidence—distinct interruption—change in location—At a trial for three different assault charges arising from the same domestic violence incident, the trial court properly denied defendant's motion to dismiss all but one assault charge where the State presented substantial evidence that defendant committed three separate assaults on his wife rather than one continuous assault. Specifically, the evidence—including testimony from defendant's wife—showed that: defendant pushed his way into the home, struck his wife, and then grabbed her neck, after which she broke free and begged defendant to stop (the first assault); then, defendant pushed his wife up against the kitchen stove, placed one hand around her throat, and struck her in the ribs and stomach with his free hand, after which the wife broke free again and ran to a different part of the home (the second assault); and, finally, defendant pinned his wife onto the floor, got on top of her, and strangled her until she managed to escape and call the police (the third assault). **State v. French, 711.**

ATTORNEY FEES

Subject matter jurisdiction—delay after entry of domestic violence protective order—pending custody proceedings—award vacated—Where plaintiff was granted an ex parte domestic violence protection order (DVPO) (pursuant to Chapter 50B of the General Statutes) against defendant in March 2021 and defendant later filed a separate action for child custody (pursuant to Chapters 50 and 50A), but the parties agreed to numerous continuances and no further action was taken until January 2023, when plaintiff was allowed to amend her DVPO complaint—followed by the trial court's dismissal of her complaint and defendant's filing of a motion for attorney fees—the trial court's award of attorney fees to defendant was vacated. The trial court lacked subject matter jurisdiction for any award of attorney fees under Chapters 50 or 50A because causes of action under those statutes remained pending; as to Chapter 50B, jurisdiction to award relief expired 18 months after entry of the DVPO. As to an award of attorney fees pursuant to N.C.G.S. § 6-21.5, the trial court did not make findings regarding whether there was a complete absence of a justiciable issue or if either party prevailed; accordingly, the matter was remanded for further proceedings. Finally, plaintiff's arguments regarding the denial of her Civil Procedure Rule 59 and 60 motions were moot. **Cauley v. Cauley, 315.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

No-merit brief—permanency planning order—reunification efforts ceased—guardianship awarded to foster parents—In a child neglect matter, the trial court's permanency planning order ceasing reunification efforts with respondent-father and granting permanent guardianship of the minor child to the child's foster parents was affirmed where, after respondent-father's counsel filed a no-merit brief identifying only one potential issue and respondent-father did not file a pro se

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

brief, the appellate court conducted an independent review of the record and concluded that the trial court made the statutorily required findings and properly considered respondent-father's decision to voluntarily return to incarceration rather than remain on parole and that the trial court did not abuse its discretion in ceasing reunification efforts or in granting guardianship to the foster parents based on the minor child's best interest. **In re M.L.H., 189.**

Permanency planning order—guardianship—no sworn testimony—findings of fact unsupported—In an abuse and neglect proceeding involving three minor children—the older two having been removed from the family home for, among other reasons, their exposure to domestic violence and substance abuse, and the third and youngest child having been removed shortly after his birth—the permanency planning order awarding guardianship of the children to their foster parents was vacated because the district court's findings of fact did not support its conclusions of law or its decree where the court did not receive any sworn oral testimony or take judicial notice of any previous matter but merely received the prospective guardians' affidavits and reports from the county department of social services and the children's guardian ad litem into evidence. **In re J.A.S.F., 12.**

Permanency planning—custody to non-parents—delegation of visitation rights—abuse of discretion—In a neglect and dependency matter in which the trial court awarded custody of the minor child to paternal relatives ("custodians") and then entered an order transferring the Chapter 7B juvenile proceeding to a Chapter 50 civil custody proceeding, the trial court abused its discretion by authorizing the custodians to modify or cease the mother's visitation, including to change visitation from supervised to unsupervised. The visitation provision containing the impermissible delegation of authority in the Chapter 50 order was vacated and the matter was remanded for further proceedings. **In re A.J.J., 616.**

Permanency planning—custody to non-parents—verification—adequacy of resources—In a neglect and dependency matter, the trial court properly awarded custody of the minor child to paternal relatives ("custodians") where there was sufficient evidence that the custodians had adequate resources to provide for the child's needs as required by N.C.G.S. § 7B-906.1(j). Although there was no evidence of either custodian's employment or income, section 7B-906.1(j) provides that greater than six consecutive months of placement with a prospective custodian is evidence of adequate resources; here, the child had resided with the custodians for more than six months, and, further, evidence was presented that the child had his own room, storage space, TV, Internet, and phone, and that his needs were being met. **In re A.J.J., 616.**

Permanency planning—custody to non-parents—verification—understanding of legal significance—In a neglect and dependency matter, the trial court properly awarded custody of the minor child to paternal relatives ("custodians," with whom the juvenile had been placed for over seven months) where there was sufficient evidence that the custodians understood the legal significance of obtaining custody as required by N.C.G.S. § 7B-906.1(j), including testimony from a department of social services (DSS) social worker, testimony from one of the custodians, and reports from DSS and the guardian ad litem. The evidence demonstrated that both custodians understood the recommendations from DSS, wanted to receive custody of the child, had been providing for the various needs of the child since his placement with them, and were willing to continue to meet those needs going forward. **In re A.J.J., 616.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Stipulation—signed by only one respondent and objected to by the other—sole basis for adjudication—vacated and remanded—In an abuse and neglect proceeding concerning two children, the district court erred in basing its adjudication solely on a stipulation to twenty-three allegations—largely concerning conduct by the mother—that was not signed by the mother or her counsel, but rather was signed only by the father and his counsel, and, moreover, that was accepted over the mother's specific objection and despite her request that the court hold a hearing on the merits of the petitions. A stipulation by one respondent-parent may not bind or be used against another respondent-parent who was not a party to the stipulation and who objected to its use. Absent the findings of fact derived from stipulations concerning the mother's conduct, the district court's conclusion of law that the juveniles were abused and neglected was unsupported, and, accordingly, the adjudication and disposition orders were vacated and the matter was remanded for a new adjudicatory hearing. **In re T.C., 648.**

Transfer to Chapter 50 proceeding—statutory findings—In a neglect and dependency proceeding in which the trial court awarded custody of the minor child to paternal relatives ("custodians") and then entered an order transferring the Chapter 7B juvenile proceeding to a Chapter 50 civil custody proceeding, the trial court made the necessary findings of fact pursuant to N.C.G.S. §§ 7B-911(c)(1)-(2) and 50-13.2(a). The court's findings were supported by the evidence, including the finding that the child was happy in his placement and that his needs were being met. The trial court's findings regarding other relevant factors, such as the mother's lack of progress in her case plan and the custodians' willingness and ability to provide for the child, supported its conclusion that the custody award was in the child's best interest. Finally, the court's ultimate finding that continued state intervention was no longer necessary was supported by evidence in the record, including: statements by the custodians and the child's mother about plans to carry out visitation; a report by the department of social services (DSS) recommending that DSS, counsel, and the guardian ad litem should be released; and testimony from a DSS social worker that there was no reason for the court to stay involved in the child's life after three years. **In re A.J.J., 616.**

CHILD CUSTODY AND SUPPORT

Child support award—parent's income—findings of fact insufficient—In a proceeding for equitable distribution, alimony, and child support, the trial court erred in calculating child support based upon plaintiff's income from a previous year (rather than his income at the time of the order's entry) without making findings of fact that would support such an award. **Theuerkorn v. Heller, 534.**

Grandparents' complaint for child custody—motion to dismiss for lack of standing—reviewed under wrong standard—After plaintiff-grandparents filed a complaint seeking custody of their minor grandson, an order granting defendant-father's motion to dismiss for lack of standing—seemingly filed pursuant to Civil Procedure Rule 12(b)(6)—was reversed and the matter was remanded because the trial court had reviewed the motion under the wrong standard. Specifically, the court should not have considered defendant-father's testimony at the hearing on the motion to dismiss, but instead should have focused solely on the sufficiency of the complaint, viewing all allegations as true and in the light most favorable to plaintiff-grandparents. Under the correct standard of review, the complaint sufficiently established plaintiff-grandparents' standing to bring a custody claim, since it alleged that

CHILD CUSTODY AND SUPPORT—Continued

defendant-father acted inconsistently with his constitutionally protected rights as a parent and included specific allegations regarding his failure to provide for and establish a relationship with the child. **White v. Boatwright, 813.**

CIVIL PROCEDURE

Alimony and postseparation support—involuntary dismissal—with prejudice absent specific language to contrary—no jurisdiction over refiled claims—In a divorce matter relating to plaintiff ex-wife's claims for alimony and postseparation support, where the trial court's order dismissing plaintiff's alimony claim for failure to prosecute did not explicitly state that the dismissal was without prejudice, the order constituted an involuntary dismissal with prejudice under Civil Procedure Rule 41(b), which in turn terminated the ex-wife's post-separation support claim (under N.C.G.S. § 50-16.1A(4)(c)). Consequently, after plaintiff filed a new complaint seeking alimony and postseparation support, the court's subsequent order awarding postseparation support to plaintiff was vacated on appeal because the court lacked subject matter jurisdiction to hear the refiled claim. Although the second order included a finding that the prior order constituted a dismissal without prejudice, this finding did not cure the jurisdictional defect; further, plaintiff's argument that the finding was an amendment to the prior order pursuant to Civil Procedure Rule 60(a) was meritless, since that Rule does not grant trial courts the authority to correct substantive errors in their decisions. **Sessoms v. Ray, 431.**

Rule 59 motion to amend judgment—jury instruction error of indeterminate effect—abuse of discretion analysis—In an action in which plaintiff brought intentional tort claims against a massage therapist for alleged sexual assault and negligent hiring claims against the therapist's employer, the trial court did not abuse its discretion by denying plaintiff's Rule 59 motion to amend the judgment even though the trial court erred by failing to instruct the jury properly on joint and several liability (as a result of which plaintiff was entitled to a new trial on damages). Where the jury was tasked with determining damages based on causes of action rather than plaintiff's injuries—and awarded plaintiff damages for each cause of action—and where the verdict sheet was not clear on whether the jury awarded plaintiff duplicative damages for the same injuries or instead apportioned the damages between the defendants, the appellate court upheld the trial court's denial because it was not apparent from the record if the jury would have reached the same result even if the proper instructions had been given. **B.C. v. Palmetto Wellness Grp. N.C., LLC, 150.**

Rule 60(a)—clerical error rather than substantive change—motion properly allowed—In a proceeding for equitable distribution, alimony, and child support, the trial court properly granted defendant's Civil Procedure Rule 60(a) motion to correct a clerical error in an order—where the court had left blank the amount of alimony awarded to defendant from plaintiff—because the original order already provided that plaintiff must pay defendant an alimony award and the amended order still required plaintiff to pay defendant an alimony award. Thus, the amended order did not alter the effect of the original order or change the source from which the award was derived, but rather only corrected the amount of money involved, a change not implicating a substantive right. **Theuerkorn v. Heller, 534.**

CONSTITUTIONAL LAW

Confrontation Clause—DNA analyses—challenge to one witness not preserved—no error regarding other witness—In a rape prosecution, the admission of

CONSTITUTIONAL LAW—Continued

DNA results from a private laboratory and related testimony from two employees of the State Crime Lab, did not offend defendant's Sixth Amendment rights. As to one employee's testimony, defendant made only general objections and an objection on hearsay grounds and, thus, did not preserve his constitutional arguments for appellate review. As to the second employee's testimony (to which defendant made a specific, timely objection on Confrontation Clause grounds), the out-of-court statement introduced—test results from the private lab, which found male DNA in the swabs from the victim's rape kit—satisfied only one of the two requirements needed to implicate defendant's Confrontation Clause rights. While the DNA profile produced by the private lab was used by the employee to identify defendant after the profile was matched, first, to a state database, and, then, after independent analyses conducted by the employee, to defendant's sample (and, thus, constituted hearsay), it was not testimonial because it was not generated solely to aid a police investigation. Finally, even assuming any error in the admission of the DNA results, any error was harmless in light of the other evidence of defendant's guilt. **State v. Tate, 507.**

Defenses—first-degree murder—diminished capacity—potential consequences—colloquy with defendant—correct statement of law—In a prosecution for first-degree murder, arising from defendant having stabbed and bludgeoned her mother to death, the trial court's statements during a colloquy with defendant and her counsel about the affirmative defense of diminished capacity, taken as a whole, correctly informed defendant that, in order to assert the defense, defendant must admit her guilt to the murder, and, further, that such an admission and defense could potentially result in an instruction to the jury on second-degree murder. **State v. Copenhaver, 217.**

Effective assistance of counsel—failure to raise constitutional issues at trial—dismissed without prejudice to file MAR—In an appeal from judgment entered upon defendant's conviction of assault on a female, defendant's claim that his counsel was constitutionally ineffective for failing to raise two constitutional issues at trial was dismissed without prejudice to reassert the claim in a motion for appropriate relief in the trial court; based on the cold record, the appellate court could not decide the issue on the merits without further development of the facts. **State v. Gardner, 251.**

