

# ADVANCE SHEETS

OF

## CASES

ARGUED AND DETERMINED IN THE

# COURT OF APPEALS

OF

## NORTH CAROLINA

*APRIL 5, 2023*

**MAILING ADDRESS: The Judicial Department  
P. O. Box 2170, Raleigh, N. C. 27602-2170**

**THE COURT OF APPEALS  
OF  
NORTH CAROLINA**

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# COURT OF APPEALS

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FILED 6 SEPTEMBER 2022

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### APPEAL AND ERROR

**Interlocutory order—denial of motion to dismiss—personal jurisdiction—substantial right**—An interlocutory order denying defendants' motions to dismiss a set of consolidated wrongful death actions for lack of personal jurisdiction was immediately appealable as affecting a substantial right. **Bartlett v. Est. of Burke, 249.**

**Interlocutory order—denial of motions to dismiss—assertion of sovereign immunity—adverse ruling on personal jurisdiction**—In an action for declaratory and injunctive relief—initiated by plaintiffs against the State for allegedly breaching the public trust doctrine—where the State filed motions to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1), (2), and (6), based on the defense of sovereign immunity, the trial court's interlocutory order denying the State's motions was immediately appealable pursuant to N.C.G.S. § 1-277 with regard to Rules 12(b)(2) (which constituted an adverse ruling on personal jurisdiction) and 12(b)(6) (as affecting a substantial right), but not with regard to Rule 12(b)(1). **Coastal Conservation Ass'n v. State of N.C., 267.**

**Preservation of issues—constitutional argument—admission of blood test in criminal case**—In a prosecution for felony death by vehicle and driving while impaired, defendant failed to preserve for appellate review her argument that the trial court erred by admitting her blood alcohol test results into evidence—based on

## APPEAL AND ERROR—Continued

her contention that her consent to the blood draw was not knowing, voluntary, or intelligent, in violation of the federal and state constitutions—where defense counsel did not raise the constitutional argument at trial. Further, the Court of Appeals declined to invoke Appellate Rule 2 to review this argument in defendant’s appeal from her convictions. **State v. See, 413.**

## ATTORNEY FEES

**Motion to set aside foreclosure sale of home—to collect homeowner’s association fees—Planned Community Act**—In a case where a homeowner’s association sold petitioners’ home in a foreclosure sale to collect petitioners’ unpaid association fees, after which the trial court granted petitioners’ motion under Civil Procedure Rule 60(c) to set aside the sale, the court erred in denying petitioners’ subsequent request for attorney fees where petitioners qualified as the “prevailing party” in a “civil action relating to the collection of assessments” for purposes of the Planned Community Act. **In re Foreclosure of George, 288.**

## CHILD ABUSE, DEPENDENCY, AND NEGLECT

**Misdemeanor child abuse—parents fighting over physical possession of child—pulling opposite ends of child—sufficiency of evidence**—The State presented sufficient evidence to convict defendants of committing misdemeanor child abuse (N.C.G.S. § 14-318.2) against their four-year-old son where, during a custody exchange, defendant-father and defendant-mother engaged in a “tug of war” over the child, in which the parents violently pulled opposite ends of the child, placing him at substantial risk of being injured—even if they did not intend to hurt him. Although defendant-mother argued that she was trying to protect the child because the father was in an irate and dangerous state of mind, the State was not required to rule out every hypothesis of innocence to survive the motion to dismiss. **State v. Adams, 379.**

**Permanency planning—cessation of reunification efforts—non-accidental injuries to one child—lack of progress on case plan**—The trial court did not abuse its discretion by directing DSS to cease reunification efforts between a mother and her two children where the children had been removed from the home as a result of unexplained non-accidental injuries to one of the children when he was less than six months old, including multiple fractures, other internal injuries, and retinal hemorrhages in both eyes. Sufficient competent evidence supported the trial court’s unchallenged findings of fact addressing each of the factors in N.C.G.S. § 7B-906.2(d), and the court made a reasoned decision based on the mother’s lack of an adequate explanation for all of the child’s injuries and on the mother’s incomplete progress on her case plan. **In re M.T., 305.**

## CONSTITUTIONAL LAW

**North Carolina—Art. I, sec. 38—right to harvest fish—applicability of immunity defenses—colorable claim**—In an action initiated by a conservation group and citizens (together, plaintiffs) seeking declaratory and injunctive relief regarding the State’s alleged mismanagement of North Carolina’s coastal fisheries, which plaintiffs asserted violated their constitutional right to harvest fish, the State was not entitled to the defenses of governmental or sovereign immunity where plaintiffs raised a colorable constitutional claim directly under Art. I, sec. 38 of the North Carolina Constitution (right to hunt, fish, and harvest wildlife) for which no other adequate state remedy existed. **Coastal Conservation Ass’n v. State of N.C., 267.**

## CONSTITUTIONAL LAW—Continued

**North Carolina—Art. XIV, sec. 5—conservation of coastal fisheries—applicability of immunity defenses—colorable claim**—In an action initiated by a conservation group and citizens (together, plaintiffs) seeking declaratory and injunctive relief regarding the State’s alleged mismanagement of North Carolina’s coastal fisheries, which plaintiffs asserted violated their constitutional right to harvest fish, the State was not entitled to the defenses of governmental or sovereign immunity where plaintiffs raised a colorable constitutional claim directly under Art. XIV, sec. 5 of the North Carolina Constitution (conservation of natural resources) for which no other adequate state remedy existed. **Coastal Conservation Ass’n v. State of N.C., 267.**

## CRIMINAL LAW

**Prosecutor’s closing argument—felony animal cruelty—reading of case law—not grossly improper**—The prosecutor’s closing argument in a trial for felony animal cruelty—during which the prosecutor read to the jury, without objection, the facts of a prior animal cruelty case and opined that since the facts were similar to the instant case, the element of intent was established beyond a reasonable doubt—was not so grossly improper as to require a new trial, given the overwhelming evidence presented by the State. **State v. Lawson, 404.**

