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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-361

Nos. COA20-730, 20-746

Filed 20 July 2021

Buncombe County, No. 18 SP 758

JAMES M. ELLIS, Administrator of the Estate of Johnnie Edward Harper,
Petitioner,

v.

KIM HARPER, PAT DOE 1, ROCHELLE GREENIDGE, PAT DOE 2, BETH RODRIGUEZ, PAT DOE 3, SONYA THOMAS, PAT DOE 4, RED WOLF CONTRACTING SERVICE LLC and MICHAEL SVENCICKI, LIEN CLAIMANTS,
Respondents.

Appeals by respondent Kim L. Harper from orders entered 3 June 2020 and 22 June 2020 by Judge Steve Warren in Buncombe County Superior Court. Heard in the Court of Appeals 11 May 2021.

Stone & Christy, P.A., by James M. Ellis, for petitioner-appellee.

Respondent-appellant Kim L. Harper, pro se.

ZACHARY, Judge.

¶ 1 These are the fourth and fifth appeals, respectively, brought by Respondent Kim L. Harper arising out of the administration of the estate of her father, Johnnie Edward Harper (“the Decedent”). In COA20-730, Harper appeals from the superior court’s order entered 3 June 2020, on remand from an earlier opinion of this Court,

authorizing Petitioner James M. Ellis, the public administrator of Buncombe County and appointed administrator of the estate, to sell real property to make assets to pay the estate's debts and the costs of administration. In COA20-746, Harper appeals from the superior court's orders entered 22 June 2020 enforcing a gatekeeper order and denying her request to file a motion for sanctions against the public administrator. We have consolidated these appeals for hearing pursuant to N.C.R. App. P. 40. After careful review, we affirm the superior court's orders.

Background

¶ 2 The full background of these appeals is set forth in a pair of prior opinions of this Court: *In re Harper*, 269 N.C. App. 213, 837 S.E.2d 602 (2020) ("*Harper I*"), and *In re Harper*, 270 N.C. App. 820, 840 S.E.2d 535, 2020 WL 1686347 (2020) (unpublished) ("*Harper II*"). We recite here the facts relevant to the appeals currently before us.

¶ 3 The Decedent died intestate on 1 June 2015. *Harper I*, 269 N.C. App. at 214, 837 S.E.2d at 603. Harper, one of his four children, qualified as administratrix of the estate on 28 June 2016. *Id.* Harper failed to timely file an account for the estate, leading to successive orders directing her to do so or be held in contempt or removed as fiduciary. *Id.* On 27 September 2018, at a hearing on the clerk of court's order to appear and show cause,

Harper produced an account for filing, but did not file a

proper account: the account did not balance, and she provided no supporting documentation of the listed disbursements or the balance held. On the date of the hearing, the estate had \$139.30, no saleable personal property, and numerous debts. Harper had also moved into the [D]ecedent's house, and admitted that she had spent money belonging to the estate on her personal expenses.

On 4 October 2018, the clerk removed Harper as administratrix of the estate, and appointed James Ellis, the public administrator of Buncombe County, to serve as successor administrator of the estate. Harper timely appealed this order to superior court, and on 4 December 2018, this matter came on for hearing before the Honorable Marvin P. Pope, Jr. After reviewing the case file and hearing arguments from both parties, Judge Pope entered an order dismissing the appeal. Harper timely appealed to this Court, and this appeal was designated as COA19-326.

On 19 November 2018, the public administrator petitioned the clerk of superior court to sell the real property owned by the Decedent at the time of his death. The public administrator asserted that it was necessary to sell the real property in order to make assets to pay debts of the estate, and thus it would be in the best interest of the estate to sell the real property.

Id. at 214–15, 837 S.E.2d at 603. The public administrator subsequently filed an amended petition, naming Redwolf Contracting Service, LLC and Michael Svencicki (collectively, “Redwolf”) as parties to the petition because they claimed a lien on the real property relating to the contract to improve the property.

On 6 December 2018, the clerk entered an order granting the public administrator (1) possession, custody, and control of the Decedent's real property; (2) the authority to remove Harper from the Decedent's house; and (3) the authority to sell the real property.