Effective assistance of counsel—Harbison error—jury instruction—prejudice not shown—In defendant's appeal from her conviction of first-degree murder, arising from defendant having stabbed and bludgeoned her mother to death, the record was sufficient for the Court of Appeals to resolve her ineffective assistance of counsel claims. First, to the extent defendant's trial counsel's admission of defendant's guilt triggered a *Harbison* inquiry, counsel's discussion—and the trial court's colloquy at the outset of trial—with defendant demonstrated defendant's knowing and voluntary consent to her counsel's admission. Second, the failure of defendant's trial counsel to object to the trial court's jury instruction on the defense of insanity, despite defendant's clear desire that such a defense not be asserted, even if error, was not prejudicial in light of the jury's verdict—declining to find defendant not guilty by reason of insanity. **State v. Copenhaver, 217.**

Effective assistance of counsel—no objection to testimony or jury instructions—performance not deficient—After defendant crashed his car into a tree while his wife was in the passenger seat, defendant received effective assistance of counsel during his subsequent trial for charges of felony death by vehicle and driving while impaired. Specifically, defendant failed to show on appeal that his trial

CONSTITUTIONAL LAW—Continued

attorney's performance was deficient for failure to object to testimony from the State's expert (regarding defendant's blood alcohol concentration after the crash) and from one of the officers present at the crash scene, or for failure to object to the court's jury instruction on intervening negligence; both testimonies were properly admitted, and there was no error in the court's jury instructions. **State v. Venable, 788.**

Right to speedy trial—Barker factors—nineteen-month delay in signing appellate entries—no violation—After being convicted of numerous sexual offenses against a child, the trial court's nineteen-month delay in signing defendant's appellate entries did not violate defendant's right to a speedy trial where, although the length of the delay was presumptively prejudicial, the balance of the other factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), did not establish the right to a new trial: the reason for the delay (related to the retirement of the trial judge) was not the sort of deliberate act to weigh in favor of a defendant; defendant did not assert the right during the delay; and defendant could not show that he was prejudiced by his post-judgment, pre-appeal incarceration (which he alleged was a result of the delay) where he did not assert that his appeal was hampered by the delay and where his appellate arguments all proved to be without merit. **State v. Maney, 108.**

CONTEMPT

Civil—failure to pay attorney fees—amount owed increased under the contempt order—improper modification—After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, under which she was also required to pay child support, the contempt order was reversed where it improperly increased the amounts in attorney fees and past-prospective child support that plaintiff was required to pay. The trial court erred in using the contempt order to modify its prior order, as well as to punish plaintiff for noncompliance, since the purpose of civil contempt is to coerce compliance with an underlying order. **Collins v. Holley, 323.**

Civil—failure to pay attorney fees—automatic incarceration in case of missed payment—improper—After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, under which she was also required to pay child support, the contempt order was reversed where it required that plaintiff be automatically incarcerated if she failed to make any of her court-ordered payments as scheduled. Under settled law, plaintiff could only be incarcerated after a determination that she was capable of complying with the underlying court order; however, the trial court had no way of projecting out and assuming what income, expenses, or assets plaintiff would have in the future. **Collins v. Holley, 323.**

Civil—failure to pay attorney fees—findings unsupported by evidence—improper modification of attorney fee order—In plaintiff mother's appeal from an order in a child custody case, in which the trial court found her in civil contempt for failing to pay attorney fees pursuant to a prior order, the Court of Appeals disregarded three findings of fact in the contempt order that were unsupported by competent evidence: that all of plaintiff's child support payments had been late; that plaintiff had the ability to comply with the terms of the order for attorney fees and child support; and that defendant father had insufficient means to defray his attorney fees. Additionally, the Court of Appeals rejected a conclusion of law (labeled as a finding of fact in the contempt order) that grounds existed to modify the prior order

CONTEMPT—Continued

by increasing the amount of attorney fees and child support that plaintiff would have to pay; civil contempt is not a proper mechanism for modifying an underlying order, but rather is an enforcement mechanism used to compel obedience to that order. **Collins v. Holley, 323.**

Civil—failure to pay attorney fees—purge conditions—increase in amount owed—improper—After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, under which she was also required to pay child support, the contempt order was reversed where its purge conditions required plaintiff to pay even greater amounts in attorney fees and past-prospective child support than what the prior order originally required. The evidence at trial indicated that plaintiff lacked the present ability to comply with the purge conditions, since she already made insufficient income to cover both her monthly expenses and the court-ordered payments (in the original amounts, let alone in the new increased amounts). Further, the increase in those court-ordered payment obligations was an improper use of civil contempt to punish plaintiff rather than to coerce compliance with the underlying order. **Collins v. Holley, 323.**

Civil—failure to pay attorney fees—willfulness—insufficiency of factual findings—After the trial court in a child custody case entered an order finding plaintiff mother in civil contempt for failing to pay attorney fees pursuant to a prior order, the contempt order was reversed because the court's factual findings failed to support the conclusion that plaintiff willfully violated the prior order. To the contrary, the evidence showed that plaintiff's income was insufficient to cover both her regularly recurring expenses and her court-ordered payments; since she lacked the ability to comply with the order for attorney fees, her noncompliance could not be deemed willful. Additionally, the contempt order lacked certain statutorily required findings: that the attorney fee order remained in force and that the purpose of that order might still be served by compliance with it. **Collins v. Holley, 323.**

Civil—purge prior to entry of written order—vacated—A trial court's order finding defendant in civil contempt for his failure to pay court-ordered child support, uninsured medical expenses, and attorney fees was vacated because, although the court orally found defendant in contempt of its child support order—incarcerating him and requiring him to pay the child support and medical expenses he owed to purge himself of contempt—defendant executed a cash bond for the purge amount before the court filed its written contempt order; once defendant purged the contempt, the trial court lacked authority to hold defendant in contempt. **Bridges v. Bridges, 9.**

Criminal—indirect—violation of injunction—denial of motion to dismiss—standard of review—In an appeal from the trial court's order finding defendant in contempt after a hearing on a motion for order to show cause filed by plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors)—in which plaintiff alleged that defendant had violated a permanent injunction by performing HVAC work without a license—the appellate court reviewed the trial court's denial of defendant's motion to dismiss de novo and determined that, since the case involved indirect criminal contempt, the appropriate standard of review was the substantial evidence standard. Thus, the question was whether plaintiff presented substantial evidence, viewed in the light most favorable to plaintiff, that defendant installed a new HVAC system or that he removed and replaced the duct work of an old HVAC system, either one of which would allow a trier of fact to find a violation

CONTEMPT—Continued

of the injunction. **State Bd. of Exam'rs of Plumbing, Heating & Fire Sprinkler Contractors v. Hudson, 71**.

Criminal—not a misdemeanor—no applicable statute of limitations—The trial court's order finding defendant in criminal contempt for violating a permanent injunction by performing HVAC work without a license was not entered in violation of any statute of limitations. Although an indirect criminal contempt proceeding resembles a conventional criminal bench trial, criminal contempt does not come within the "[a]ny other crime" language in N.C.G.S. § 14-1 (delineating felonies and misdemeanors). Moreover, a criminal contempt determination is not a misdemeanor in North Carolina; therefore, the contempt proceeding was not subject to the two-year statute of limitations set forth in N.C.G.S. § 15-1(a). **State Bd. of Exam'rs of Plumbing, Heating & Fire Sprinkler Contractors v. Hudson, 71**.

Criminal—plumbing work performed in violation of injunction—findings of fact—sufficiency of evidence—In an appeal from the trial court's order finding defendant in criminal contempt for violating a permanent injunction by performing HVAC work without a license, several findings of fact challenged by defendant as being improper or unsupported by the evidence were upheld on appeal, including findings derived from an investigator's observations that an HVAC unit installed by defendant was installed improperly and an ultimate finding of fact that plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors) presented sufficient circumstantial evidence that defendant installed a new HVAC unit and made replacement repairs to an old HVAC unit. Competent evidence supported each finding and, moreover, even if the findings regarding the investigator's opinion were improper—assuming defendant's position that the investigator was not tendered as an expert witness—any error was not prejudicial because plaintiff only needed to prove that defendant installed an HVAC system, regardless of whether it was installed properly. **State Bd. of Exam'rs of Plumbing, Heating & Fire Sprinkler Contractors v. Hudson, 71**.

Criminal—violation of injunction—HVAC repair performed without a license—carve out exception inapplicable—In a case in which plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors) filed a motion to show cause alleging that defendant violated a permanent injunction by performing HVAC work without a license, plaintiff presented substantial evidence from which a trier of fact could conclude that defendant's duct work repair on an old HVAC system constituted a violation of the injunction (one of two violations alleged). Contrary to defendant's argument, the work he performed—removing a section of duct board and replacing it—did not qualify under the "carve out exception" contained in N.C.G.S. § 87-21(c) (exempting certain minor repairs to an existing HVAC system from the license requirement). **State Bd. of Exam'rs of Plumbing, Heating & Fire Sprinkler Contractors v. Hudson, 71**.

Criminal—violation of injunction—installation of new HVAC unit without a license—circumstantial evidence—In a case in which plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors) filed a motion for order to show cause alleging that defendant violated a permanent injunction by performing HVAC work without a license, plaintiff presented substantial evidence from which a trier of fact could conclude that defendant installed a new HVAC system (one of two violations alleged). The evidence, despite being circumstantial, was sufficient to survive defendant's motion to dismiss, and included: an invoice prepared by defendant stating in two places that he had "Replaced unit"; defendant's inconsistent

CONTEMPT—Continued

statements regarding whether "unit" referred to just one part or the whole HVAC system and whether he meant to say "repair" instead of "replace"; defendant's prior violations of the injunction; and a payment defendant made to the homeowner for $600.00 to cover a bill by another service provider who worked on the new HVAC system after it was installed, which defendant explained he did "to be released from anything to do with" the unit. **State Bd. of Exam'rs of Plumbing, Heating & Fire Sprinkler Contractors v. Hudson, 71**.

Direct criminal contempt—admitted ingestion of impairing substance before hearing—delay of urine sample—After a hearing where defendant—who was there to plead guilty to criminal charges—admitted to consuming an unspecified impairing substance earlier that morning and then provided a urine sample that tested positive for methamphetamine, the trial court erred in holding defendant in direct criminal contempt, since the record did not support the court's finding that defendant falsely claimed that he would not test positive for an impairing substance. Rather, defendant merely represented that he was of clear mind and understood the nature of the proceedings despite having previously ingested the unspecified substance. Further, although the proceedings were delayed a few hours because defendant could not provide a urine sample quicker, this could not serve as the basis for direct contempt, since defendant provided the sample outside the presence of the court. **State v. Aspiote, 89.**

CONTRACTS

Breach—town's nonpayment under road improvement contract—unresolved utility conflicts—impossibility of performance—In a breach of contract action brought against a town by plaintiff, a company that had been awarded a contract to install a storm water drainage system underneath roads as part of a broader roadway improvement plan, the trial court's judgment awarding plaintiff $132,657.40 was affirmed where the court's unchallenged findings of fact amply supported its conclusions, including that: the town had breached the contract by failing to identify and arrange for the resolution of potential utility impacts—including underground gas lines—prior to the start of plaintiff's work and by failing to pay plaintiff for work satisfactorily completed under the contract; the town's refusal to terminate the contract as requested by plaintiff was unreasonable; the town's breach excused further performance by plaintiff; and the town was not justified in defaulting plaintiff. Further, the trial court's decision did not overlook the contract's Authority of Engineer term, since the project engineer's limited authority under the contract did not extend to determining whether the town had met its contractual obligations or owed damages. **N. State Env't, Inc. v. Town of Mooresville, 387.**

Release agreement between employer and employee—"affiliate"—negligence claims against individuals not barred—In plaintiff's negligence action arising from toxic mold exposure in his workplace, although plaintiff and his employer (a company) entered into a compromise settlement agreement (approved by the Industrial Commission) and signed a general release agreement, the release agreement did not serve to bar plaintiff's claims against defendants—two individuals who, besides being officers in the company, owned the property in which the company leased space as a commercial tenant—where plaintiff asserted his claims against defendants in their individual capacities as property owners and landlords of the workplace. By the plain language and express terms of the release agreement, defendants were not subject to the release: first, as individuals, they did not qualify as affiliates of the company; and second, in the context of plaintiff's claims, they

CONTRACTS—Continued

were not acting in their official capacities in the course and scope of their employment with the company. Therefore, the trial court erred by granting defendants' motion to dismiss plaintiff's negligence claim for lack of subject matter jurisdiction under Civil Procedure Rule 12(b)(1). **Nelson v. Smith, 51.**