## DAMAGES AND REMEDIES

**Restitution—voided foreclosure sale of home—buyer—unclean hands—unjust enrichment**—After the trial court granted petitioners’ motion under Civil Procedure Rule 60(c) to set aside the foreclosure sale of their home for lack of proper notice, the court did not abuse its discretion in declining to award restitution to the buyer for the purchase price of the home. Specifically, the buyer was barred from recovering under the doctrine of unclean hands where the record showed the buyer knew about the defective notice of the sale, proceeded to buy the home for very little money, refused to allow petitioners to repurchase the home for the auction price, and then sold the home to a third party at a much higher price. Further, the buyer’s unclean hands precluded it from recovering on a theory that the homeowner’s association that sold petitioners’ home was unjustly enriched by the voided sale. **In re Foreclosure of George, 288.**

**Restitution—voided foreclosure sale of home—damage to home—ejection-related expenses**—In a case where a homeowner’s association sold petitioners’ home in a foreclosure sale to collect petitioners’ unpaid association fees, after which the trial court granted petitioners’ motion under Civil Procedure Rule 60(c) to set aside the sale, the court abused its discretion in declining to award petitioners any restitution after their home had been partially demolished while in the buyer’s possession and where plaintiffs were subjected to a variety of expenses following their ejection from the home. **In re Foreclosure of George, 288.**

## DISCOVERY

**Voluntary discovery—criminal case—laboratory records—procedures for blood alcohol analysis**—In a prosecution for felony death by vehicle and driving while impaired, where a chemical analysis of defendant’s blood by the City-County Bureau of Identification laboratory indicated that defendant was drunk when she fatally struck a pedestrian with her car, the trial court did not abuse its discretion in denying defendant’s request for voluntary discovery of the laboratory’s audit, non-

## DISCOVERY—Continued

conformity, and corrective-action records, which defendant argued might contain information demonstrating possible user error in the operation of the machine used to analyze her blood. The State provided sufficient information to familiarize defendant with the laboratory's testing procedures, which she used to effectively cross-examine the doctor who analyzed her blood sample. Further, on appeal from her convictions, defendant failed to cite any authority or assert any legal basis for her claim that the denial of her discovery request violated her due process rights under the state constitution. **State v. See, 413.**

## ESTATES

**Elective share—statute amended during appeal to superior court—remand for application of new statute**—In an estate proceeding, where the portion of the clerk of court's order awarding an elective share of the estate to decedent's wife was appealed to the superior court, the superior court erred by sua sponte raising the issue of whether the clerk had used the correct values in its calculation and issuing a new order awarding a different elective share. Because a new version of the applicable statute went into effect while the matter was on appeal to the superior court (and the estate proceeding was not final), the clerk's order was no longer based on good law and the superior court should have remanded the matter to the clerk for application of the amended statute. **In re Est. of Geringer, 296.**

## INDICTMENT AND INFORMATION

**Felony animal cruelty—name of horse—surplusage**—In an indictment charging defendant with felony animal cruelty, the trial court properly allowed the State to amend the indictment by removing the name of the horse, which was not an essential element of the offense and therefore was not required to render the indictment facially valid. Further, the remaining description of the animal as a "chestnut mare horse" was sufficiently clear to allow defendant the ability to prepare an adequate defense and to protect himself from being twice put in jeopardy for the same offense. **State v. Lawson, 404.**

## JURISDICTION

**Personal—action "arising out of or relating to" defendant's contacts—stream of commerce—no purposeful availment**—In a set of consolidated wrongful death actions filed after four people died in a helicopter crash in North Carolina, the trial court erred by denying motions to dismiss for lack of personal jurisdiction filed by the helicopter manufacturer and the manufacturer of the helicopter engines that overheated during the accident where plaintiffs (the crash victims' estates) failed to show that their lawsuits "arose out of or related to" the manufacturers' contacts with North Carolina. The German helicopter manufacturer and French engine manufacturer, neither of whom sold their products directly to North Carolina, did not purposefully avail themselves of the privilege of conducting business in North Carolina where they merely injected their products into the "stream of commerce" through actions directed at an international market (including the United States generally) rather than at North Carolina specifically. **Bartlett v. Est. of Burke, 249.**

## JURY

**Criminal trial—voir dire—reopening—trial court's discretion**—In a prosecution for misdemeanor child abuse, the trial court did not abuse its discretion by

## JURY—Continued

denying defendant-parents' motions to reopen voir dire of a juror who, after he had been passed upon by counsel but before the jury was impaneled, stated that he believed defendants should be required to testify. The trial court carefully instructed the juror on defendants' right not to testify, heard arguments from counsel, considered the matter overnight, considered the negative impact that reopening voir dire could have on the orderly disposition of defendants' charges, and was satisfied that the juror would follow the law as the court instructed him. **State v. Adams, 379.**

## JUVENILES

**Delinquency—indirect contempt—prior adjudication of undisciplined—notice—allowable disposition**—There was no error in the trial court's adjudication of delinquency for indirect contempt based on a juvenile's failure to meet various school attendance and performance conditions imposed by the court after a prior adjudication of undisciplined. The juvenile's due process and statutory rights were not violated where the juvenile was given several warnings regarding contempt prior to the delinquency petition being filed, and the disposition of delinquency for indirect contempt was expressly allowed by the applicable statutes. **In re B.W.C., 284.**

## NEGLIGENCE

**Gross contributory negligence—voluntary intoxication**—The trial court properly dismissed—pursuant to Civil Procedure Rule 12(b)(6)—a wrongful death action against a retail, dining, and recreational complex where, one night, the decedent arrived at the complex already drunk, consumed more alcohol on the premises until his blood alcohol concentration was nearly five times the legal limit, and then drowned after jumping into a nearby lake. The decedent's voluntary intoxication amounted to gross contributory negligence barring his estate's recovery from any negligence by the complex. **Lovett v. Univ. Place Owner's Ass'n, 366.**

## PROBATION AND PAROLE

**During pendency of appeal—requirement to complete conditions of probation—stayed**—In its judgments entered upon jury verdicts finding defendant guilty of misdemeanor child abuse, the trial court erred by ordering defendant to fulfill conditions of his probation during the pendency of his appeal. Defendant's probation was stayed by N.C.G.S. § 15A-1451 upon his notice of appeal. **State v. Adams, 379.**