Harper appealed the clerk’s order to the superior court, and on 18 December 2018, this matter came on for hearing before Judge Pope. After hearing arguments and examining the court file, Judge Pope entered an order dismissing the appeal. Harper timely appealed to this Court, and this appeal was designated as COA19-327.

Id. at 214–15, 837 S.E.2d at 603–04.

¶ 4 After appealing the superior court’s order granting the public administrator’s petition to sell real property, but before our opinion in *Harper I* issued, Harper “filed at least three pleadings with this Court: two petitions for writ of supersedeas and one motion for a temporary stay All three pleadings were denied.” *Harper II*, at *2. Harper also “filed an emergency motion to stay and a petition for a writ of certiorari with the North Carolina Supreme Court. The motion and petition were denied.” *Id.*

¶ 5 Because the order granting the petition to sell real property was not stayed, the public administrator proceeded with evicting Harper and selling the real property. On 5 February 2019, the public administrator filed a report of sale of the real property. That same day, another matter related to the property came on for trial in Buncombe County District Court: *Redwolf Contracting Service, LLC v. Harper*, No. 17 CVD 1822, concerning Redwolf’s claimed lien on the real property. The trial court in that matter subsequently discharged Redwolf’s claim of lien.

¶ 6 On 15 February 2019, notice of an upset bid on the real property was filed. On 26 February 2019, the clerk of court entered an order confirming the sale of the real

property to the upset bidder. Harper did not appeal this order.

¶ 7 After Harper made several more filings—including a notice of *lis pendens* intended to block the sale of the real property—on 3 May 2019, “the superior court entered a gatekeeper order prohibiting [Harper] from filing further pleadings in the matter without prior approval by the court, or alternatively, without being represented by counsel.” *Harper II*, at *2. Harper timely appealed the gatekeeper order, and that appeal was designated as COA19-808. *Id.*

¶ 8 On 7 January 2020, this Court filed its opinion in *Harper I*, consolidating the first two appeals—Nos. COA19-326 and COA19-327—pursuant to N.C.R. App. P. 40. 269 N.C. App. at 213–14, 837 S.E.2d at 603. In COA19-326, we affirmed the superior court’s order removing Harper as administratrix of the estate for failing to render a satisfactory account, but remanded to the trial court for correction of a clerical error. *Id.* at 217–18, 837 S.E.2d at 605.

¶ 9 In COA19-327, we vacated the superior court’s order authorizing the public administrator to sell the Decedent’s real property to make assets to pay debts of the estate because the superior court applied the incorrect standard of review to Harper’s appeal of the clerk’s order. *Id.* at 220, 837 S.E.2d at 606–07. We then remanded the matter to the superior court to conduct a hearing de novo. *Id.* at 220, 837 S.E.2d at 607.

¶ 10 On 7 April 2020, this Court filed its opinion in *Harper II*, in which we dismissed

Harper's appeal of the superior court's entry of the gatekeeper order, for multiple violations of the North Carolina Rules of Appellate Procedure. *Harper II*, at *4.

¶ 11 Pursuant to our remand in *Harper I*, the superior court scheduled a new hearing for 2 June 2020 on the public administrator's petition for possession, custody, and control for sale of real estate to make assets. On 2 March 2020, Harper submitted a demand for a jury trial. On 19 May 2020, Harper submitted a motion to continue the scheduled hearing. On 2 June 2020, the superior court permitted Harper to file her motion to continue under the gatekeeper order, but denied the motion and conducted the de novo hearing as scheduled.

¶ 12 On 3 June 2020, the superior court entered an order denying Harper's motion for a jury trial and granting the public administrator's petition, authorizing him to sell the property to pay the debts and costs of administration of the estate. By separate order also entered on 3 June, the trial court also denied Harper's motion to continue. On 10 June 2020, Harper timely filed her notice of appeal from the 3 June 2020 orders, and this appeal was designated as COA20-730. That same day, Harper filed a motion to stay execution of the judgment pending appeal pursuant to Rule 62(d) of the North Carolina Rules of Civil Procedure.