Third-party-beneficiary breach of contract—commercial lease—services agreement—lack of direct benefit to general public—The trial court properly granted summary judgment to defendants—the owner and the management company of a shopping center—on plaintiff's third-party-beneficiary breach of contract claim, in which she asserted that her husband's death in a car accident (that, although it occurred two miles away, was caused by a teen driver who had attended car meets in the parking lot of the shopping center, which sometimes entailed car racing) constituted a breach of defendants' contracts—a commercial lease agreement between the owner and its tenants and the services agreement between defendants—that set forth certain responsibilities for providing security and traffic control. Plaintiff could not show that she and her husband were intended third-party beneficiaries of the contracts despite language in the lease requiring tenants to carry liability insurance "for the protection of the general public," a term which was intended to set forth the rights and responsibilities between the landlord and its tenants. **Ghassemi v. Centrex Props., Inc., 338.**

CRIMES, OTHER

Exploitation of an older adult—elements—acting knowingly and with deception—sufficiency of evidence—In a case involving multiple counts of exploitation of an older adult by defendant who, together with her husband, managed the finances of her elderly mother-in-law, the trial court properly denied defendant's motion to dismiss the charges where substantial evidence showed that, in withdrawing large sums of money from her mother-in-law's bank account without the latter's knowledge or permission, defendant acted knowingly and with deception. The State's evidence included testimony from defendant's sister-in-law, who described the mother-in-law's shock upon discovering that the money had been withdrawn, defendant's refusal to accept the sister-in-law's help with managing the mother-in-law's finances, and defendant's lies about the mother-in-law's tax documents going missing. Additionally, a bank employee testified that defendant: insisted that the mother-in-law had authorized the withdrawals until, after the bank employee confronted defendant with the withdrawal forms, defendant confessed to copying her mother-in-law's signatures; and made suspicious statements concerning the withdrawals, such as "my husband, knew about this. It wasn't just me." **State v. Fraley, 463.**

CRIMINAL LAW

Defenses—insanity—jury instruction given against defendant's wishes—plain error not shown—In a prosecution for first-degree murder, arising from defendant having stabbed and bludgeoned her mother to death, defendant did not establish prejudice in the trial court's instruction to the jury on the defense of insanity—assuming, without deciding, that the instruction constituted error—even though defendant repeatedly refused to argue insanity at trial and contended on appeal the evidence did not support such an instruction. The jury, in returning a verdict of guilty of first-degree murder, rejected both of the affirmative defenses it was instructed on—insanity and diminished capacity—after the State, in its closing argument, accurately distinguished between the defenses and emphasized that

CRIMINAL LAW—Continued

neither defendant nor the State was seeking a verdict of not guilty by reason of insanity. **State v. Copenhaver, 217.**

Guilty pleas—recitation of specific information from allegations in indictments—minor misstatements and omissions—factual basis sufficient— Where defendant's notice of appeal from the judgment entered after he pled guilty to twenty-five offenses was defective, but his intent to appeal was clear and the State was not misled, the Court of Appeals, in its discretion, allowed defendant's petition for writ of certiorari to reach the merits of defendant's argument and reject it; the prosecutor's recitation of specific details and information from the allegations in the indictments was sufficient for the trial court to determine that there was a factual basis for defendant's guilty pleas, despite minor misstatements and omissions by the prosecutor in the recitation. **State v. Owens, 290.**

Jury deliberations—court's response to jury's questions—defense counsel's request for clarifying instruction—no prejudicial error—In a prosecution for charges including robbery with a dangerous weapon, the trial court did not commit prejudicial error by declining to answer the jury's questions during deliberations concerning an essential element of armed robbery—whether the victim's life was threatened or endangered—and in declining defense counsel's subsequent request for an instruction aimed at addressing the jury's questions. The issue was preserved for appellate review where defense counsel objected to the court's jury instructions before and after they were given; however, because defendant could not show a reasonable possibility that the jury would have returned a different verdict absent the purported error, such error was harmless. **State v. Gamble, 242.**

Motion to sever—co-defendants in first-degree murder and intentional child abuse trial—no error or abuse of discretion—The trial court did not err in denying defendant's motion to sever her trial on charges of first-degree murder and intentional child abuse, arising from the death of her one-year-old son, from that of her co-defendant (the other person who was present when the abuse was inflicted) where: (1) "finger pointing" at trial between the co-defendants about who inflicted the abuse did not deprive defendant of a fair trial; and (2) the cross-examinations by the co-defendants did not illustrate a conflict between their defenses, much less a high degree of conflict. Further, remarks made by the trial court—about previous denials by other judges of defendant's earlier motions to sever—showed that the trial court understood it had the discretion to revisit those decisions, although it ultimately also elected to deny defendant's motion. Defendant's related arguments that the trial court erred in precluding evidence she sought to introduce (out of concern for protecting the co-defendant's rights) lacked merit. **State v. Upchurch, 775.**

Motion to suppress—affidavit accompanying warrant application—not conclusory—not stale—In a drug trafficking and firearms prosecution, the trial court properly denied defendant's motion to suppress evidence obtained during the search of a residence pursuant to a warrant where competent evidence supported a finding of fact which defendant contended was merely a recitation of conclusory and stale assertions from a detective's affidavit accompanying the warrant application. The underlying circumstances presented in the application (including corroborating information) supported the credibility and reliability of the informant upon whom the detective relied, and the information relied upon dated from only one to two weeks past—not an unreasonable delay given the ongoing nature of the alleged trafficking behavior—and thus was not stale. **State v. Clark, 445.**

CRIMINAL LAW—Continued

Motion to withdraw guilty plea—twenty-year delay—properly denied before sentencing—greater sentence improperly imposed—In a criminal case that was reinstated twenty years after defendant had gone missing, where defendant had pleaded guilty to multiple charges (including robbery with a dangerous weapon) with the condition that he would receive an active sentence of 61 to 83 months, the trial court did not err in denying defendant's motion to withdraw his plea agreement prior to sentencing, since several factors—particularly the twenty-year time span between his plea agreement and his motion to withdraw—weighed heavily against a finding that he had a fair and just reason for withdrawing his guilty plea. However, because the court failed to inform defendant of his statutory right (under N.C.G.S. § 15A-1024) to withdraw his plea after it imposed a greater sentence than what defendant had agreed to in his plea agreement, the court's judgment was vacated and the case was remanded for a new sentencing hearing. **State v. Latta, 103.**

Murder trial—jury instructions—self-defense—disqualifying felonious conduct—causal nexus established—The trial court did not commit plain error in defendant's trial for second-degree murder (which arose from the fatal shooting of a man from whom defendant sought to buy marijuana) by instructing the jury that if it found an immediate causal nexus between defendant's use of force and the attempt to commit, commission of, or escape after the commission of a felony, defendant would be disqualified from asserting self-defense. Despite defendant's argument to the contrary, the contemporaneous criminal conduct engaged in by defendant in this case, attempting to possess two ounces of marijuana and attempting to possess any amount of marijuana with the intent to sell or deliver, were felonies that could negate a claim of self-defense upon a showing by the State that, but for defendant's felonious conduct, the fatal confrontation with the victim would not have occurred. **State v. Townsend, 132.**

Prosecutor's argument—urging jurors to "walk in the victim's shoes"—remarks improper but not prejudicial—In a prosecution for numerous sexual offenses against a child—defendant's daughter, whose abuse by defendant from an early age escalated until she had a panic attack in high school and disclosed defendant's behavior—the trial court did not reversibly err in failing to intervene, in the absence of an objection by defendant, during closing arguments when the prosecutor urged the jurors to "walk in [the victim's] shoes." Although those remarks were improper, they did not prejudice defendant given the overwhelming evidence of his guilt. **State v. Maney, 108.**

Prosecutor's closing argument—defendant's choice not to testify—prejudicial error not shown—At a trial for crimes arising from a home break-in and subsequent attempts to sell wristwatches stolen from the home, where defendant did not testify or present other evidence, the trial court did not commit prejudicial error by failing to intervene ex mero motu when the prosecutor stated during closing arguments that "[defendant] doesn't have to testify, but there's no other evidence to say otherwise as to how he got those watches honestly." The prosecutor's remarks were improper, since they violated defendant's statutory and constitutional rights against self-incrimination. Moreover, the error was never cured where the State did not withdraw the remark and the trial court neither made a statement indicating that the remark was improper nor instructed the jury not to consider defendant's failure to testify. Nevertheless, the prosecutor's remarks were not so grossly improper as to entitle defendant to a new trial given the overwhelming, uncontradicted evidence of his guilt of the charged crimes. **State v. Gilbert, 720.**

CRIMINAL LAW—Continued

Prosecutor's closing argument—defendant's propensity to commit drive-by shootings—not grossly improper—In a first-degree murder prosecution arising from the fatal drive-by shooting of two victims, the prosecutor's statement that defendant "like[d] to shoot out of the backs of cars at people," in reference to evidence of a prior drive-by shooting involving defendant which was introduced at trial, was not so grossly improper as to require the trial court to intervene ex mero motu. Taking the statement in context of the prosecutor's entire closing, in which the prosecutor reminded the jury that the prior incident was introduced solely for the purpose of showing defendant's identity as the perpetrator in the instant case, the statement did not impede defendant's right to a fair trial. **State v. Solomon, 483.**

Prosecutor's closing argument—murder trial—credibility of witness—In defendant's trial for first-degree murder arising from a fatal shooting, the trial court did not commit reversible error by failing to intervene ex mero motu during the State's closing argument when the prosecutor stated that one of the witnesses "was the most credible witness that testified" in the trial, that the witness "never lied," and that the witness told the jury the truth. The statements were not improper because they were made in the context of showing that the witness gave specifics in his testimony that matched the physical evidence and, as such, did not constitute improper statements of the prosecutor's personal beliefs but were made in order to give the jury reasons to believe the witness by arguing his truthfulness. **State v. Arrington, 211.**

Prosecutor's closing argument—remarks about functioning alcoholics—not grossly improper—In a prosecution for multiple crimes arising from a domestic violence incident, where some evidence indicated that defendant had been drinking for several hours before attacking his wife, the trial court did not abuse its discretion by failing to intervene ex mero motu during the State's closing argument, when the prosecutor made several statements about how alcoholics can "still function" and "know right from wrong" even with a high blood alcohol concentration. The prosecutor's statements were, at most, inappropriately speculative, but not grossly improper considering that, viewed in their full context, they were used to highlight the lack of spelling errors in the text messages defendant sent after the incident rather than to indicate that defendant was a functioning alcoholic. **State v. Tadlock, 754.**

Prosecutor's closing statement—murder trial—no improper assumption of facts not in evidence—In defendant's trial for first-degree murder, the trial court was not required to intervene ex mero motu during the prosecutor's closing argument during which, contrary to defendant's assertion on appeal, the prosecutor argued facts that were properly admitted into evidence—including contents downloaded from defendant's phone—and all reasonable inferences drawn therefrom. Further, the prosecutor's suggestion in closing that defendant learned from a concealed carry class that he could assert self-defense by claiming to be in fear for his life did not constitute reliance on improperly admitted hearsay; therefore, the prosecutor did not violate ethics rules governing attorney conduct. **State v. Joyner, 93.**

Rape and kidnapping—defenses—voluntary intoxication—jury instruction—unnecessary—In a prosecution for charges—including first-degree kidnapping and first-degree forcible rape—arising from a domestic violence incident between defendant and his wife, defendant was not entitled to a jury instruction on voluntary intoxication where, although some evidence indicated that he had been drinking for several hours before the incident, the remaining evidence did not show that he was unable to control himself or was so intoxicated that he could not form the specific intent to commit the charged crimes. Firstly, there was no evidence that defendant

CRIMINAL LAW—Continued

had difficulty speaking or walking, or that he had engaged in inexplicable behavior immediately prior to attacking his wife. Moreover, after the incident, defendant helped his wife up from the floor, helped to clean her up, brought her pain medication, and apologized to her, all of which indicated his ability to appreciate the nature of his actions. **State v. Tadlock, 754.**

DAMAGES AND REMEDIES

Restitution—larceny of a firearm—exact value of award—worksheet insufficient—remanded—The trial court's award of $1,000 in restitution—entered after a jury found defendant guilty of the larceny of a firearm that defendant, an employee at a car detailing business, stole from the trunk of a customer's vehicle—was vacated and the matter was remanded for a rehearing on restitution. While the victim's trial testimony provided some evidence regarding the firearm (that it was a "special" 1911 Colt 45 caliber gun which had been competition-tuned by a gunsmith) which would support an award, the only evidence on the exact value of the gun was the restitution worksheet, a document that has been expressly held insufficient to sustain an award of restitution. **State v. Gray, 728.**

DIVORCE

Alimony—income and expenses—insufficient findings of fact—In a proceeding for equitable distribution, alimony, and child support, the trial court erred in awarding alimony from plaintiff to defendant where the court's amended order incorrectly calculated plaintiff's income—by relying on plaintiff's income from a prior year instead of upon his current income, despite plaintiff having provided evidence regarding his current income—and failed to make findings of fact as to the parties' respective expenses or standards of living. **Theuerkorn v. Heller, 534.**