## SATELLITE-BASED MONITORING

**Jurisdiction—recidivist status—sufficiency of findings**—Where, in light of *State v. Grady*, 327 N.C. 509 (2019), the trial court vacated a previous order imposing lifetime satellite-based monitoring (SBM) on defendant and issued a new order requiring him to enroll in SBM for a period of 30 years, the appellate court rejected defendant's argument that the trial court lacked subject matter jurisdiction to do so, as the trial court continued jurisdiction over the original order and could modify it pursuant to defendant's motion for appropriate relief. Further, the trial court had statutory authority to impose SBM because defendant's offense was committed against a minor; and finally, the trial court made sufficient findings to support its determination that defendant required the "highest possible level of supervision and monitoring" for a term of 30 years. **State v. Cheers, 394.**

## TERMINATION OF PARENTAL RIGHTS

**Disposition phase—parent’s expert witness—exclusion of testimony**—In the disposition phase of a termination of parental rights proceeding, the trial court did not abuse its discretion by excluding testimony from one of the mother’s expert witnesses where it made a reasoned decision that the expert’s opinion would not be helpful or relevant because she lacked information about the mother or the specific facts of the case, she did not know how social services operated in North Carolina, and her data on families and child welfare was not based on research from North Carolina. **In re M.T., 305.**

**Grounds for termination—abuse or neglect—non-accidental injuries to one child—likelihood of future neglect**—The trial court properly terminated a mother’s parental rights to her two children on the grounds of abuse (one child) and neglect (both children) where the children had been removed from the home due to unexplained non-accidental injuries to one of the children when he was less than six months old, including multiple fractures, other internal injuries, and retinal hemorrhages in both eyes. Competent evidence supported the court’s findings of fact, which in turn supported its conclusions of law that there would be a repetition of neglect if the children were returned to the mother’s care based on the mother’s lack of a reasonable explanation for all of her son’s injuries and on her lack of progress in addressing the issues that led to the children’s removal. **In re M.T., 305.**

## WATERS AND ADJOINING LANDS

**Public trust doctrine—coastal fisheries management—sovereign immunity doctrine**—An action initiated by a conservation group and citizens (together, plaintiffs) seeking declaratory and injunctive relief regarding the State’s alleged breach of the public trust doctrine for failing to adequately manage North Carolina’s coastal fisheries was not barred by the doctrine of sovereign immunity where plaintiffs were not asserting rights of ownership or attempting to enforce public trust rights against a private party, but sought judicial review of the State’s alleged obligations to manage public trust lands. **Coastal Conservation Ass’n v. State of N.C., 267.**

## WORKERS’ COMPENSATION

**Termination of benefits—misconduct related to compensable injury—constructive refusal of suitable employment—inapplicable**—An opinion and award ordering an employer (defendant) to pay temporary total disability benefits to one of its truck drivers (plaintiff) was affirmed where, after plaintiff initially received benefits for a back injury he sustained on the job in a single-vehicle accident, defendant fired plaintiff for cause and then terminated his benefits on grounds that, because he was fired for misconduct (falling asleep at the wheel during the accident), plaintiff had made himself ineligible for rehire through defendant’s return-to-work program and therefore had constructively refused suitable post-injury employment. The Industrial Commission properly declined to apply the test for constructive refusal of suitable employment articulated in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228 (1996), which only applies to employees who are fired for misconduct that is unrelated to their work-related injury, where applying the test to plaintiff would have created a fault-based bar to workers’ compensation, which would cut against the underlying principles of the workers’ compensation system. **Richards v. Harris Teeter, Inc., 370.**

**N.C. COURT OF APPEALS**  
**2023 SCHEDULE FOR HEARING APPEALS**

Cases for argument will be calendared during the following weeks:

January	9 and 23
February	6 and 20
March	6 and 20
April	10 and 24
May	8 and 22
June	5
August	7 and 21
September	4 and 18
October	2, 16, and 30
November	13 and 27
December	11 (if needed)

Opinions will be filed on the first and third Tuesdays of each month.



**BARTLETT v. EST. OF BURKE**

[285 N.C. App. 249, 2022-NCCOA-588]

LENNARD BARTLETT, SR. ADMINISTRATOR OF THE ESTATE OF  
MARY SUSAN WHITE BARTLETT, PLAINTIFF

v.

ESTATE OF JEFFREY L. BURKE; AIR METHODS CORPORATION;  
AIRBUS HELICOPTERS DEUTSCHLAND, GMBH; AIRBUS HELICOPTERS, INC.;  
SAFRAN HELICOPTER ENGINES; AND  
SAFRAN HELICOPTER ENGINES USA, INC., DEFENDANTSKASEY HOBSON HARRISON, EXECUTRIX OF THE ESTATE OF  
KRISTOPHER RAY HARRISON, PLAINTIFF

v.

ESTATE OF JEFFREY L. BURKE; AIR METHODS CORPORATION;  
AIRBUS HELICOPTERS DEUTSCHLAND, GMBH; AIRBUS HELICOPTERS, INC.;  
SAFRAN HELICOPTER ENGINES; AND  
SAFRAN HELICOPTER ENGINES USA, INC., DEFENDANTS.

No. COA22-95

Filed 6 September 2022

**1. Appeal and Error—interlocutory order—denial of motion to dismiss—personal jurisdiction—substantial right**

An interlocutory order denying defendants' motions to dismiss a set of consolidated wrongful death actions for lack of personal jurisdiction was immediately appealable as affecting a substantial right.

**2. Jurisdiction—personal—action “arising out of or relating to” defendant’s contacts—stream of commerce—no purposeful availment**

In a set of consolidated wrongful death actions filed after four people died in a helicopter crash in North Carolina, the trial court erred by denying motions to dismiss for lack of personal jurisdiction filed by the helicopter manufacturer and the manufacturer of the helicopter engines that overheated during the accident where plaintiffs (the crash victims' estates) failed to show that their lawsuits “arose out of or related to” the manufacturers' contacts with North Carolina. The German helicopter manufacturer and French engine manufacturer, neither of whom sold their products directly to North Carolina, did not purposefully avail themselves of the privilege of conducting business in North Carolina where they merely injected their products into the “stream of commerce” through actions directed at an international market (including the United States generally) rather than at North Carolina specifically.