¶ 13 On 12 June 2020, the public administrator filed a motion for reconfirmation of the sale of the real property, and the clerk of court entered an order reconfirming the sale. That same day, the public administrator filed a motion for sanctions and to

dismiss Harper's notice of appeal and motion to stay, alleging violations of the gatekeeper order. On 19 June 2020, Harper submitted to the senior resident superior court judge her own motion for sanctions against the public administrator, in accordance with the gatekeeper order.

¶ 14 On 22 June 2020, the superior court entered an order directing that Harper's motion for sanctions not be filed, and returning that motion to Harper. The superior court also entered an order denying Harper's motion to stay. Harper timely filed notice of appeal from both 22 June 2020 orders, and that appeal was designated as COA20-746.

Standards of Review

¶ 15 "On appeal to the superior court of an order of the clerk in matters of probate, the trial court judge sits as an appellate court." *Harper I*, 269 N.C. App. at 215, 837 S.E.2d at 604 (citation omitted). On appeal to this Court from a decision of a trial court sitting without a jury, as in this case, "findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *In re Bass*, 366 N.C. 464, 467, 738 S.E.2d 173, 175 (2013) (citation omitted). "Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Harper I*, 269 N.C. App. at 215, 837 S.E.2d at 604 (citation and internal quotation marks omitted). Conclusions of law are reviewed de novo. *Bass*, 366 N.C.

at 467, 738 S.E.2d at 175.

¶ 16 “Denial of a motion for a continuance is reviewable on appeal only for abuse of discretion.” *In re Will of Yelverton*, 178 N.C. App. 267, 274, 631 S.E.2d 180, 184, *disc. review denied*, 360 N.C. 577, 636 S.E.2d 200 (2006).

¶ 17 As for the trial court’s enforcement of the gatekeeper order, “[i]t is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). “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.” *Feeassco, LLC v. Steel Network, Inc.*, 264 N.C. App. 327, 334, 826 S.E.2d 202, 208 (2019) (citation and internal quotation marks omitted).

COA20-730

¶ 18 On appeal from the superior court’s 3 June 2020 orders, Harper raises five issues: (1) whether it was reasonable to make Redwolf a party to the public administrator’s petition; (2) whether the superior court failed to conduct a de novo hearing on remand; (3) whether the public administrator presented sufficient evidence to show that taking possession, custody, and control of the real property to make assets was reasonable; (4) whether Harper was deprived of her constitutional right to a jury trial; and (5) whether the superior court abused its discretion by

denying her motion to continue.

¶ 19 Harper devotes much of her appellate briefs to allegations of bias against her by the public administrator, her co-heirs, and the various district and superior court officials who have overseen these proceedings. These arguments generally do not address the issues she raises on appeal. However, Harper specifically challenges the superior court's findings of fact 4–10, 12, 16–22, and 24–28, as well as each of the superior court's conclusions of law. The challenged findings of fact read:

4. Petitioner Ellis is . . . duly qualified and acting as Administrator of the Estate of Johnnie Edward Harper, deceased, Buncombe County Estates File 16 E 1030.

5. That a verified petition was filed in this matter seeking authority to take possession, custody and control of the real property of Decedent herein. The Court has considered said petition along with other evidence during the course of the de novo hearing referenced herein.

6. An Order was issued by the Clerk of Court December 6, 2018, granting Possession, Custody and Control and instructing Administrator James M. Ellis to sell the property to obtain funds to allow for the proper administration of the estate.

7. The Order issued by the Clerk of Court was appealed by Harper to Superior Court where the appeal was dismissed by Order of the Honorable Marvin P. Pope, Jr., dated December 18, 2018.

8. On appeal by Harper to the North Carolina Court of Appeals, the special proceeding was remanded to this Court to conduct a hearing de novo.

9. Red Wolf Contracting Service, LLC and Michael

ELLIS V. HARPER

2021-NCCOA-361

Opinion of the Court

Svencicki, at the time of filing of the petition in this matter, claimed to have a lien against the property by virtue of a contract with Kim Harper to improve the real property. See Buncombe County District Court file 15 CVD 767. Attorney Daniel L. Strobel represented Red Wolfe [sic] Contracting and Michael Svencicki before the Clerk of Court. Red Wolf is now represented by attorney John Noor.

