COA 24-454 28TH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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ALLISON SWEENEY MOHEBALI, Plaintiff-Appellant, v. JOHN DAVID HAYES, MD and HARVEST MOON WOMEN'S HEALTH, PLLC, Defendant-Appellees.	)	From Buncombe County

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COURT-ASSIGNED AMICUS CURIAE'S RESPONSE TO PLAINTIFF'S MOTION TO STRIKE A PORTION OF AMICUS'S BRIEF

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Plaintiff argues that Amicus has put forth an unpreserved argument in support of the trial court's determination to deny Plaintiff's constitutional challenge to N.C. Gen. Stat. § 90-21.19. That is not the case; and, the first part of Plaintiff's motion—the motion to strike—should be denied. Because the argument regarding Plaintiff making a facial constitutional challenge is properly before this Court, Amicus has no objection to this Court considering rebuttal arguments of Plaintiff expressed in part II of her Motion.

Plaintiff makes three general arguments in favor of striking the analysis of whether Plaintiff's constitutional argument is an as applied or facial challenge. Each falls short of supporting striking the argument.

Unlike a party, Amicus has neither an opportunity nor an obligation to preserve arguments for appeal. The obligation to preserve arguments for the appeal falls to the party asserting the error—in this case Plaintiff. *See, e.g.,* N.C.R. App. P. 10(a). Defendants did not appear, and Defendants have not raised any issues on appeal. In *Murray v. Univ. of N.C. at Chapel Hill*, 246 N.C. App. 86, 782 S.E.2d 531 (2016), cited by Plaintiff, this Court noted that the defendant-*appellant* had not preserved a personal jurisdiction argument and instead submitted a sovereign immunity defense as a subject matter question. The appellate court noted this argument was not preserved and, more importantly, not subject to immediate review. Because there was no basis for immediate review, the appeal was dismissed. *Murray* does not help Plaintiff here because it is a traditional exercise of the Court's interlocutory jurisdiction and this case is in a different posture: being a final judgment as well as involving amici.

Plaintiff's citation to *M.E. v. T.J.*, 380 N.C. 539, 869 S.E.2d 624 (2022) is more relevant, because an amicus argument was involved, but ultimately that opinion is not controlling. There the North Carolina Supreme Court modified and affirmed the Court of Appeals ruling at 275 N.C. App. 528, 854 S.E.2d 74 (2020). The portions of the opinion *modified* were the parts of the Court of Appeals opinion dealing with the role of an amicus, not the portions dealing with the substantive analysis of whether domestic violence protective orders could exclude same sex relationships. Even if that

were not the case, however, Amicus here has not injected new facts or alerted the Court to aspects of the record not previously before it.[1]

The ruling of the trial court is that section 90-21.19 is constitutional and that is what has been argued. "The question for review is whether the ruling of the trial court was correct and not whether the reason given therefore is sound or tenable." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) (citation omitted). "[A] correct decision of a lower court will not be disturbed because a wrong or insufficient or superfluous reason is assigned." *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957) (citation omitted). In *State v. Hester*, 254 N.C. App. 506, 516, 803 S.E.2d 8, 16 (2017), this Court examined the right for any reason doctrine as one that upholds the ultimate decision of the trial court.

> The dissenting opinion notes the well-established trot that 'the law does not permit parties to swap horses between courts in order to get a better mount.' However, those cases and all others cited only apply to instances where the party, whether Plaintiff, Defendant, or the State, is carrying the burden on appeal to show error in the lower court's ruling on appeal, and relies upon a theory not presented before the lower court.
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> That circumstance is not before us here. We review the trial court's ultimate ruling for error, prejudice, and, in this case, solely for plain error. This Court is free to and may uphold the trial court's 'ultimate ruling' based upon a theory not presented below or even argued here.
>
> Our precedents clearly allow the party seeking to *uphold* the trial court's presumed-to-be-correct and 'ultimate ruling' to, in fact, choose and run any horse to race on appeal to sustain the legally correct conclusion of the order appealed from.

[1] Amicus is not even filing a motion; rather, it is responding to one filed against it.

Id. (cleaned up) (emphasis in original).

In furtherance of the ability of the Court to uphold the trial court's judgment for any reason, the issue of whether a facial versus as-applied challenge is raised is an issue of subject matter jurisdiction. *See Cryan v. Nat'l Council of Young Men's Christian Associations of United States*, 280 N.C. App. 309, 314, 867 S.E.2d 354, 358, *aff'd*, 384 N.C. 569, 887 S.E.2d 848 (2023). In *Cryan*, the plaintiff was arguing that the constitutional challenge—asserted by the defendants in a motion to dismiss the timeliness of the complaint—was facial. The Court held that it was not, but noted the question was one of subject matter jurisdiction. *Id.*; *see also Lakins v. W. N. Carolina Conf. of United Methodist Church*, 283 N.C. App. 385, 389-95, 873 S.E.2d 667, 672-76 (2022). Amicus cited *Kelly v. State*, 286 N.C. App. 23, 30, 878 S.E.2d 841, 847 (2022), in its brief because there the Court noted how to determine the question of whether the challenge raised was facial or as-applied, but the Court also analyzed that issue as one of subject matter jurisdiction. *Id.* at 29-30, 878 S.E.2d at 847.

Amicus's footnote that the facial challenge did not implicate subject matter jurisdiction of the trial was to point out under *Holdstock* that because the challenge was not a "properly raised" facial challenge under Rule 42(b)(4) (*i.e.* it was raised outside of the complaint or answer), the trial court was free to review the issue and reject Plaintiff's challenge even as a facial challenge:

> A facial challenge made in a motion later than thirty days from the filing of the defendant's answer or responsive pleading, as determined by the Rule, is not required to be transferred to a three-judge panel by N.C.G.S. § 1-267.1 or N.C.G.S. § 1-81.1(a1), and there is nothing in these

> statutes expressly prohibiting the trial court from considering a facial challenge, *but* if the trial court were to determine that an act was facially unconstitutional or contrary to federal law, N.C.G.S. § 1-267.1(c) prohibits the trial court from entering any order or judgment to that effect.

Holdstock v. Duke Univ. Health Sys., Inc., 270 N.C. App. 267, 276, 841 S.E.2d 307, 314 (2020) (emphasis in original).

Plaintiff's last point, that this Court cannot raise the type of challenge it is reviewing, and thus subject matter jurisdiction, on its own is incorrect. "It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *State v. Webber*, 190 N.C. App. 649, 650–51, 660 S.E.2d 621, 622 (2008); *Reece v. Forga*, 138 N.C.App. 703, 704, 531 S.E.2d 881, 882 (2000) ("A party may not waive jurisdiction, and a court has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action ex mero motu when subject matter jurisdiction is lacking.").

In the end, the fact that Defendants have not raised a jurisdictional argument is no reason to strike the same from Amicus's brief as the jurisdictional argument can be reviewed *sua sponte* and seeks to uphold the ultimate ruling of the trial court—that N.C. Gen. Stat. § 90-21.19 is constitutional. However, Amicus agrees that the argument was not addressed in Plaintiff's initial appellant's brief and Amicus certainly has no objection to this Court considering the additional words Plaintiff needed to address the concern.

Respectfully submitted, this the 9th day of December, 2024.

By: /s/ Electronically Submitted
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Brief via email to the address identified below:

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Previous attempts at service of Dr. John Hayes and the corporate defendant via mail and email have been returned as non-deliverable. Therefore, service of this motion will not be made on Dr. Hayes or the corporate entity until a new address is available.

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