**BARTLETT v. EST. OF BURKE**

[285 N.C. App. 249, 2022-NCCOA-588]

Appeal by defendants from orders entered 13 September 2021 by Judge David L. Hall in Durham County Superior Court. Heard in the Court of Appeals 9 August 2022.

*Robb & Robb LLC, by Gary C. Robb, admitted pro hac vice, Anita Porte Robb, admitted pro hac vice, and Brittany Sanders Robb, admitted pro hac vice, and Ward and Smith P.A. by Christopher S. Edwards for plaintiff-appellees Lennard Bartlett, Sr. Administrator of the Estate of Mary Susan White Bartlett and Kasey Hobson Harrison, Executrix of the Estate of Kristopher Ray Harrison.*

*Pangia Law Group, by Amanda C. Dure and Joseph L. Anderson, and Mast, Mast, Johnson, Wells & Trimyer, PA, by Charles D. Mast and Nichole G. Booker for cross claimant-appellee the Estate of Jeffrey L. Burke.*

*Crouse Law Offices by James T. Crouse for plaintiff-intervenor-appellee Robert Sollinger.*

*Ellis & Winters LLP, by Alex J. Hagan and Kelly Margolis Dagger, and Wilson Elser Moskowitz Edelman & Dicker, LLP by Kathryn A. Grace and William J. Katt, admitted pro hac vice, for defendants-appellees Estate of Jeffrey L. Burke and Air Methods Corporation.*

*Moore & Van Allen PLLC, by Christopher D. Tomlinson and Anthony T. Lathrop, and Locke Lord LLP by Eric C. Strain, admitted pro hac vice, and Paul E. Stinson, admitted pro hac vice, for defendant-appellant Airbus Helicopters Deutschland GmbH.*

*Nelson Mullins Riley & Scarborough LLP, by D. Martin Warf and William M. Starr, and Jackson Walker LLP, by Stuart B. Brown, Jr., admitted pro hac vice, for defendant-appellant Safran Helicopter Engines.*

TYSON, Judge.

¶ 1 Safran Helicopter Engines (“SHE”) and Airbus Helicopters Deutschland GmbH (“AHD”) appeal from orders entered denying their motions to dismiss for lack of specific personal jurisdiction. We reverse and remand.

**BARTLETT v. EST. OF BURKE**

[285 N.C. App. 249, 2022-NCCOA-588]

**I. Background**

¶ 2 At approximately 11:08 a.m. on 8 September 2017, a Eurocopter Deutschland GmbH model MBB-BK117 C2 helicopter (“Helicopter”) took off from the helipad at Sentara Albemarle Regional Medical Center in Elizabeth City with a flight plan bound for the helipad located at Duke University Hospital in Durham. The Helicopter’s manufacturer designated the unit as serial number 9474, and it was assigned a Federal Aviation Administration (“FAA”) registration number of N146DU. Air Methods Corporation operated the Helicopter for the owner, Duke University Health Systems, Inc., specifically as a medevac flight for Duke Life Flight.

¶ 3 The Helicopter pilot commenced a turn to the south at approximately 11:16 a.m. A minute later, the Helicopter’s computer transmitted flight data stating the aircraft was flying at an altitude of 1,200 feet above mean sea level with a ground speed of 75 knots or 86.3 miles per hour. Witnesses on the ground later reported they observed smoke trailing from behind the Helicopter while in flight. Witnesses also reported the Helicopter appeared to be hovering and not traveling forward. The Helicopter quickly descended and impacted a shallow turf drainage pathway about 30 feet wide and 2,000 feet long located between two fields of eight-foot-tall grass on a wind turbine farm in Hertford. The Helicopter landed upright, but the cabin collapsed downward upon impact and was partially consumed by post-impact fire.

¶ 4 Onboard the Helicopter was pilot-in-charge, Jeffrey L. Burke; two flight nurses: Kristopher R. Harrison and Crystal Sollinger; and patient, Mary Susan White Bartlett. All individuals aboard perished in the crash. Burke was employed by Air Methods Corporation and Harrison and Sollinger were employed by Duke University Health Systems, Inc.

¶ 5 The National Transportation Safety Board (“NTSB”) investigated the crash. Examination of the Helicopter’s wreckage revealed the second engine’s rear turbine shaft bearing exhibited dislocation consistent with overheating and lack of lubrication, and the bearing roller pins were worn down to the surface of the bearing race. The FAA issued a Special Airworthiness Information Bulletin (“SAIB”) SW-18-04 alerting owners, operators, maintainers, and certified repair facilities of the MBB-BK117 C2 helicopters of possible blockages of the engine oil drainage system. The SAIB SW-18-04 bulletin references an emergency landing by a MBB-BK117 C2 helicopter in Sioux Falls, South Dakota on 26 January 2017 resulting in no fatalities and the 8 September 2017 crash of this Helicopter. The SAIB noted “block drain line may, under certain circumstances, present a risk for an engine fire and/or inflight shutdown

**BARTLETT v. EST. OF BURKE**

[285 N.C. App. 249, 2022-NCCOA-588]

of the affected engine.” SAIB SW-18-04 recommended operators of MBB-BK117 C2 helicopters perform inspections of the bearing lines and drain collector at a maximum of 100 hours of time-in-service.

¶ 6 The Helicopter at issue was equipped with two Arriel 1E2 jet turbine engines (the “Engines”) manufactured by Turbomeca S.A.S, which company was purchased by Safran SA in 2005 and rebranded as SHE in 2016. SHE is a wholly-owned subsidiary of Safran SA, a French public limited company, which is not a party to this action. SHE’s principal place of business is located in Paris, France, and it maintains a place of business in Bordes, France, where it manufactured the Engines at issue. SHE sold and delivered the Engines to Eurocopter Deutschland GmbH located in Germany in December 2010. SHE sells and delivers Arriel engines to AHD in both France and Germany.

¶ 7 Safran Helicopter Engines USA is a Delaware corporation with its principal place of business located in Grand Marie, Texas. Safran Helicopter Engines USA is a wholly-owned subsidiary of Safran USA, a Delaware corporation with its principal place of business located in Irving, Texas. Safran USA is also a wholly owned subsidiary of Safran S.A. Safran USA fulfills orders for engines, provides technical support to customers, and markets these services and products within the United States.