10. The interest of Kim Harper in the property of Decedent is subject to the claims of creditors of the estate of Johnnie Edward Harper as Kim Harper inherited her interest through the estate.

....

12. Red Wolf and Svencicki assert a claim to the proceeds of sale in this matter.

....

16. A petition for reimbursement of funeral expenses in the amount of \$5,298.95 was pending in this matter at the time the petition was filed in this matter and significant attorney fees have been incurred and are expected to be incurred based on the estate file being several inches thick with filings from [Harper,] the former representative who was removed by previous Order of the Clerk of Court, which removal was affirmed on appeal.

17. The funeral bill reimbursement appeal period has run and the order requiring reimbursement of the funeral expenses has not been appealed.

18. Decedent had just under \$3,500.00 in his personal account at the time of death which funds were dissipated during Harper's administration and have not been accounted for.

19. One claim to First Citizens Bank has been paid, presumably by Harper, but the source of funds is unclear.

It is unknown how much income the estate may have received that is currently missing.

20. At the time of filing the petition in this matter, the estate had \$139.30 in the Stone & Christy Trust Account which funds were recovered from the BB&T Estate Account opened by [Harper].

21. Harper appealed the Order removing her and served frivolous pleadings on the other heirs such as a motion to compel an inventory when [Harper] has no standing and the other heirs have no such legal responsibility.

22. At the time of filing this proceeding, Buncombe County taxes for 2018 were outstanding in the amount of \$1,571.58 including the City of Asheville taxes.

....

24. That at the time of the filing of the Petition there existed insufficient assets, without recourse to the real property, to settle the claims and pay the debts and administrative expenses of the Estate.

25. Petitioner will be unable to successfully settle the claims of the Estate and pay for the costs of administration, without recourse to the real property.

26. Pursuant to NCGS 28A-13-3(c) (3), Petitioner has determined that it is in the best interest of the administration of the Estate of Johnnie Edward Harper for him to exercise possession, custody, and control over the real property described above in order that the property may be sold and the proceeds of sale used to pay debts and administrative expenses of the Estate.

27. Petitioner has also determined that it is in the best interests of the estate to sell the property by private sale.

28. During the course of this hearing Kim Harper made an oral motion for a jury trial.

¶ 20 The challenged conclusions of law read, in their entirety:

1. That pursuant to N.C.G.S. 28A-13-3(c) it is in the best interest of the administration of the estate to authorize the personal representative to take possession, custody or control over the real property described herein of the estate.

2. That Respondent Harper is not entitled to a jury trial pursuant to and based upon N.C.G.S. 1-301.2.

3. That any finding of fact may be considered a Conclusion of Law if necessary to support the Order in this case.

¶ 21 For the following reasons, we affirm the superior court’s 3 June 2020 orders.

I. Redwolf

¶ 22 Harper first argues, *inter alia*, that “there was no evidence that the [public administrator] presented that would lead the trial court to believe that Redwolf was a legitimate claimant against the [D]ecedent’s estate.” Among other points made in her appellate brief, Harper disputes the existence of the lien and claims that “the alleged lien had nothing to do with the [D]ecedent’s estate.”

¶ 23 The record contains Redwolf’s claim of lien against the real property for improvements to the property owned by the Decedent upon his death. Redwolf’s claim of lien, which was filed 17 February 2017, appears to have been discharged by the trial court in No. 17 CVD 1822 on 19 February 2019, *after* the public administrator filed the petition in this case. The fact that Redwolf “claimed to have a lien against the property[,]” specifically “at the time of filing of the petition in this matter,” is

uncontroverted, and is supported by several documents in the record. Accordingly, findings of fact 9 and 12 are supported by competent evidence and are conclusive on appeal. *See Bass*, 366 N.C. at 467, 738 S.E.2d at 175. Further, we note that finding of fact 10 is merely an accurate statement of law. *See* N.C. Gen. Stat. §§ 28A-13-3(a)(1), 28A-15-1(a) (2019).

¶ 24 There was nothing inappropriate about the public administrator's decision to make Redwolf a party to the petition, when Redwolf claimed a lien against the property at the time of the filing of the petition. Harper's argument is overruled.