Division of military pension—calculation—coverture fraction properly applied—In a matter involving the division of military pension benefits, the trial court properly granted plaintiff twenty-one percent of her ex-husband's disposable military retired pay and, in a declaratory judgment, properly interpreted the parties' previous separation and property settlement agreement to require use of a coverture fraction rather than a "Frozen Benefit Rule" to calculate plaintiff's portion of defendant's pension benefits. The clear and unambiguous language in the agreement—that plaintiff was entitled to fifty percent of defendant's benefits "accumulated during the course of the marriage"—was to implement the standard method of calculation in place at the time the parties signed the agreement, which was to multiply the coverture fraction by the disposable retired pay that defendant was to receive upon his retirement. Despite defendant's attempt to invoke the Frozen Benefit Rule (so that plaintiff's share was "frozen" as of the date of the agreement), that rule was not codified until nearly seven years after the parties entered into their agreement. **Green v. Green, 608.**

Equitable distribution—distributive award—no explicit finding of fact—ability to pay ascertainable from the record—In a proceeding for equitable distribution, alimony, and child support, the trial court did not abuse its discretion in ordering plaintiff to pay defendant a distributive award, rather than making an in-kind distribution, as provided for in N.C.G.S. § 50-20(e), where, although the court did not make an explicit finding of fact regarding plaintiff's ability to pay the award with liquid assets, plaintiff's ability to do so was ascertainable from unchallenged

DIVORCE—Continued

findings of fact, including that plaintiff was awarded portions of two retirement accounts, as well as a home with significant equity. **Theuerkorn v. Heller, 534.**

Equitable distribution—military pension—calculation and award—statutory default equation properly applied—In an action between former spouses in which plaintiff ex-wife filed a motion seeking division of defendant ex-husband's military pension, the trial court's award of 24.7720% of defendant's military pension to plaintiff and its order requiring defendant to remit $50,111.73 of back payments to plaintiff were supported by its findings of fact, which in turn were supported by competent evidence. The parties' prior consent judgment had reserved the pension issue for further consideration without specifying an equal division; therefore, the statutory default method applied and, here, the trial court properly applied the statutory default coverture fraction in its calculation and award. **Holland v. Holland, 362**.

Subject matter jurisdiction—military pension division—dismissal of procedural motion—no effect—In an action between former spouses in which plaintiff ex-wife filed a motion seeking division of defendant ex-husband's military pension, the trial court properly denied defendant's motion to dismiss for lack of subject matter jurisdiction. At the time plaintiff filed her motion, her sole remaining claim was for equitable distribution (ED). Contrary to defendant's assertion, plaintiff's voluntary dismissal of her initial motion—she refiled a new one several months later—did not effectuate a dismissal of the ED claim in its entirety, but was instead a procedural withdrawal of her motion (done erroneously with a pre-printed AOC form for voluntary dismissals) that did not cause prejudice to defendant. **Holland v. Holland, 362.**

EVIDENCE

Against a child—Evidence Rule 404(b)—no error—Evidence Rule 403—no abuse of discretion—In a prosecution for numerous sexual offenses against a child—defendant's daughter, whose abuse by defendant from an early age escalated until she had a panic attack in high school and disclosed defendant's behavior—the trial court did not err, let alone plainly err, in admitting evidence from defendant's ex-wife about defendant's abusive, erratic, and threatening behavior against her where that evidence met the criteria for admission under Evidence Rule 404(b) because it was: (1) temporally proximate to charged offenses against defendant's daughter; (2) probative of why defendant's ex-wife did not report an incident in which defendant sexually assaulted both his daughter and his then-wife and why his daughter did not initially report being abused; and (3) sufficiently similar to the charged offenses, in that both involved sexual abuse against family members, sometimes took place in the same locations, often involved force and threats, and included vaginal rape. Further, the trial court did not abuse its discretion in admitting the testimony under Evidence Rule 403 after reviewing the ex-wife's testimony outside the presence of the jury, hearing opposing arguments from counsel, and explaining the reasons for admitting the evidence. **State v. Maney, 108.**

Authentication—forensic download of defendant's phone—testimony confirming contents—In defendant's trial for first-degree murder, the trial court did not err, much less plainly err, by allowing the State to introduce into evidence a forensic download of defendant's cell phone. The data extracted, including text messages and call logs, was properly authenticated pursuant to Evidence Rule 901 by the testimony of the sheriff's department sergeant who had examined defendant's phone and its contents prior to initiating the download and therefore had knowledge that the extracted data was what the State claimed it to be. **State v. Joyner, 93.**

EVIDENCE—Continued

Character evidence—door opened by defendant's cross-examination—properly admitted—In a prosecution on charges of first-degree murder and intentional child abuse (arising from the death of defendant's one-year-old son), the trial court properly admitted character evidence (that defendant cheated on the child's father while pregnant with the child) where defendant "opened the door" to such testimony by asking the father, on cross-examination, whether defendant had "been a good woman" to the father during their relationship. **State v. Upchurch, 775.**

Expert testimony—sexual offenses against a child—impermissible vouching for victim's credibility—new trial—In a prosecution for multiple charges of taking indecent liberties with a child and first-degree statutory sexual offense, in which no physical evidence of abuse was presented, defendant was entitled to a new trial because two expert witnesses gave testimony that impermissibly vouched for the victim's credibility. First, the victim's treating therapist made several statements indicating her opinion or assumption that abuse had occurred and, more importantly, testified that she had diagnosed the victim with post-traumatic stress disorder and that the symptoms he exhibited were consistent with the trauma he had reported. Second, the doctor who first evaluated the victim testified that the lack of physical findings was consistent with the victim's disclosure of sexual abuse. These errors rose to the level of plain error since, absent the improper evidence, the jury likely would have reached a different verdict. **State v. Wingate, 800.**

Expert witness testimony—reliability—retrograde extrapolation—blood alcohol concentration—plain error analysis—After defendant crashed his car into a tree while his wife was in the passenger seat, the trial court in defendant's prosecution for charges of felony death by vehicle and driving while impaired did not err by allowing a forensic chemist to give expert testimony about determining defendant's blood alcohol concentration at the time of the crash through a retrograde extrapolation analysis. This testimony met the reliability requirements of Evidence Rule 702 where it was based on sufficient underlying facts—including blood drawn from defendant roughly an hour after the crash, defendant's own statements about drinking before driving, and other evidence found at the crash scene—which in turn supported the witness's assumption that defendant was in a post-absorptive state when he crashed the car. Furthermore, the trial court did not commit plain error in admitting the testimony where the State had presented ample other evidence of defendant's impairment during the crash, meaning that defendant could not show that the jury would have reached a different result absent the expert's testimony. **State v. Venable, 788.**

Expert witness testimony—Rule 702 reliability requirements—only some Daubert factors addressed—plain error review—In defendant's appeal from her convictions for possession of methamphetamine and possession of drug paraphernalia, the Court of Appeals applied plain error review to defendant's argument that testimony from a forensic scientist—tendered at trial by the State, without objection, as an expert in using forensic chemistry to detect narcotics—did not meet the reliability requirements of Evidence Rule 702(a). In doing so, the appellate court found no error—much less plain error—where the witness satisfied Rule 702's requirements by describing a two-part test he used to identify controlled substances, which was generally accepted in the scientific community, and then by explaining how he applied that testing method to the white crystalline material seized from defendant's purse during her arrest. Furthermore, the witness's failure to testify as to all of the reliability factors identified in *Daubert v. Merrell Dow Pharmaceuticals*,

EVIDENCE—Continued

Inc., 509 U.S. 579 (1993), did not render his testimony unreliable or inadmissible. **State v. Stidham, 741.**

Hearsay— exceptions—excited utterance—startling event—bank statement showing large sum of money missing—In a case involving multiple counts of exploitation of an older adult by defendant who, together with her husband, managed the finances of her mother-in-law, an elderly woman who later discovered upon reading a bank statement that a significant amount of money was missing from her bank account, the trial court properly admitted hearsay statements that the mother-in-law made immediately after reading the bank statement (including "someone is taking money out of my bank account," "I want it back now," and "[I] never told them nor gave permission to anyone to withdraw money from [my] account,") as substantive evidence that defendant withdrew the money for her personal use without her mother-in-law's knowledge or permission. Given the mother-in-law's circumstances—as an eighty-four-year-old widow who suffered from dementia and had no control over her finances—and visible emotion immediately after her discovery, the act of opening a bank statement and noticing a large sum missing from her life savings qualified as a sufficiently startling event such that the excited utterance exception to the rule against hearsay applied to her statements. **State v. Fraley, 463.**

Hearsay—pre-trial statements—corroborative of trial testimony—properly admitted—In a prosecution on charges of first-degree murder and intentional child abuse (arising from the death of defendant's one-year-old son), the trial court properly admitted pre-trial statements by the child's father—that he did not believe defendant's version of the events which resulted in their child's death—where the challenged statements corroborated, and tended to add weight and credibility to, the father's trial testimony. **State v. Upchurch, 775.**

Lay opinion testimony—admissibility—bullet trajectory—detective not qualified as ballistics expert—no abuse of discretion—In defendant's trial for second-degree murder (which arose from the fatal shooting of a man from whom defendant sought to buy marijuana), the trial court did not abuse its discretion by allowing testimony from a detective regarding the trajectory of bullets based on dowel rods that he had placed in bullet holes at the crime scene. In addressing this issue of first impression, the appellate court noted that, although the detective was not qualified as an expert in ballistics or projectiles, his testimony was properly admitted as lay opinion testimony pursuant to Evidence Rule 701, since his opinion was based on his own personal observations, training, and experience. **State v. Townsend, 132.**

Lay opinion testimony—bullet trajectory—detective not qualified as ballistics expert—not subject to statutory disclosure requirement—In defendant's trial for second-degree murder (which arose from the shooting of a man from whom defendant sought to buy marijuana), where a detective's testimony regarding bullet trajectories was properly admitted as lay opinion testimony and where the detective was not qualified as an expert witness at the trial, the disclosure requirements in N.C.G.S. § 15A-903(a)(2) (requiring the State to provide expert witness materials to defendants prior to trial) did not apply. **State v. Townsend, 132.**

Murder trial—victim's bloody clothing—probative value not substantially outweighed by danger of unfair prejudice—In defendant's trial for first-degree murder arising from a fatal shooting, the trial court did not abuse its discretion by allowing the State to introduce into evidence the victim's bloody clothing because

EVIDENCE—Continued

the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The evidence was used by the State to demonstrate how and where the victim was shot and was not excessively displayed. **State v. Joyner, 93**.

Prior crime—murder trial—Rule 404(b)—identity of defendant as shooter—prejudice analysis—In a first-degree murder prosecution arising from the fatal drive-by shooting of two victims, the trial court's admission of defendant's involvement in a prior drive-by shooting—for which defendant pleaded guilty to assault with a deadly weapon with intent to kill—did not amount to prejudicial error. Leaving aside the question of whether the separate shooting incidents were sufficiently similar for purposes of proving defendant's identity as the perpetrator in the instant case, defendant could not show prejudice given the overwhelming other evidence of his guilt—even if circumstantial—and, therefore, there was not a reasonable possibility that the jury would have acquitted him absent the challenged evidence. **State v. Solomon, 483.**

HOMICIDE

First-degree murder—defendant as perpetrator—sufficiency of evidence—surveillance and tracking data—In a first-degree murder prosecution arising from the fatal drive-by shooting of two victims, the State presented substantial evidence of defendant's identity as the perpetrator to survive defendant's motion to dismiss, including defendant's locations, cell phone communications, and actions taken before and after the shootings. Although circumstantial, the evidence consisting of video surveillance footage, cell phone analysis, ankle monitoring data, and internet search history raised more than mere suspicion or conjecture as to defendant's participation in the shootings. **State v. Solomon, 483.**

Second-degree murder—malice—intentional act—use of deadly weapon—sufficiency of evidence—In a prosecution of multiple charges arising from an altercation in which two people were shot, one fatally, the State presented substantial evidence from which a jury could find that defendant acted with malice to support second-degree murder. Testimony from multiple witnesses stating that they saw defendant raise a gun and fire at the victim supported an inference that defendant acted intentionally. Moreover, although defendant's account of the incident differed in some details, she related pulling out the gun and cocking it before the victim was shot; in any event, any inconsistencies in the evidence were for the jury to resolve, and did not require dismissal of the charge. **State v. Swinson, 496.**

HOSPITALS AND OTHER MEDICAL FACILITIES

Certificate of need—competing applications—award to one applicant insufficient to show prejudice to another—In a certificate of need (CON) matter, in which three applicants had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina, where the administrative law judge properly upheld the decision of the Department of Health and Human Services to award the CON to one applicant, since the agency did not commit any error in making its determination, the mere denial of another applicant's submission did not automatically establish substantial prejudice to that unsuccessful applicant. **MH Mission Hosp., LLLP v. N.C. Dep't of Health & Hum. Servs., 372.**

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

Certificate of need—competitive review—denial—no substantial prejudice—The decision of the Department of Health and Human Services denying petitioner's application for a certificate of need (CON) to build a fixed MRI scanner—and instead awarding the CON to a second applicant—did not constitute substantial prejudice as a matter of law and was therefore properly upheld by an administrative law judge. Petitioner failed to show that the agency's decision was erroneous or improper where the agency had no statutory obligation to favor one applicant over another and was not required to weigh market competition in the same city over other relevant factors. Further, although petitioner argued that the denial of its application resulted in a loss of forecasted revenue, its projections were merely hypothetical, particularly where those projections were based on presumptions that residents would shift from two existing MRI units to petitioner's newly-built one, if it were granted the CON. **Chesapeake Diagnostic Imaging Ctrs., LLC v. N.C. Dep't of Health & Hum. Servs., 582**.