¶ 8 Safran S.A. and Safran USA chartered Turbomeca Manufacturing, a Delaware Corporation, in July 2007. Turbomeca Manufacturing, Inc. was later renamed Turbomeca Manufacturing LLC. Turbomeca Manufacturing, Inc. manufactured helicopter engine components. Turbomeca Manufacturing, Inc. opened a manufacturing facility in Monroe. Safran purchases engine components from Turbomeca Manufacturing LLC for use in engines it manufactured in France.

¶ 9 AHD is formerly known as Eurocopter Deutschland GmbH. Eurocopter Deutschland GmbH was renamed AHD in 2014. AHD is a company engaged in the design, manufacture, testing, inspection, assembly, labeling, advertising, sale, promotion, and distribution of helicopters, with its principal place of business located in Germany. AHD sourced two helicopter components from companies located in North Carolina.

¶ 10 Airbus Helicopters, Inc. is a Delaware corporation with its principal place of business in Texas. Airbus Helicopters, Inc. is the successor to American Eurocopter Corporation. In 2009, Eurocopter entered a Distribution and Service Center Agreement with American Eurocopter Corporation, which was assigned to successor entity Airbus Helicopters, Inc.

**BARTLETT v. EST. OF BURKE**

[285 N.C. App. 249, 2022-NCCOA-588]

¶ 11 The Distribution and Service Center Agreement defines their relationship and granted American Eurocopter Corporation the exclusive right to sell new Eurocopter helicopters within the United States. American Eurocopter Corporation obligated itself to promote, market, and support products it purchased from Eurocopter for resale within the United States.

¶ 12 In 2011, Eurocopter sold and delivered the Helicopter at issue to American Eurocopter Corporation. This transaction occurred in Germany. The purchase agreement is governed by German law. American Eurocopter Corporation was responsible for importing the Helicopter into the United States. The Helicopter was delivered in a standard configuration.

¶ 13 American Eurocopter Corporation imported and sold the Helicopter to Duke University Health System, Inc. in Texas also in a standard configuration. American Eurocopter Corporation agreed to provide Duke University Health System, Inc. as the Helicopter's owner with technical publications, pilot training, and maintenance training.

¶ 14 AHD was made aware Air Methods was operating the Helicopter as an EMS medevac Duke Life Flight on behalf of Duke University Health System, Inc. AHD was also made aware of approximately two dozen other similar helicopter operators in North Carolina. In 2017, Air Methods asked Airbus Helicopters, Inc. a technical question about the Helicopter that required Airbus Helicopters, Inc. to obtain information from AHD, which then responded to Air Methods. The subject of this inquiry is not at issue in the accident involving the Helicopter.

¶ 15 Lennard Bartlett, Sr., in his capacity as administrator of the estate of Mary Susan White Bartlett, and Kasey Hobson Harrison, in her capacity as executrix of the estate of Kristopher Ray Harrison, each filed negligence and breach of warranty actions for wrongful death damages against the Estate of Jeffrey L. Burke; Air Methods Corporation; AHD; Airbus Helicopters, Inc.; SHE; and, Safran Helicopter Engines USA, Inc. on 11 December 2017.

¶ 16 Dina Burke, as administrator of the Estate of Jeffrey L. Burke, filed crossclaims against SHE and AHD.

¶ 17 Lennard Bartlett, Sr., in his capacity as administrator of the estate of Mary Susan White Bartlett ("Bartlett Action"), and Kasey Hobson Harrison, in her capacity as executrix of the estate of Kristopher Ray Harrison ("Harrison Action"), each filed amended complaints. The Estate of Jeffrey L. Burke and Air Methods Corporation answered,

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asserted affirmative defenses, and cross-claimed for indemnity against SHE and AHD.

¶ 18 SHE moved to dismiss the Bartlett and Harrison Actions on 15 June 2018. SHE also moved to dismiss the indemnity claims filed by the Estate of Jeffrey L. Burke and Air Methods Corporation. Both the Bartlett and Harrison Actions were consolidated by order on 14 August 2018.

¶ 19 AHD moved to dismiss the Bartlett and Harrison Actions for lack of personal jurisdiction on 21 August 2018 and 11 September 2018, respectively. AHD moved to dismiss the crossclaim of the Estate of Jeffrey L. Burke on 6 May 2019.

¶ 20 On 1 October 2018, Robert Sollinger, in his capacity as executor of the estate of Crystal Sollinger, moved to intervene and file a complaint, which was granted by order entered on 13 November 2018. SHE and AHD moved to dismiss the Sollinger action for lack of personal jurisdiction on 6 May 2019. The trial court entered orders denying SHE's and AHD's motions to dismiss under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure and holding North Carolina had personal jurisdiction over SHE and AHD by orders entered 13 September 2021. SHE and AHD appeal.

**II. Jurisdiction**

¶ 21 **[1]** SHE and AHD correctly concede this appeal is interlocutory but assert their substantial rights will be impacted without immediate review. *See* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2021).

¶ 22 “Generally, there is no right of immediate appeal from interlocutory orders and judgments.” *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

¶ 23 Our Supreme Court has held:

A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

*Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (internal citations omitted).

¶ 24 “This general prohibition against immediate [interlocutory] appeal exists because [t]here is no more effective way to procrastinate the

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administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders.” *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 568 (2007) (citation and internal quotations omitted).

¶ 25 Our General Statutes recognize a limited right to an immediate appeal from an interlocutory order denying a motion to dismiss for lack of personal jurisdiction. See N.C. Gen. Stat. § 1-277(b) (2021) (“Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]”). The denial of a “motion[] to dismiss for lack of personal jurisdiction affect[s] a substantial right and [is] immediately appealable.” *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257-58, 625 S.E.2d 894, 898 (2006) (citations omitted).

¶ 26 This exception is narrow: “the right of immediate appeal of an adverse ruling as to jurisdiction over the person, under [N.C. Gen. Stat. § 1-277(b)], is limited to rulings on ‘minimum contacts’ questions, the subject matter of Rule 12(b)(2).” *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982). This appeal is properly before this Court.