II. *De Novo Hearing*

¶ 25 Harper next argues that the superior court failed to conduct a de novo hearing on remand, in accordance with our mandate in *Harper I*. As we explained in COA19-327, Harper was entitled to a hearing de novo on her appeal to the superior court of the clerk's order permitting the sale of the Decedent's real property. *Harper I*, 269 N.C. App. at 219, 837 S.E.2d at 606. On appeal from a special proceeding as provided by N.C. Gen. Stat. § 1-301.2(e), "when sitting as an appellate court, the superior court shall proceed as if no hearing had been held by the clerk and without any presumption in favor of the clerk's decision." *Id.* (citation and internal quotation marks omitted).

¶ 26 Our careful review of the transcript of this proceeding on remand, and the superior court's resulting order, reveals no error in the court's standard of review. Again, much of Harper's argument on this issue focuses on allegations of bias against

her, but these allegations speak more to the evidence in the record and before the superior court, rather than to the court's application of the appropriate standard of review. Indeed, Harper describes the superior court's "clear reliance on the 'record'" as a principal factor in support of her argument that the superior court denied her a hearing de novo.

¶ 27 Unlike in *Harper I*, where the superior court "mistakenly adopted the [incorrect] standard of review" as evidenced by its order, which tracked the language of § 1-301.3(d) rather than applying the de novo standard prescribed by § 1-301.2(e), *id.* at 219–20, 837 S.E.2d at 606, here, we find no similar mistake in the superior court's order on remand. Further, we note that the only challenged findings of fact relevant to this issue are accurate statements of the procedural history of this matter. As Harper has not shown that the superior court failed to conduct a proper de novo hearing, this argument is also overruled.

III. Sufficient Evidence

¶ 28 Harper next argues that the public administrator did not present sufficient evidence to the superior court to establish that it was reasonable for him to take possession, custody, and control of the real property. However, as with the previous issue, much of Harper's argument on this issue centers on allegations regarding the conduct of the public administrator—in this instance, accusing him of mischaracterizing her performance as the prior administratrix of the estate and

“defam[ing] her in a cascading snowball of compound lying, i.e. deception.”

¶ 29 There is ample evidence in the record to support the superior court’s relevant findings of fact on this issue. Findings of fact 16, 18, 20 and 22 accurately describe documents or filings in the record. Findings of fact 17 and 19 are accurate descriptions of the circumstances of this case, while finding of fact 21 is a reasonable summary of the events following Harper’s removal as administratrix.

¶ 30 Similarly, our careful review shows that competent evidence in the record supports the superior court’s findings of fact 24–27, which explain the bases for the court’s determination that the best interests of the estate would be served by permitting the public administrator to take possession, custody, and control of the real property so that the proceeds of its sale may be used to pay estate debts and the costs of administration. Contrary to Harper’s claim that the record is “devoid of any corroborating evidence[,]” each of the superior court’s relevant findings is supported by competent evidence in the record, and is thus conclusive on appeal. *See Bass*, 366 N.C. at 467, 738 S.E.2d at 175.

¶ 31 As the superior court’s findings of fact and the appellate record demonstrate, sufficient evidence existed to support the court’s determination that the best interests of the estate would be served by permitting the public administrator to take possession, custody, and control of the real property. Harper’s argument is overruled.

IV. Right to a Jury Trial

¶ 32 Harper next raises the question: “regarding the loss of private property, does the Constitution provide for a jury trial?” However, Harper did not raise a constitutional argument on this issue in either her submitted demand for a jury trial or at the hearing on remand. “In order to preserve a question 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). Accordingly, Harper has not preserved any constitutional argument on this issue.

¶ 33 Further, Harper has abandoned any statutory argument on this issue. Harper’s argument in her brief on this issue consists of the following sentence: “From what Harper has been able to discern, the short answer is ‘Yes’, unless the matter is a foreclosure or some other action that defines similar terms, i.e., a contract has been breached between a lender and a borrower.” “Issues . . . in support of which no reason or argument is stated [in a party’s brief] will be taken as abandoned.” N.C.R. App. P. 28(b)(6); *see also, e.g., Wilson v. Pershing, LLC*, 253 N.C. App. 643, 650, 801 S.E.2d 150, 156 (2017) (where an appellant’s brief “does not contain any substantive arguments on [an issue presented], this issue has been abandoned.”).