Certificate of need—competitive review—market access—as-applied constitutionality—The decision of the Department of Health and Human Services denying petitioner's application for a certificate of need (CON) to build a fixed MRI scanner—and instead awarding the CON to a second applicant—was not unconstitutional as applied to petitioner where, despite petitioner's argument, the agency was not required to weigh market competition over other factors in its review process, or to solely consider whether its decision would allow a monopoly of certain services to form. Here, the agency found the competitor's application to be superior to petitioner's application in three out of five factors; therefore, the administrative law judge properly affirmed the agency's decision. **Chesapeake Diagnostic Imaging Ctrs., LLC v. N.C. Dep't of Health & Hum. Servs., 582**.

Certificate of need—competitive review—property interest asserted—no due process implications—The decision of the Department of Health and Human Services denying petitioner's application for a certificate of need (CON) to build a fixed MRI scanner—and instead awarding the CON to a second applicant—did not constitute a deprivation of a property interest implicating due process rights and, thus, there was no requirement for the reviewing administrative law judge to make findings regarding petitioner's putative property interest. Petitioner had no legitimate claim of entitlement to an approved CON application in a competitive review, in which the agency had the statutory authority to compare multiple applicants and to either approve, approve with conditions, or deny any application. **Chesapeake Diagnostic Imaging Ctrs., LLC v. N.C. Dep't of Health & Hum. Servs., 582**.

Certificate of need—conformance with statutory criteria—cost, design, and means of construction—designated Brownfield site—The administrative law judge (ALJ) properly affirmed the decision of the Department of Health and Human Services to award a certificate of need (CON) to one of three applicants that had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina. The selected applicant complied with Criteria 12 (regarding the reasonableness of the cost, design, and means of construction) where, although its proposed development of a new hospital was on a designated EPA Brownfield Site, there was no evidence of a legal or practical bar to the site being developed, and the ALJ's further determination that the property could be safely remediated was not contradicted by any evidence that remediation would exceed projected development costs. **MH Mission Hosp., LLLP v. N.C. Dep't of Health & Hum. Servs., 372.**

HOSPITALS AND OTHER MEDICAL FACILITIES—Continued

Certificate of need—conformance with statutory criteria—need determination—"surgical services"—The administrative law judge properly affirmed the decision of the Department of Health and Human Services to award a certificate of need (CON) to one of three applicants that had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina. The selected applicant complied with Criteria 1 (requiring a proposed project to be consistent with applicable policies and need determinations in the SMFP) where, although its project did not include a general purpose operating room (OR) (contained in both of the other applicants' plans), the plain and unambiguous language of the SMFP did not require a general purpose OR; moreover, the selected plan included a new c-section operating room, which qualified under the broad category of "medical or surgical services" contained in the SMFP. **MH Mission Hosp., LLLP v. N.C. Dep't of Health & Hum. Servs., 372.**

Certificate of need—public hearing—limits placed on applicant employees from speaking—no substantial prejudice—In a certificate of need (CON) matter, in which three applicants had submitted a CON application for acute care beds and other medical services in response to a State Medical Facilities Plan (SMFP) identifying those needs in western North Carolina, the administrative law judge properly determined that the decision of the Department of Health and Human Services to prohibit eight employees of one of the applicants from speaking during a portion of the agency's public hearing—a part of the hearing process distinct from the Proponent Time Period, during which applicants' employees were allowed to speak—did not constitute prejudicial error. Even if the restriction placed on the employees was in error or not in keeping with the agency's past practice, there was no substantial prejudice as a matter of law, since the limitation was in accord with a permissible interpretation of the public hearing statute. **MH Mission Hosp., LLLP v. N.C. Dep't of Health & Hum. Servs., 372.**

HUSBAND AND WIFE

Separation agreement—validity—reconciliation—no written modification—rescission not required—In an action initiated by plaintiff after her husband died intestate in which plaintiff sought to have their separation agreement, which also contained property settlement provisions, declared void, the trial court's determination that the agreement remained in effect was supported by competent evidence. Even assuming that plaintiff and her husband had reconciled after signing the agreement—about which conflicting evidence was presented—any reconciliation did not operate as a revocation of the agreement because plaintiff and decedent never revoked or modified the agreement in writing as required by the agreement's terms. Plaintiff failed to show that missed payments by her husband pursuant to the agreement constituted a material breach for which rescission was required, since legal remedies were available to compensate her for her loss. Finally, there was no merit to plaintiff's contention that a loan modification executed by her and her husband (modifying the terms of a deed of trust) constituted a modification of the separation agreement, where the two documents were entirely separate in subject matter and intentions. **Jones v. Jones, 660.**

IMMUNITY

Governmental—not applicable—allowing for-profit entity to operate after-school program on public school grounds—proprietary function—In a tort action against a public school system and other defendants, which was brought by the parents of a child who was sexually assaulted by an owner and operator of a private, for-profit, after-school language program that used the facilities of the public school system to conduct its business, the school system was not entitled to governmental immunity. In allowing the for-profit program to use school facilities for profit-making activities for a substantial fee but without a contract, the school system was engaged in a commercial activity, rather than the sort of activity traditionally provided by government entities. Governmental immunity does not extend to such a proprietary, as opposed to governmental, function. **Brady v. Charlotte-Mecklenburg Bd. of Educ., 560.**

Public official immunity—police officer—summary judgment—genuine issue as to gross negligence—immunity pierced—In a tort action arising from a car crash involving plaintiff and a police officer responding to a shoplifting incident, the trial court did not err at the summary judgment phase in finding that the officer was not immune from suit through public official immunity, since the court also found that a genuine issue of material fact existed as to whether the officer's conduct during the incident rose to the level of gross negligence, which in turn pierced the shield of absolute immunity the officer would have enjoyed under the public official immunity doctrine. **Hatcher v. Rodriguez, 351.**

Public official—not applicable—allowing for-profit entity to operate after-school program on public school grounds—public employees—In a tort action, brought by the parents of a child who was sexually assaulted by an owner and operator of a private, for-profit, after-school language program that used the facilities of a public school system to conduct its business against three employees of the public school system and other defendants, employee-defendants were not entitled to public official immunity because they were public employees, rather than public officials. Even if the employees' positions were created by statute (the Community Schools Use Act, N.C.G.S. §§ 115C-203 through 115C-209.1)—which was unclear—the legislation did not expressly delegate to the employees any power over the approval process for organizations and individuals wishing to use school facilities that was more than ministerial. **Brady v. Charlotte-Mecklenburg Bd. of Educ., 560.**

INDICTMENT AND INFORMATION

Continuing criminal enterprise—non-jurisdictional, non-statutory defect—prejudice not established—On remand from the North Carolina Supreme Court for reconsideration in light of *State v. Singleton*, 386 N.C. 183 (2024) (holding that the Criminal Procedure Act abrogated any remaining portion of the common law jurisdictional indictment rule), the Court of Appeals held that, although defendant's indictment on a charge of continuing criminal enterprise (CCE)—related to his alleged involvement with a cocaine trafficking ring—was defective, defendant was not entitled to relief. While the indictment failed to enumerate the alleged underlying offenses comprising CCE, that defect was non-jurisdictional in nature, and defendant did not establish that the indictment failed to satisfy constitutional purposes. Further, defendant failed to establish that the flawed indictment was prejudicial in light of the overwhelming evidence of his guilt. **State v. Cornwell, 453.**

Defective indictment—first-degree statutory sexual offense charged—sentenced to greater offense—In a sexual offense prosecution, where the Court of

INDICTMENT AND INFORMATION—Continued

Appeals vacated defendant's sentence and remanded for a new trial due to improperly admitted evidence, the appellate court noted an issue with defendant's indictment for consideration on remand. Although defendant's indictment charged him with first-degree statutory sexual offense pursuant to N.C.G.S. § 14-27.29—an offense which requires proof that a defendant is at least four years older than the victim—the trial court had sentenced defendant to the greater offense of statutory sexual offense with a child by an adult under N.C.G.S. § 14-27.28—an offense which requires the additional proof that a defendant was at least eighteen years old at the time of the offense. Although all of the facts needed to convict defendant pursuant to the latter statute were present in the indictment, the various references at trial to both offenses demonstrated a lack of certainty about which offense defendant had been charged with and, therefore, resulted in prejudice to defendant. **State v. Wingate, 800.**

JUDGES

Impartiality—numerous references to sheriff—no prejudicial error—In defendant's trial for first-degree murder, the trial judge's comments introducing the county sheriff as the "High Sheriff" to the prospective jurors during jury selection and repeatedly thanking the jurors "on behalf of the [s]heriff" throughout the trial did not amount to an improper expression of opinion in violation of N.C.G.S. §§ 15A-1222 and 15A-1232; further, even had any error occurred, defendant could not show prejudicial error in light of the overwhelming evidence of his guilt. **State v. Joyner, 93.**

JURISDICTION

Disciplinary—attorney licensed out of state—Rule 8.5 of the Rules of Professional Conduct—In an action before the North Carolina State Bar Disciplinary Hearing Commission (DHC) involving an attorney (defendant) who lived in North Carolina and maintained an office there but was licensed in New York and limited his practice to federal immigration court, a disciplinary order disbarring defendant was reversed where the DHC lacked subject matter jurisdiction over defendant under Rule 8.5 of the Rules of Professional Conduct, which authorized the State Bar to discipline attorneys not licensed in North Carolina but who "render any legal services in North Carolina." Rule 8.5 could not confer jurisdiction over defendant beyond the jurisdiction granted under N.C.G.S. § 84-28, which limited the DHC's disciplinary jurisdiction to attorneys "admitted to practice law in [North Carolina]." Furthermore, Chapter 84 defined the "practice [of] law" in terms of the specific legal services performed, not the physical location where an attorney works or meets with clients. **N.C. State Bar v. Musinguzi, 410.**

Disciplinary—attorney licensed out of state—statutory basis for jurisdiction—limited to attorneys admitted to practice in North Carolina—An order of discipline from the North Carolina State Bar Disciplinary Hearing Commission (DHC) was reversed where the DHC lacked subject matter jurisdiction over defendant, since N.C.G.S. § 84-28 limits the DHC's disciplinary jurisdiction to any attorney "admitted to practice law in [North Carolina]," and defendant—though he lived in North Carolina and maintained a law office there—was licensed in New York and limited his practice to federal immigration court. Importantly, the more specific language in section 84-28 controlled over the more general language in section 84-23 granting the State Bar disciplinary authority over any "licensed lawyer," which, when

JURISDICTION—Continued

read in conjunction with section 84-28, necessarily referred to any lawyer licensed to practice in North Carolina. **N.C. State Bar v. Musinguzi, 410.**

Trial court—entry of contempt order—no divestment of jurisdiction by prior notice of appeal—The trial court properly exercised its jurisdiction when it entered a criminal contempt order after defendant had entered notice of appeal from a form document in which the trial court checked off a box finding defendant in indirect criminal contempt (albeit for circumstances other than those pertaining to defendant) and which indicated defendant's sentence and fine for the contempt. The form document was not file stamped and was neither a final judgment nor an appealable interlocutory order; therefore, defendant's notice of appeal from that instrument did not divest the trial court of its jurisdiction to memorialize its oral rulings at the contempt hearing in a final written order of contempt. **State Bd. of Exam'rs of Plumbing, Heating & Fire Sprinkler Contractors v. Hudson, 71**.