**III. Issue**

¶ 27 **[2]** SHE and AHD argue the trial court erred in asserting and holding it had acquired personal jurisdiction over them.

**IV. Personal Jurisdiction**

¶ 28 North Carolina applies a two-step analysis to determine whether a non-resident defendant is subject to *in personam* jurisdiction. See *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986) (citation omitted). “First, jurisdiction must be authorized by our ‘long-arm’ statute, N.C. Gen. Stat. § 1-75.4. Second, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.” *Cambridge Homes of N.C. Ltd. P’ship v. Hyundai Constr., Inc.*, 194 N.C. App. 407, 411, 670 S.E.2d 290, 295 (2008) (internal citations and quotation marks omitted).

¶ 29 The Fourteenth Amendment’s Due Process Clause limits a state court’s power to exercise jurisdiction over a non-resident defendant. See *International Shoe Co. v. Washington*, 326 U.S. 310, 315 90 L. Ed. 95, 101 (1945). The Supreme Court of the United States recognizes “two kinds of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction.” *Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.*, 592 U.S. \_\_, \_\_, 209 L.

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Ed. 2d 225, 233 (2021) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 180 L. Ed. 2d 796, (2011)).

¶ 30 “The application of that rule will vary with the quality and nature of the defendant’s activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of” the forum state’s laws. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-75, 85 L. Ed. 2d 528, 542 (1985) (internal citation omitted). This “ ‘purposefully avails’ requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated’ contacts[.]” *Id.* (citation omitted).

¶ 31 The basis of the suit must “arise out of or relate to the defendant’s contacts with the forum.” *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 582 U.S. \_\_\_, \_\_\_, 198 L. Ed. 2d 395, 403 (2017) (citation omitted); see *Ford Motor Co.*, 592 U.S. at \_\_\_, 209 L. Ed. 2d at 234 (citations omitted); *Burger King*, 471 U.S. at 472, 85 L. Ed. 2d at 541 (citation omitted); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 411 (1984) (citations omitted); *International Shoe*, 326 U.S. at 319, 90 L. Ed. at 104.

**A. Standard of Review**

¶ 32 “When jurisdiction is challenged, plaintiff has the burden of proving that jurisdiction exists.” *Stetser v. TAP Pharm. Prods., Inc.*, 162 N.C. App. 518, 520, 591 S.E.2d 572, 574 (2004) (citation omitted). As noted above, “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Burger King Corp.*, 471 U.S. at 475, 85 L. Ed. 2d at 542 (citation omitted).

¶ 33 “The standard of review [on appeal] of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record[.]” *Bell v. Mozley*, 216 N.C. App. 540, 543, 716 S.E.2d 868, 871 (2011) (citation and quotation marks omitted). “We review *de novo* the issue of whether the trial court’s findings of fact support its conclusion of law that the court has personal jurisdiction over a defendant.” *Id.* (citation omitted).

**B. Minimum Contacts**

¶ 34 North Carolina’s Long Arm Statute, N.C. Gen. Stat. § 1-75.4 (2021), grants North Carolina’s courts specific personal jurisdiction “over defendant[s] to the extent allowed by due process.” *Dillon*

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*v. Numismatic Funding Corp.*, 291 N.C. 674, 676 ,231 S.E.2d 629, 631 (1977). The two-step inquiry from *Tom Togs* “collapses into the question of whether” the defendant moving to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) “has the minimum contacts with North Carolina necessary to meet the requirements of due process.” *Sherlock v. Sherlock*, 143 N.C. App. 300, 303, 545 S.E.2d 757, 760 (2001) (citations and quotation marks omitted).

**1. Ford Motor Co. v. Montana Eighth Judicial Dist. Ct.**

¶ 35 The Supreme Court of the United States recently addressed the issue of a state court’s authority under the Due Process Clause of the Fourteenth Amendment to exercise personal jurisdiction over an out-of-state defendant in *Ford Motor Co.*, 592 U.S. at \_\_, 209 L. Ed. 2d at 232. In *Ford*, the action arose out of two separate automobile accidents occurring in Montana and Minnesota involving vehicles manufactured by Ford Motor Company. *Id.* Ford Motor Company is incorporated in Delaware and headquartered in Michigan. *Id.* at \_\_, 209 L. Ed. 2d at 231.

¶ 36 Ford Motor Company conceded “it does substantial business in” both states, “that it actively seeks to serve the market for automobiles and related products” in both states, and “it ha[d] purposefully avail[ed] itself of the privilege of conducting activities in both places.” *Id.* at \_\_, 209 L. Ed. 2d at 235 (citation and quotation marks omitted). Ford Motor Company maintained and argued a strict causal relationship was required to be shown between the injury and conduct.

¶ 37 Ford Motor Company asserted the required link had to “be causal in nature” and “jurisdiction attaches only if the defendant’s forum conduct gave rise to the plaintiff’s claims.” *Id.* (quotation marks omitted).

¶ 38 The Supreme Court of the United States held:

None of our precedents ha[ve] suggested that only a strict causal relationship between the defendant’s in-state activity and the litigation will do. As just noted, our most common formulation of the rule demands that the suit “arise out of *or relate to* the defendant’s contacts with the forum.” The first half of that standard asks about causation; but the back half, after the “or,” contemplates that some relationships will support jurisdiction without a causal showing. *That does not mean anything goes. In the sphere of specific jurisdiction, the phrase “relate to” incorporates real limits, as it must to adequately*

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*protect defendants foreign to a forum.* But again, we have never framed the specific jurisdiction inquiry as always requiring proof of causation—i.e., proof that the plaintiff’s claim came about because of the defendant’s in-state conduct.

*Id.* at \_\_\_, 209 L. Ed. 2d at 235-36 (last emphasis supplied, citations omitted).

¶ 39

The Supreme Court’s majority opinion drew the following example analyzing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 297, 62 L. Ed. 2d 490 (1980):

[I]ndeed, this Court has stated that specific jurisdiction attaches in cases . . . when a company like Ford serves a market for a product in the forum State and the product malfunctions there. In *World-Wide Volkswagen*, the Court held that an Oklahoma court could not assert jurisdiction over a New York car dealer just because a car it sold later caught fire in Oklahoma. But in so doing, we contrasted the dealer’s position to that of two other defendants—Audi, the car’s manufacturer, and Volkswagen, the car’s nationwide importer (neither of which contested jurisdiction):

“[I]f the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in [several or all] other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.”