¶ 34 As stated above, the superior court concluded, as a matter of law, that “Harper is not entitled to a jury trial pursuant to and based upon N.C.G.S. 1-301.2.” To the degree that Harper raises a statutory issue on appeal, she has stated no reason or

argument in support of that issue in her brief. Accordingly, this issue is abandoned.

V. Motion to Continue

¶ 35 Finally, Harper argues that the superior court abused its discretion by denying her motion to continue. We disagree.

¶ 36 “Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it.” *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976).

In passing on the motion the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and in good faith. . . . The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice.

Id. (citation omitted).

¶ 37 Harper contends that the superior court gave “[n]o consideration” to her representations on this motion while giving “[e]xcessive consideration” to the public administrator’s representations, which she claims were “mostly false.” Harper’s motion was based on her asserted medical issues, which she contends left her “confused, and [with] trouble concentrating” at the hearing on remand. Nonetheless, when ruling upon Harper’s motion at the hearing, the superior court “found [her] remarks to be lucid and articulate.” The court continued: “However, given my review of the grounds for the motion to continue, along with the material submitted, as

articulated by the court, the court, in its discretion, is going to deny your motion to continue.”

¶ 38 After careful review of the record and transcript, we can discern no abuse of discretion in the superior court’s consideration of Harper’s motion to continue. Accordingly, this argument is overruled.

¶ 39 For the foregoing reasons, the superior court’s 3 June 2020 orders must be affirmed.

COA20-746

¶ 40 On appeal from the superior court’s 22 June 2020 orders enforcing the gatekeeper order and denying her motion to stay execution of judgment pending appeal, Harper argues that the superior court showed “extraordinary prejudice” toward her position and violated her constitutional rights. Harper’s position is primarily based upon her “constitutional right to appeal a lower court’s decisions,” and she argues that “under no circumstances should a Gatekeeper Order be held against someone for these reasons.” But these arguments are aimed more squarely at the merits of the gatekeeper order itself, Harper’s appeal of which was dismissed in *Harper II*, than toward the superior court’s 22 June 2020 orders.

¶ 41 To the extent that Harper challenges the 22 June 2020 orders, Harper argues that “there was nothing whatsoever frivolous about Harper’s motion to stop reconfirmation” because the superior court was “functus officio” upon her filing of the

notice of appeal that gave rise to COA20-730. Harper makes no argument with regard to the order denying her motion to stay execution of the judgment pending appeal, and therefore, to the extent that her appeal concerns that order, we consider it abandoned. *See* N.C.R. App. P. 28(b)(6).

¶ 42 As for the superior court’s order enforcing the gatekeeper order, we find no abuse of discretion in its decision not to permit Harper to pursue her motion for sanctions against the public administrator. Under the terms of the gatekeeper order, Harper was required “to notify the Senior Resident Superior Court Judge in writing, with a copy of the proposed filing, with a memorandum setting forth the legal basis supporting the motion or relief requested[.]” No such memorandum is included in the record, and there is no other indication that Harper complied with that requirement of the gatekeeper order when she moved for sanctions.

¶ 43 Accordingly, after careful review of the record, we cannot conclude that the superior court’s decision was “manifestly unsupported by reason or . . . so arbitrary that it could not have been the result of a reasoned decision.” *Feeassco*, 264 N.C. App. at 334, 826 S.E.2d at 208 (citation and internal quotation marks omitted). We conclude that the superior court did not abuse its discretion, and the 22 June 2020 order enforcing the gatekeeper order is affirmed.

Conclusion

¶ 44 For the foregoing reasons, the superior court’s orders in both appeals are

ELLIS V. HARPER

2021-NCCOA-361

Opinion of the Court

affirmed.

COA20-730: AFFIRMED.

COA20-746: AFFIRMED.

Judges MURPHY and CARPENTER concur.

Report per Rule 30(e).