JURY

Due process right to a unanimous jury—jury instructions and verdict sheets—no error—In a prosecution that resulted in defendant being found guilty of second-degree rape—where the indictment alleged that defendant "knew" the victim was mentally incapacitated and was physically helpless (due to having consumed alcohol), while the jury was instructed that, to convict defendant, it must find beyond a reasonable doubt that he "knew or should reasonably have known" of the victim's condition—defendant's due process rights to a unanimous jury verdict and to be convicted only of an offense for which he was charged were not violated. First, N.C.G.S. § 15-144.1(c) provides that short-form indictments for second-degree rape (based on victim incapacity) need not allege the element of actual or constructive knowledge of the victim's condition. Second, the disjunctive instruction on knowledge did not deny defendant a unanimous jury verdict because defendant's actual versus constructive knowledge of the victim's incapacity did not implicate separate criminal acts, but, instead, constituted alternative factual avenues to prove the same element. **State v. Tate, 507.**

LACHES

Equitable distribution—motion for division of military pension—delay not unreasonable—pension issue reserved until vesting—In an action between former spouses in which plaintiff ex-wife filed a motion seeking division of defendant ex-husband's military pension, the trial court properly denied and dismissed defendant's laches defense—whereby defendant asserted that plaintiff's fifteen-year delay in seeking to resolve her equitable distribution claim was unreasonable and should be barred. First, the parties' prior consent judgment explicitly reserved the pension issue for further consideration; therefore, defendant was on notice of the grounds for the issue he sought to bar. Second, since defendant was not vested in his military pension until his retirement, it was not unreasonable for plaintiff to wait until then to file her motion, which she did within two months of defendant's retirement. Finally, defendant's assertion that he would have sought other employment had he known that his military pension would be divided did not serve to support his laches defense. **Holland v. Holland, 362.**

MOTOR VEHICLES

Driving while impaired—appreciable impairment—blood alcohol concentration—sufficiency of evidence—After defendant crashed his car into a tree while his wife was in the passenger seat, the trial court in defendant's criminal prosecution did not err by denying defendant's motion to dismiss a charge of driving while impaired (DWI), where the State presented sufficient evidence of defendant's impairment at the time of the crash. First, the State showed that defendant was "appreciably impaired" through testimony from one of the officers present at the crash scene who, despite not having personally detected an odor of alcohol on defendant, observed other evidence of impairment, including five empty bottles of brandy inside defendant's car along with defendant's own admission to drinking before driving. Second, the State presented evidence of defendant's blood alcohol concentration about an hour after the crash, which was sufficient in and of itself to support a DWI conviction. **State v. Venable, 788.**

Felonious operation of a motor vehicle to elude arrest—jury instructions—plain error not shown—In a prosecution for felonious operation of a motor vehicle to elude arrest—which requires the State to prove the existence of two or more statutory aggravating factors to elevate the offense to a felony—where defendant stipulated to the existence of one factor (driving while license revoked) and the State offered evidence of another (reckless driving), the trial court gave instructions regarding the State's burden of proof for the felony versus misdemeanor levels of the offense that were correct as a matter of law and clearly informed the jury that the State still bore the burden to prove beyond a reasonable doubt that defendant drove recklessly; the jury's request, during deliberations, for clarification of the difference between the misdemeanor and felony levels of the offense did not render the instructions erroneous, let alone demonstrate plain error by the trial court. **State v. Montgomery, 124.**

Felonious operation of a motor vehicle to elude arrest—reckless driving—evidence sufficient—In a prosecution for felonious operation of a motor vehicle to elude arrest, the State presented evidence of reckless driving (a statutory aggravating factor, two of which are required to elevate the offense to a felony) sufficient to send the charge to the jury: defendant drove into a lane closed to regular traffic where multiple construction workers were working on foot and paving was underway, disregarded the commands of a uniformed police officer who initiated a traffic stop, drove his truck in reverse and in the wrong direction through the construction zone, increased his speed, ran over the officer's foot, struck the officer's hip and thigh, and knocked the officer to the ground. Taken in the light most favorable to the State, that evidence indicated that defendant drove his truck in willful disregard of the safety of others and/or in a manner likely to endanger others. **State v. Montgomery, 124.**

Felony death by vehicle—intervening negligence—jury instruction—final mandate—no plain error—After defendant crashed his car into a tree while his wife was in the passenger seat, the trial court in defendant's prosecution for charges of felony death by vehicle and driving while impaired did not err by failing to read the entire instruction on intervening negligence when instructing the jury on proximate cause or by omitting intervening negligence from its final mandate on the felony charge. The court's instructions sufficiently incorporated the main principles regarding intervening negligence, and its final mandate on felony death by vehicle included the appropriate law on proximate cause. Further, any error here did not amount to plain error where, given the ample evidence presented to support defendant's guilt of

MOTOR VEHICLES—Continued

the charged crimes, the jury probably would not have reached a different result had the court read the full intervening negligence instruction. **State v. Venable, 788.**

NEGLIGENCE

Failure to train a minor to comply with rules of a sporting event—tort not recognized—dismissal proper—In a tort proceeding brought by a high school lacrosse player and his parents against another high school lacrosse player and defendant player's school—arising from a collision between the two players during a game that resulted in serious injuries to plaintiff player—the trial court properly dismissed plaintiffs' negligence and negligent infliction of emotional distress claims against defendant school because neither North Carolina statutes nor case law establishes a cause of action for the failure of a school or coach to train a minor in the rules of a sporting event. **Fenderson v. Davidson Day Sch., 591.**

Gross negligence—car accident—officer speeding in response to nonemergency—reckless disregard for safety of others—In a tort action arising from a car crash involving plaintiff and a police officer, the trial court did not err by denying summary judgment to defendants (the officer and the city he worked for) on plaintiff's gross negligence claim, where the evidence showed that the officer: responded to a shoplifting incident despite no request for assistance from the officer at the scene; initiated an emergency response, which was against department policy for a property crime; turned on his lights but failed to activate his siren; by his own admission, did not know how to operate the siren following recent repairs to his vehicle; drove at 52 mph in a 35-mph speed zone; and looked away from the road to adjust the siren controls, all while driving into an oncoming traffic lane on a two-lane road with double lines, after which he crashed into plaintiff's vehicle. Based on these facts, a jury could find that the officer's actions showed a high probability of injury to the public despite the absence of significant countervailing law enforcement benefits, thereby creating a genuine issue of material fact on the issue of gross negligence. **Hatcher v. Rodriguez, 351.**

Gross negligence—respondeat superior—applicability conceded by defendants—claims of inadequate training and negligent supervision still allowed to proceed—In a tort action arising from a car crash involving plaintiff and a police officer responding to a shoplifting incident, where the trial court denied summary judgment to defendants (the officer and the city he worked for) on plaintiff's gross negligence claim, the trial court did not err by declining to dismiss plaintiff's additional claims of inadequate training and negligent supervision where, although the city conceded that the officer acted within the course and scope of employment at the time of the collision, thereby enabling plaintiff to argue the city's liability under the doctrine of respondeat superior, plaintiff also sought punitive damages, which could only be pursued through the inadequate training and negligent supervision claims. **Hatcher v. Rodriguez, 351.**

Jury instructions—joint and several liability—assault by massage therapist—negligent hiring by employer—new trial granted on damages—In an action in which plaintiff brought intentional tort claims against a massage therapist for alleged sexual assault and negligent hiring claims against the therapist's employer, the trial court committed reversible error by failing to give plaintiff's requested jury instruction on joint and several liability, under which defendant employer could be held jointly and severally liable for its employee's intentional wrongful acts. The requested instruction was supported by the evidence and correct as a matter of law.

NEGLIGENCE—Continued

Joint and several liability does not require a distinction between negligent and intentional acts, but may attach where independent acts committed by separate parties unite to proximately cause a single, indivisible injury. The dismissal of plaintiff's respondeat superior claim was of no effect, since liability under that doctrine would be merely derivative and, here, the jury found both defendants directly liable for plaintiff's injury. Where the trial court's given instruction did not accurately reflect the law and may have misled the jury with regard to the damages award, the judgment was reversed and the matter remanded for a new trial on damages only. **B.C. v. Palmetto Wellness Grp. N.C., LLC, 150.**

Off-property car accident—legal duty by property owner—harm not foreseeable—The trial court properly granted summary judgment to defendants—the owner and the management company of a shopping center—on plaintiff's negligence claim alleging that her husband's death in a car accident was the result of defendants' failure to prevent car meets in the shopping center's parking lot, which sometimes entailed car racing. Defendants could not be held liable for negligence where the accident and resulting harm were not reasonably foreseeable; the accident occurred two miles from the shopping center and the relationship between the teen driver's actions—deciding, after he left a car meet at the shopping center, to test his car's limits by accelerating to nearly ninety miles per hour and failing to stop at a stop sign before entering the intersection where he hit decedent's car—and the car meets were attenuated. **Ghassemi v. Centrex Props., Inc., 338.**

Standard of care—violation not shown—collisions between players inherent to lacrosse—summary judgment—In a tort proceeding brought by a high school lacrosse player and his parents against another high school lacrosse player, as well as defendant player's coach and school—arising from a collision between the two players during a game that resulted in serious injuries to plaintiff player—the trial court properly granted summary judgment in favor of defendant player because none of the evidence forecast showed that defendant player acted willfully or wantonly to injure plaintiff player, given the inherent nature of high-speed, high-impact body collisions in lacrosse. Specifically, all three officials who refereed the game agreed that defendant player did not intentionally make head-to-head (and, thus, illegal) contact, and two of the three officials believed that plaintiff player engaged in a potentially illegal, head-down block during the collision. Accordingly, defendants' related argument—that the trial court should have ruled that plaintiff player was contributorily negligent—and arguments from both parties regarding the trial court's judgment on the pleadings (which preceded the summary judgment ruling) were moot. **Fenderson v. Davidson Day Sch., 591.**

NUISANCE

Private and public—car meets in parking lot—single instance of injury—The trial court properly granted summary judgment to defendants—the owner and the management company of a shopping center—on plaintiff's nuisance claims (both public and private) alleging that her husband's death from a car accident resulted from defendants' failure to prevent car meets in the parking lot of the shopping center, which sometimes entailed car racing. Plaintiff failed to allege facts to support each essential element of a nuisance claim since, although she asserted that the car meets repeatedly occurred, there was no continuous injury but, rather, a single physical injury—her husband's death. Notably, plaintiff sought damages as a result of the accident but did not seek abatement of the alleged nuisance. **Ghassemi v. Centrex Props., Inc., 338.**

PARTIES

Challenge to mining permit—intervention of right—permissive intervention—conditions not met—Where appellants (a nonprofit entity dedicated to preserving William B. Umstead State Park and a couple who owned a home adjacent to the Park) sought to intervene in a contested case between the North Carolina Department of Environmental Quality (NCDEQ) and respondent (a company operating a quarry near the Park and seeking to modify a mining permit to expand its operations), the superior court properly affirmed the denial of appellants' motions by the administrative law judge (ALJ). The individual appellants failed to show a direct and immediate interest in the matter—as required to intervene of right pursuant to Civil Procedure Rule 24(a)(2)—because their basis for challenging the mining permit (a direct and substantial physical hazard to their home) differed from that of NCDEQ (significant adverse effects on the Park); further, they were not entitled to permissive intervention pursuant to Rule 24(b)(2) because there was no common question of law or fact between their asserted interest and the contested case. In addition, the interests of the nonprofit, which sought only permissive intervention, were adequately represented by NCDEQ such that the superior court was correct to determine that the ALJ did not abuse his discretion in denying the nonprofit's motion to intervene. **N.C. Dep't of Env't Quality v. Wake Stone Corp., 403.**

PROBATION AND PAROLE

Probation revocation—absconding from supervision—evidence sufficient—failure to exercise discretion—Where defendant—a resident of Virginia at the time he received a suspended sentence with 24 months of supervised probation after pleading guilty in North Carolina to two counts of obtaining property by false pretenses—was approved to transfer his North Carolina probation, first to Virginia (where he was already on probation) and then to West Virginia, before returning to Virginia without notifying his North Carolina probation officer and later failing to heed the officer's order to return to North Carolina, the evidence was sufficient to reasonably satisfy the trial court that defendant willfully violated or violated without lawful excuse a valid condition of his probation by absconding from supervision. However, the transcript of the revocation hearing revealed that the trial court failed to exercise its discretion in deciding to revoke defendant's probation, as evidenced by the court's remark that "it looks like the only alternative that I have at this particular time is to revoke [defendant's] probation." Accordingly, the trial court's order was vacated and the matter was remanded for the trial court to determine, in its discretion, whether or not to revoke defendant's probation. **State v. Johnson, 733.**

Revocation of probation—alleged violation—insufficiency of evidence—The trial court's judgment revoking defendant's probation was reversed where the State presented insufficient evidence to support the allegations in its probation violation report—that defendant, a registered sex offender, was "charged" with a failure to "register" a social media site "with the Sheriff's department," and that this was "a violation of [defendant's] probation." First, although the report alleged that defendant violated a condition of his probation by committing a crime on "18 January 2023," all of the evidence offered at the revocation hearing referenced events that occurred on a later date (in March 2023). Second, although the evidence established that defendant had accounts on certain social media platforms, there was no evidence showing that he failed to register these accounts within the ten-day window prescribed under N.C.G.S. §§ 14-208.11(a)(10) and 14-208.9(e) (requiring registered sex offenders to report any "online identifier" to the registering sheriff), thus committing a crime. **State v. Gault, 471.**