Or said another way, if Audi and Volkswagen’s business deliberately extended into Oklahoma (among other States), then Oklahoma’s courts could hold the companies accountable for a car’s catching fire there—even though the vehicle had been designed and made overseas and sold in New York. For, the Court explained, a company thus “purposefully avail[ing] itself” of the Oklahoma auto market “has clear notice” of its exposure in that State to suits

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arising from local accidents involving its cars. And the company could do something about that exposure: It could “act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are [still] too great, severing its connection with the State.”

*Id.* at \_\_\_, 209 L. Ed. 2d at 236-37 (citations omitted).

¶ 40 The Supreme Court concluded: “Ford had systematically served a market in Montana and Minnesota for the very vehicles that the plaintiffs allege malfunctioned and injured them in those States. So there is a strong ‘relationship among the defendant, the forum, and the litigation’—the ‘essential foundation’ of specific jurisdiction.” *Id.* at \_\_\_, 209 L. Ed. 2d at 238 (citation omitted).

¶ 41 The majority’s opinion in *Ford*, does not explain how a large national, ubiquitous company could not be subject to jurisdiction in all courts, however, it cites with approval and does not overrule its decision in *Goodyear*. In *Goodyear*, the Supreme Court of the United States found North Carolina could not hale Goodyear Dunlop Tires Operations, S.A. into a North Carolina court, when the allegedly defective tire was manufactured in Turkey and purportedly malfunctioned in France. *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 918, 180 L. Ed. 2d at 802.

¶ 42 The majority’s opinion’s “assortment of nouns” in *Ford* does not establish outer limits for lower courts to follow when evaluating whether due process protections prohibit a court from establishing specific personal jurisdiction over a non-forum defendant. *Ford Motor Co.*, 592 U.S. at \_\_\_, 209 L. Ed. 2d at 245 (Gorsuch, J., concurring). Justice Gorsuch’s concurrence asserts the majority opinion’s holding may affect lower court’s evaluation of specific personal jurisdiction after *Ford*:

Where this leaves us is far from clear. For a case to “relate to” the defendant’s forum contacts, the majority says, it is enough if an “affiliation” or “relationship” or “connection” exists between them. But what does this assortment of nouns *mean*? Loosed from any causation standard, we are left to guess. The majority promises that its new test “does not mean anything goes,” but that hardly tells us what does. In some cases, the new test may prove more forgiving than the old causation rule. But it’s hard not to wonder whether it may also sometimes turn out to be more demanding. Unclear too is whether,

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in some cases like that, the majority would treat causation and “affiliation” as alternative routes to specific jurisdiction or whether it would deny jurisdiction outright.

*Id.* (internal citations omitted).

¶ 43 This Court’s post-*Ford* opinions in *Cohen v. Cont’l Motors, Inc.*, 2021-NCCOA-449, 279 N.C. App. 123, 864 S.E.2d 816 (2021) and *Miller v. L.G. Chem, Ltd.*, 2022-NCCOA-55, 281 N.C. App. 531, 868 S.E.2d 896 (2022) analyze prior specific personal jurisdiction precedents. *Cohen* and *Miller* are instructive and set precedential goalposts and boundary lines to determine whether sufficient or insufficient jurisdictional contacts are shown and proven.

### **2. *Cohen v. Cont’l Motors, Inc.***

¶ 44 In *Cohen*, the plaintiffs’ aircraft starter adapter failed, causing a loss of oil pressure and ultimate failure of the aircraft’s engine. *Cohen*, 2021-NCCOA-449 at ¶ 2, 279 N.C. App. at 125, 864 S.E.2d at 818. The plane crashed and both owners/pilots perished. *Id.* Continental Motors, Inc., the engine’s manufacturer, is domiciled in Delaware, made nearly 3,000 sales, earning almost \$4 million from North Carolina-based consumers. *Id.* at ¶¶ 3-4, 279 N.C. App. at 125, 864 S.E.2d at 819. Continental Motors worked closely with fourteen paid North Carolina maintenance providers and paid subscribers from its electronic subscription account for manuals and technical support. *Id.* at ¶ 6, 279 N.C. App. at 126, 864 S.E.2d at 819.

### **3. *Miller v. L.G. Chem, Ltd.***

¶ 45 “LG Chem manufactures and sells lithium-ion batteries which are designed and sold solely to corporate and industrial businesses for inclusion in battery packs used for specified products” not for use in the vape devices for which they were inserted in the underlying action. *Miller*, 2022-NCCOA-55 at ¶ 23, 281 N.C. App. at 537, 868 S.E.2d at 901. LG Chem never sold battery or battery components to North Carolina-based companies. *Id.* at ¶ 26, 281 N.C. App. at 538, 868 S.E.2d at 902. This Court held the defendants in *Cohen* could be haled into North Carolina’s courts, but the defendants in *Miller* could not.

## **C. Analysis**

¶ 46 This Court has held: “The mere fact that [a defendant] was ‘connected’ to the manufacture and distribution of [a product] is not sufficient to support a conclusion that [the defendant] purposefully availed

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itself of North Carolina jurisdiction by injecting its products into the stream of commerce.” *Id.* at ¶ 19, 281 N.C. App. at 536, 868 S.E.2d at 901 (citation omitted).

¶ 47 Our Supreme Court recently summarized the Supreme Court of the United States’ prerequisites for a forum to exercise personal jurisdiction under a stream of commerce theory in *Mucha v. Wagner*, 2021-NCSC-82, 378 N.C. 167, 861 S.E.2d 501 (2021):

These cases have drawn a distinction between conduct targeted at states generally and conduct targeted at the specific forum state seeking to exercise jurisdiction over the defendant. Thus, the Court has held that a forum state may exercise personal jurisdiction over a defendant who delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State, but not over a defendant who directed marketing and sales efforts at the United States without engaging in conduct purposefully directed at the forum state.