PROBATION AND PAROLE—Continued

Subject matter jurisdiction—to revoke probation—probation violation report—adequate notice of alleged violation—The trial court had jurisdiction to revoke defendant's probation where the State's probation violation report alleged that defendant, a registered sex offender, was "charged" with a failure to "register" a social media site "with the Sheriff's department," and that this was "a violation of [defendant's] probation." The violation report gave defendant sufficient notice of the alleged probation violation such that he could prepare his defense, where: it stated the condition of probation he allegedly violated—that he commit no criminal offense; mentioned the specific acts that the State contended constituted the violation; and indicated which criminal offense he allegedly committed, referring to his failure to report an online identifier pursuant to N.C.G.S. § 14-208.11(a)(10), which is a Class F felony. **State v. Gault, 471.**

PROCESS AND SERVICE

Abuse of process—judgment notwithstanding the verdict—more than a scintilla of evidence—In an alienation of affection proceeding that resulted in a jury finding in favor of defendant, the trial court erred in allowing plaintiff's motions for judgment notwithstanding the verdict on defendant's abuse of process claim—that plaintiff brought the action to harass, inconvenience, and embarrass defendant and plaintiff's former wife, who married defendant following her divorce from plaintiff—where plaintiff essentially conceded the existence of the first element of abuse of process (ulterior motive), and, taken in the light most favorable to defendant, more than a scintilla of evidence supported the second element (an act in the use of process not proper in the regular prosecution of the proceeding); namely, that on the pretext of assisting the process server, plaintiff trespassed onto defendant's property and spit on defendant. Further, plaintiff committed those acts after defendant's counsel communicated to plaintiff that counsel would accept service on defendant's behalf. **Ponder v. Been, 691.**

Change of parties on default judgment—void for lack of personal jurisdiction—no summons issued to individual—Rule 60 motion inappropriate—In a negligence case in which the trial court entered an order for entry of default judgment against a corporation, but plaintiff, after discovering that the corporation had been administratively dissolved years earlier, filed a Rule 60 motion to change the name of the judgment defendant from the corporate name to an individual ("Taylor"), the trial court abused its discretion by allowing the motion. First, the trial court had no personal jurisdiction over Taylor because, although plaintiff had served the summons and complaint on Taylor in his capacity as the corporation's registered agent, no summons had been issued or directed to Taylor in his individual capacity and, therefore, valid service of process did not occur. Moreover, plaintiff's attempt to use a Rule 60 motion to name a different judgment defendant could not cure the defective process because, rather than merely correcting a clerical error, the name change amounted to an improper substitution or entire change of parties. Accordingly, the trial court's amended order was vacated as void. **Russell v. Taylor, 207.**

PRODUCTS LIABILITY

Death from over-the-counter inhaler—contributory negligence—failure to read label—summary judgment—In an action brought by the estate of a woman who died after taking a single dose of an over-the-counter bronchodilator, the trial court properly granted summary judgment to defendant (the drug's manufacturer)

PRODUCTS LIABILITY—Continued

on claims of negligence and breach of implied warranty of merchantability where the facts did not raise any genuine issue of fact for a jury to resolve. Decedent's boyfriend purchased the inhaler from a drugstore after asking the pharmacist if the product was "good for breathing" without mentioning decedent's underlying health conditions; decedent self-administered one puff of the inhaler even though there were specific, express warnings on the packaging that the product should not be taken unless the user had been diagnosed with asthma—which decedent had not—and to consult a doctor before use if the user had heart disease or high blood pressure—both of which decedent had. Therefore, due to decedent's own contributory and negligent acts, the trial court properly concluded that plaintiff's claims were barred under N.C.G.S. § 99B-4(1) and (3)—even though, since the statute is written in the disjunctive, either one of the subsections would have been sufficient to bar recovery. **Saulsby v. Amphastar Pharm., Inc., 703.**

PUBLIC WORKS

Assessment of system development fees—water and sewage—county ordinance—"new development"—deference to county's interpretation—In a declaratory judgment action where a homebuilder (plaintiff) that owned multiple parcels within a development challenged the imposition of system development fees (SDFs) by Stanly County (defendant) in connection to the development's water and sewer system, the trial court's order granting summary judgment for defendant was affirmed where the SDFs had properly been assessed pursuant to a county ordinance, which imposed the fees upon parcels constituting "new development." Where the definition of "new development" was ambiguous under both the ordinance and the associated enabling statute, defendant reasonably interpreted the term to include parcels with completed construction that increased the number of "service units," which defendant reasonably defined as actual impervious surfaces requiring water capacity, and this definition of "new development" included plaintiff's parcels. **Adams Homes AEC, LLC v. Stanly Cnty., 1.**

REAL PROPERTY

Slander of title—common law—Real Property Marketable Title Act not implicated—jury instructions prejudicial—new trial required—In a lawsuit arising from the failed sale of defendants' real property to plaintiff—which resulted in plaintiff filing an unjust enrichment claim (which was properly dismissed) and a notice of *lis pendens* with the clerk of superior court and defendants asserting a counterclaim for slander of title—defendants sufficiently pled their counterclaim, but the trial court committed prejudicial error in instructing the jury on slander of title pursuant to the Real Property Marketable Title Act (rather than common law slander of title). The statutory scheme was not implicated where plaintiff never filed any notice of *lis pendens* with the register of deeds in the relevant county. Moreover, the jury instruction as given eliminated the burden of proof on two key elements of the common law claim: falsity and malice. Accordingly, the trial court's denial of plaintiff's motion for a new trial was reversed and the matter was remanded for further proceedings. **Palmetto RTC, LLC v. Fielden, 61.**

ROBBERY

With a dangerous weapon—evidence of endangerment to victim's life—lesser-included offense instruction not warranted—In a prosecution for charges

ROBBERY—Continued

including robbery with a dangerous weapon, the trial court did not abuse its discretion by declining to instruct the jury on the lesser-included offense of common law robbery where the State had presented sufficient evidence that the victim's life was threatened or endangered during the robbery—more specifically, that the victim saw defendant holding a rifle with both hands from the time he entered her bedroom in the middle of the night to steal two purses (after having already entered the home uninvited earlier that evening) until the victim escaped the scene. Further, no conflicting evidence was offered to negate the victim's claim that she felt so threatened by defendant brandishing the rifle that she thought she was going to die that night. **State v. Gamble, 242.**

With a dangerous weapon—sufficiency of evidence—possession of firearm threatening or endangering victim's life—jury instruction on mere possession unwarranted—In a prosecution for charges including robbery with a dangerous weapon, for which one of the essential elements was that the victim's life be threatened or endangered by defendant's use of a dangerous weapon, the trial court did not abuse its discretion by declining to instruct the jury that defendant's mere possession of a weapon during the course of a robbery, without more, is insufficient to support a finding that the victim's life was endangered or threatened. Defendant's request for this instruction was not supported by the evidence, which showed that defendant brandished a rifle in plain sight throughout the commission of the robbery—which occurred in the middle of the night in the victim's bedroom after defendant had already entered the victim's house uninvited earlier that evening—and the victim was not only aware of defendant brandishing the weapon but also felt so threatened by it that she thought she was going to die. **State v. Gamble, 242.**

SEARCH AND SEIZURE

Consent to search phone—voluntariness—lawful detention—probable cause—lack of coercion—In an appeal from judgment entered upon defendant's guilty plea to multiple sexual offenses against a minor and obstruction of justice, defendant's argument that the trial court erred by denying his motion to suppress content from his phone—based on defendant's contention that probable cause did not exist to continue his detention at the time he gave consent for his phone to be searched—had no merit. Where law enforcement had reasonable suspicion or probable cause of multiple crimes during its investigation of defendant—including gun and drug charges, in addition to the sexual offenses—defendant's continued detention was justified; therefore, since he was not unconstitutionally seized or illegally detained, his consent to the phone search was voluntary. Moreover, officers' statement that they would obtain a search warrant unless defendant consented to the search did not amount to coercion because they had the legal authority to do so under the circumstances of the case. **State v. Hannah, 266.**

Traffic stop—smell of marijuana alone—probable cause—to suspect possession of marijuana rather than legal hemp—In a juvenile delinquency case involving a charge for possession of marijuana with intent to sell or distribute, which stemmed from a traffic stop in which two officers searched the juvenile's vehicle after smelling what they perceived to be marijuana, the trial court erred by granting the juvenile's motion to suppress and subsequently dismissing all charges against him. Specifically, the court incorrectly concluded that the perceived odor of marijuana, without more, could not establish probable cause to suspect that the juvenile's vehicle contained marijuana rather than legal hemp. Although the court based its conclusion on a memo from the State Bureau of Investigation (SBI) arguing that,

SEARCH AND SEIZURE—Continued

because hemp and marijuana are so similar, the perceived smell of marijuana would be insufficient to establish probable cause in cases such as these, the SBI's legal interpretations were not controlling, since probable cause determinations are for the courts to make. Moreover, both officers in this case received special training and had extensive field experience not only in identifying marijuana, but also in distinguishing it from legal hemp; thus, based on their training and experience, the officers had a reasonable belief that the juvenile's vehicle contained marijuana. **In re J.B.P., 640.**

SENTENCING

Classification—second-degree murder—malice theory—unambiguous verdict—The trial court properly sentenced defendant as a Class B1 felon after she was convicted of second-degree murder where there was no evidence that defendant was merely reckless in her handling of the gun used in the incident—which would support depraved-heart malice, the only malice theory that would require classifying second-degree murder as a B2 offense—and, therefore, the jury's general verdict of guilty was not ambiguous. Further, where the evidence showed that defendant acted intentionally when she shot the victim, the trial court did not err, much less plainly err, by failing to instruct the jury on depraved-heart malice. **State v. Swinson, 496.**

Multiple assault charges—stemming from the same incident—distinct interruptions between assaults—separate sentences properly imposed—After defendant was convicted on three different assault charges arising from the same domestic violence incident, the trial court properly imposed separate sentences for each assault charge, running consecutively, despite defendant's argument that the statutes under which he was convicted (N.C.G.S. §§ 14-32.4(b) and 14-33(c)(1)-(2)) forbade the court from imposing punishments for the lesser assault offenses (assault on a female and assault inflicting serious injury) where it had already imposed a punishment for the greater offense (assault by strangulation) involving the same conduct. To the contrary, the statutes at issue allowed for multiple sentences based on multiple assaults occurring in the same altercation so long as the State presented substantial evidence of separate assaults delineated by distinct interruptions, as was the case here. **State v. French, 711.**

Prior record level—point added for committing offense while on probation—notice neither given nor waived—improper but not prejudicial error—After defendant was found guilty on drug-related charges, the trial court erred by sentencing her as a prior record level III offender for her conviction of possession of methamphetamine after adding a point under N.C.G.S. § 15A-1340.14(b)(7) for committing the offense while on probation for another crime. First, the State never gave defendant the statutorily-required written notice that it was seeking an additional point under subsection (b)(7), since the sentencing worksheet submitted to defendant was insufficient on its own to satisfy the notice requirement. Second, because defendant never admitted to committing the offense while on probation, she did not waive her right to receive notice under the statute. Third, the court did not make the requisite inquiry into whether notice was given or whether defendant waived her right to notice. Nevertheless, the court's sentencing error was not prejudicial where the minimum sentence imposed by the court was the highest minimum sentence in the presumptive range at both prior record levels II and III. Although the court could have sentenced defendant to a lesser minimum term under the erroneous prior record level, it did not; therefore, defendant failed to show a reasonable possibility that she would have received a lesser punishment had the court sentenced her as a prior record level II. **State v. Stidham, 741.**

SENTENCING—Continued

Rape and kidnapping—$25,000 fine—defendant's finances not considered—no abuse of discretion—In a prosecution for charges including first-degree kidnapping and first-degree forcible rape, the trial court did not abuse its discretion by imposing a $25,000 fine at sentencing without first taking defendant's financial situation into account. Firstly, the court was not required to consider defendant's finances or any of the other factors under N.C.G.S. § 15A-1340.36, which solely concerns the payment of restitution. Secondly, the court's assessment of the fine was not unreasonable under N.C.G.S § 15A-1362(a), which requires trial courts to consider a defendant's financial resources when determining the method of payment—not the amount—of a fine. Lastly, the fine imposed was appropriate in light of the nature of the crimes of which defendant was convicted. **State v. Tadlock, 754.**

SEXUAL OFFENSES

Inability of the victim to consent—defendant's knowledge of the victim's condition—evidence sufficient—In a prosecution that resulted in defendant being found guilty of second-degree rape (of a woman who had become incapacitated due to alcohol consumption), the trial court properly denied defendant's motion to dismiss for insufficient evidence of two elements: the victim's incapacity and defendant's knowledge of her condition. The evidence of the victim's incapacity included records of the victim's blood and urine alcohol levels, statements and testimony from the victim, and comments made by defendant to investigators about the victim's intoxication level; the evidence of defendant's knowledge of the victim's condition included defendant's comments to investigators that the victim was "wasted" and "a drunk bitch" at the time he had sex with her. **State v. Tate, 507.**

TAXATION

Real property—revocation of tax-deferred status—due process—actual notice and opportunity to be heard—In an appeal brought by a corporate landowner (appellant) before the Property Tax Commission after a county tax assessor removed eleven of appellant's parcels from the Present-Use Value tax-deferral program, where the county Board of Equalization and Review upheld the parcels' removal from the program, the Commission—in affirming the Board's decision—properly determined that appellant's constitutional due process rights had been adequately preserved where it received actual notice of the change in the parcels' tax status and subsequently participated at a hearing before the Board. Appellant's argument that it was provided insufficient time between the notice and the hearing to prepare its case before the Board was meritless where: appellant chose the hearing date; appellant's manager presented all the evidence appellant intended to produce at the hearing; nothing in the record indicated that appellant had sought more time to hire counsel or obtain additional evidence; appellant's argument that, had it been given more time, it could have developed a different theory of the case fell flat where the proposed theory was itself meritless; and appellant failed to show that it was harmed by the timing of the notice. **In re Trade Land Co., LLC, 197.**

Real property—revocation of tax-deferred status—notice—statute allowing for "immaterial irregularities"—not unconstitutional—In an appeal brought by a corporate landowner (appellant) before the Property Tax Commission after a county tax assessor removed eleven of appellant's parcels from the Present-Use Value tax-deferral program, where appellant contended that it received untimely notice of the change, the Commission properly affirmed the county Board of

TAXATION—Continued

Equalization and Review's decision (upholding the parcels' removal from the program) under N.C.G.S. § 105-394, which provides that a failure to give proper notice is an "immaterial regularit[y]" for purposes of property tax assessments. Contrary to appellant's contention, section 105-394 had not been held unconstitutional by the Supreme Court in a case that (1) involved an as-applied rather than facial challenge to the statute, and (2) was factually distinguishable from appellant's case in that it involved a total failure to provide notice. **In re Trade Land Co., LLC, 197.**

Real property—revocation of tax-deferred status—sufficiency of notice—the Machinery Act—timing provisions not implicated—In an appeal brought by a corporate landowner (appellant) before the Property Tax Commission after a county tax assessor removed eleven of appellant's parcels from the Present-Use Value tax-deferral program (upon discovering that the parcels never qualified for the program in the first place), the Commission properly affirmed the county Board of Equalization and Review's decision upholding the revocation of the parcels' tax-deferred status. Appellant contended that it did not receive proper notice of the tax assessor's decision under the Machinery Act, which required notice prior to the Board's first meeting of the year whenever a property received a new "appraisal" or "assessment." However, this timing requirement was inapplicable because appellant's parcels had not been reappraised or reassessed; rather, the tax assessor simply changed the status of appellant's already-assessed taxes from deferred to due. Thus, the notice provided to appellant was sufficient under the Act. **In re Trade Land Co., LLC, 197.**

TERMINATION OF PARENTAL RIGHTS

Cessation of reunification efforts—consideration of statutory factors—required findings of fact—After respondent-mother's two children had been adjudicated as neglected and dependent juveniles, the order ceasing reunification efforts with respondent-mother and the subsequent order terminating her parental rights in both children were vacated because, in the former order, the trial court failed to enter statutorily-required findings of fact showing that reunification efforts clearly would be unsuccessful or would be inconsistent with the children's health or safety—specifically, there were no findings showing that it had considered each of the factors enumerated in N.C.G.S. § 7B-906.2(d), such as whether respondent-mother had remained available to the department of social services and the guardian ad litem for her children, or whether she had acted in a manner inconsistent with her parental rights and with the health and safety of her children. **In re N.M.W., 20**.

Right to counsel—waiver—forfeiture—aggressive behavior toward court-appointed counsels—In a termination of parental rights case, respondent-father's right to counsel under N.C.G.S. § 7B-1101.1(a) was not violated where the trial court's findings of fact showed that he had waived his right to counsel through "egregious dilatory or abusive" conduct—namely, verbal harassment and other threatening behavior directed at his multiple court-appointed attorneys (or their staff) throughout the case. Additionally, after respondent-father's final appointed counsel withdrew, respondent-father indicated a willingness to proceed pro se during a colloquy with the trial court, after which he signed a written waiver of counsel. Furthermore, even if respondent-father's waiver was neither knowing nor voluntary, his aggressive behavior toward his appointed attorneys still constituted a clear forfeiture of his right to counsel. **In re N.M.W., 20.**

TERMINATION OF PARENTAL RIGHTS—Continued

Termination not in juvenile's best interest—father thwarted by adoption agency—no abuse of discretion—In a termination of parental rights proceeding involving a mother who relinquished her parental rights to place her infant for adoption and a father who wished to raise the child, the district court did not abuse its discretion in determining that termination of the father's parental rights was not in the child's best interest, even though grounds existed that would support termination (the father had not legitimized the child or established paternity prior to the filing of a petition by an adoption agency). The court's unchallenged dispositional findings of fact were that the father expressed his desire for custody before the child's birth, made continuous efforts to obtain custody and prevent the child's adoption, would be a great father, had a plan of care for the child, and had a strong support system to help him raise the child; moreover, it was appropriate for the court to consider that grounds existed that would support termination due to factors that were largely outside of the father's control—including efforts by petitioner adoption agency to thwart the father's attempts to gain custody. **In re B.B.A., 179.**

TRESPASS

Recurring trespass—stormwater runoff into retention pond—adjacent retail properties—nominal damages affirmed—removal of all impervious surfaces reversed—In an appeal and a cross-appeal arising from trial court orders entered in an action brought by plaintiff (the owner of a retail property) against defendant (the owner of an adjacent retail property) for trespass based on stormwater runoff from defendant's tract flowing into a retention pond on plaintiff's tract, the appellate court: (1) affirmed the judgment awarding plaintiff only $1,000 in nominal damages for defendant's recurring trespass because plaintiff failed to present evidence supporting compensatory damages—such as diminished rental value due to defendant's use of the pond or the costs to restore or repair the pond—and did not seek punitive damages; but (2) reversed one section of a separate order—requiring defendant to remove all impervious surfaces from its property—because there was insufficient evidence showing that such action was appropriate to address the recurring trespass. **H/S New Bern, LLC v. First Berkshire Props., LLC, 172.**

UNJUST ENRICHMENT

Express contract—claim barred—motion to dismiss properly denied—motion for judgment notwithstanding the verdict properly denied—In a lawsuit arising from the failed sale of defendants' real property to plaintiff—which resulted in plaintiff filing a notice of *lis pendens* concerning the property with the clerk of superior court and defendants asserting a counterclaim for slander of title—where the parties stipulated to the existence of an express contract for the purchase and sale of the property for development purposes, the trial court did not err in dismissing plaintiff's claim for unjust enrichment and denying plaintiff's motion for judgment notwithstanding the verdict (filed after the jury returned verdicts in favor of defendants and awarded damages), because an express contract totally excludes any claim arising under an implied contract, such as a claim for unjust enrichment. **Palmetto RTC, LLC v. Fielden, 61.**

WILLS

Caveat proceeding—after-born heirs—putative father—paternity established prior to decedent's death—In a caveat proceeding filed by three of decedent's

WILLS—Continued

children (caveators) who had not been named in decedent's will, the trial court properly concluded—albeit on an incorrect basis—that caveators were pretermitted heirs who were entitled to take shares in decedent's estate pursuant to N.C.G.S. § 29-19 (involving succession rights of children born out of wedlock). Although the trial court incorrectly determined that caveators could take under subsection 29-19(b)(1)—which did not apply because caveators had not been finally adjudicated as decedent's heirs prior to reaching the age of majority—caveators were nevertheless entitled to take under subsection 29-19(b)(2), the requirements of which were satisfied by decedent during his lifetime. Decedent acknowledged his paternity of caveators in an affidavit of parentage, consent order, and amended paternity order, all of which were filed with the clerk of superior court in decedent's county of residence while he was alive. Further, caveators provided timely notice of their claim in compliance with section 29-19(b). Therefore, the trial court's order entered in favor of caveators was affirmed as reaching the correct result. **In re Will of Arnette, 35.**

WORKERS' COMPENSATION

Disability determination—lower back injury—unreasonable job search—wage-loss compensation denied—The Full Commission properly determined that defendant was not entitled to wage-loss compensation for a specified two-year period based on competent evidence and sufficient findings of fact where plaintiff, who had filed a claim for benefits after injuring his lower back while working as a molding production supervisor, failed to apply for any job for a year and a half after his injury, even though he had been laid off from his job (unrelated to his injury) and had not been assigned any written work restrictions. Further, plaintiff voluntarily removed himself from the job market in order to pursue an associate degree in business. Given that plaintiff was capable of work, a job search would not have been futile and, therefore, plaintiff failed to make an initial showing of disability for the relevant time period. Finally, the Full Commission did not err by relying on an unpublished appellate opinion to reach its conclusion because the case was factually similar (regarding a claimant pursuing education rather than employment) and no published opinion of stronger persuasive value had been identified. **Cable v. Consol. Metco, Inc., 304.**

Exclusivity provision—inapplicable to employer's landlords—negligence claim against landlords not barred—In plaintiff's negligence action arising from toxic mold exposure in his workplace, although plaintiff had filed a complaint with the Industrial Commission and subsequently entered into a compromise settlement agreement with his employer (a company), the exclusivity provision of the Workers' Compensation Act did not apply to bar plaintiff's claim against defendants—two individuals who, besides being officers in the company, owned the property in which the company leased space as a commercial tenant. Since defendants and the company were separate entities, plaintiff was not barred from asserting his negligence claims against defendants in their individual capacities as property owners and landlords of the workplace. Therefore, the trial court erred by granting defendants' motion to dismiss plaintiff's negligence claim for lack of subject matter jurisdiction under Civil Procedure Rule 12(b)(1). **Nelson v. Smith, 51.**

Exclusivity provision—Woodson claim—forecast of evidence insufficient—denial of summary judgment reversed—In a tort action brought on behalf of the estate of an employee who was killed by an explosive fire while operating a zirconium crusher at a metal recycling plant owned and operated by defendants (a parent

WORKERS' COMPENSATION—Continued

company and its subsidiaries), the trial court erred in denying defendants' motion for summary judgment where plaintiff failed to forecast evidence that would establish a *Woodson* claim—an exception to the exclusivity provision of the Workers' Compensation Act permitting civil tort claims arising from work-related injuries resulting from conduct tantamount to an intentional tort. The exacting standard and high bar for a *Woodson* claim was not satisfied where no evidence showed that defendants—despite having knowledge of some possibility (or even probability) of injury or death—recognized the immediacy of the hazard facing the employee, and, thus, no evidence indicated defendants intended, or were manifestly indifferent to, the employee's injury and death. Accordingly, the trial court's denial of defendants' motion for summary judgment was reversed. **Tyson v. ELG Utica Alloys, Inc., 550.**

North Carolina Self-Insurance Security Association—covered claim—requirements not met—In a workers' compensation matter where plaintiff, the administrator of the estate of her deceased husband—a longtime employee at a furniture factory who died from mesothelioma sixteen years after he last worked for the factory, allegedly as a result of asbestos exposure throughout his employment—entered into settlement agreements releasing the factory's owner (and the surviving entity resulting from various mergers involving the factory) from any and all liabilities, which in turn were approved by the Industrial Commission, the Commission did not err in denying plaintiff's motion to add the North Carolina Self-Insurance Association as a defendant. The Association—a nonprofit unincorporated legal entity created by statute to provide mechanisms for the payment of a "covered claim" against a member self-insurer—was not a proper party because plaintiff's claim failed to satisfy two of the four requirements set forth in N.C.G.S. § 97-130(4) for a "covered claim": (1) the member self-insurer was not insolvent, even though the original owner of the factory had gone through bankruptcy, because the surviving entity of a post-reorganization merger was liable for the original owner's liabilities and was not itself insolvent; and (2) the claim was not unpaid, as plaintiff had settled with the surviving entity. **Cloer v. King Arthur Inc., 160.**

Subject matter jurisdiction—voluntary dismissal without prejudice—claim no longer active—After plaintiff took a voluntary dismissal without prejudice of his claim for workers' compensation (which he had filed after his wife was shot and killed by a co-worker), to which defendants (the wife's employer and its insurance company) did not object, the Industrial Commission no longer had subject matter jurisdiction over the matter, unless and until plaintiff chose to refile his claim within one year of the voluntary dismissal. Although defendants argued that their filing of a Form 60 (Employer's Admission of Employee's Right to Compensation) constituted an "award" from the Commission, after which they began sending weekly compensation checks to plaintiff (which plaintiff did not cash), defendants' actions did not create jurisdiction in the Commission that would permit the dismissal of plaintiff's claim with prejudice, as sought by defendants. Therefore, the Commission's order denying defendants' request for relief and dismissing plaintiff's claim without prejudice for lack of subject matter jurisdiction was affirmed. **Marlow v. TCS Designs, Inc., 680.**