*Id.* at ¶ 15, 378 N.C. at 173, 861 S.E.2d at 507-08 (citations, alterations, and internal quotation marks omitted).

¶ 48 Neither Bartlett, Harrison, nor any of the plaintiffs make any arguments to “pierce the corporate veil” of AHD or SHE or assert either entity is an “alter ego” of the United States- based defendants to AHD and SHE. SHE has no relationship with Safran Helicopter Engines USA. AHD has no ownership interest in Airbus Helicopters, Inc. The parties’ relationship is governed by the distributor agreement. Neither Airbus SE nor Safran S.A., the corporate parents, of AHD and SHE are parties in this action. *Glenn v. Wagner*, 313 N.C. 450, 455, 329 S.E.2d 326, 330-31 (1985) (lays out elements and factors for a court to consider whether to pierce the corporate veil). *See Acceptance Corp. v. Spencer*, 268 N.C. 1, 8, 149 S.E.2d 570, 575 (1966) (“[A] corporation which exercises actual control over another, operating the latter as a mere instrumentality or tool, is liable for the torts of the corporation thus controlled. In such instances, the separate identities of parent and subsidiary or affiliated corporations may be disregarded.”) (citation omitted).

¶ 49 A federal trial court has held the North Carolina court “would adopt the internal affairs doctrine and apply the law of the state of incorporation” in piercing the corporate veil. *Dassault Falcon Jet Corp. v. Oberflex, Inc.*, 909 F. Supp. 345, 349 (M.D.N.C. 1995). However, while not explaining why it used North Carolina law, this Court applied North

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Carolina law to pierce the corporate veil of a Florida corporation doing business in North Carolina to uphold personal jurisdiction in North Carolina. See *Copley Triangle Assoc. v. Apparel America, Inc.*, 96 N.C. App. 263, 265, 385 S.E.2d 201, 203 (1989). The structural and governance integrity of the foreign corporate entities is unchallenged.

**1. AHD**

¶ 50 AHD argues the trial court erred by finding it “availed itself of the privilege of conducting business in North Carolina through its continuous and deliberate efforts to serve the market here, individually[,]” and that “AHD has continuously and deliberately served the North Carolina market with regard to the Subject Helicopter and similar models.”

¶ 51 AHD challenges the following finding of fact:

11. The sales and marketing services AHD *sought and obtained* for the North Carolina market *are contacts* with North Carolina for purposes of this Motion;

(emphasis supplied).

¶ 52 “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.” *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (citation omitted). “As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.” *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations and quotation marks omitted). This “finding[] of fact” is properly characterized and reviewed as a conclusion of law.

¶ 53 AHD also challenges the following conclusions of law:

3. Discovery taken in this action fairly demonstrates that at the time AHD manufactured the Subject Helicopter, it knew and intended that the craft would be sold and used in an international market, including the United States and *potentially* North Carolina;

17. The facts found above demonstrate that AHD delivered the Subject Helicopter *into the stream of commerce* with the expectation it would be purchased

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and operated anywhere in the United States, specifically to include North Carolina;

19. In applying controlling law, this Court makes its Conclusions based, without limitation, the facts found that AHD at all times relevant to this action had

a) an international scope of operations;

b) chose to sell the Subject Helicopter (and similar models) via a nation-wide (sic) exclusive distributor agreement with A[irbus] H[elicopters] I[nc.] that included North Carolina;

c) made no attempt to limit sales to North Carolina;

d) had actual knowledge that the Subject Helicopter was being used as a medical services helicopter in North Carolina for more than seven (7) years prior to the loss complained of;

e) tracked ownership, operation, purpose and hours flown relating to the Subject Helicopter in part to derive benefit from future part sales and repairs;

f) participated in sufficient marketing and sales activity within North Carolina;

21. AHD had actual notice of potential exposure in the North Carolina courts arising from the sale and operation of the Subject Helicopter (and similar models) in North Carolina, and by providing ongoing guidance, instruction, and replacement parts for the continued operation of the Subject Helicopter in North Carolina, both individually and through its exclusive distributor A[irbus] H[elicopters] I[nc.];

(emphasis supplied). We will review these conclusions in our analysis of the underlying motion to dismiss.

¶ 54

The product at issue is a MB-BK117 C2 helicopter and its engines. AHD sells and delivers the helicopter in Germany to Airbus Helicopters Inc., who in turn imports the helicopters into the United States. Once imported into the United States, the helicopters are sold and delivered in

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Texas to the new owner or end user by Airbus Helicopters, Inc., a wholly separate entity, and is not a party to this appeal.

¶ 55 Ford Motor Company sold the various vehicles involved in each accident directly to the public through an elaborate local dealer network. Ford Motor Company “advertised, sold, and serviced those two car models in both [forum] States for many years.” *Ford Motor Co.*, 592 U.S. at \_\_\_, 209 L. Ed. 2d at 238. Unlike in *Ford*, AHD does not import nor operate a dealer network within the United States, and only sells and delivers the units in Germany directly to Airbus Helicopters Inc., an exclusive importer.

¶ 56 AHD does provide operator access to a website portal, Keycopter. The data and technical support provided by AHD includes technical publications, maintenance manuals, and technical instructions. AHD provides answers to technical questions regarding the ongoing care and maintenance of their helicopters through Keycopter.

¶ 57 In *Havey v. Valentine*, 172 N.C. App. 812, 816-17, 616 S.E.2d 642, 647-48 (2005), our Court adopted the United States Court of Appeals for the Fourth Circuit’s rule for determining whether an internet website can become the basis for the exercise of personal jurisdiction in the forum. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002). *ALS Scan, Inc.* adopted the analysis from *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D.Pa. 1997).

¶ 58 In *Havey*, this Court held:

A State may, consistent with due process, exercise judicial power over a person outside of the State when that person (1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State’s courts. *Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received.* Such passive Internet activity does not generally include directing electronic activity into the State with the manifested intent of engaging business or other interactions in the State thus creating in a person within the State a potential cause of action cognizable in

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courts located in the State. *When a website is neither merely passive nor highly interactive, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs.*

*Havey*, 172 N.C. App. at 816-17, 616 S.E.2d at 647-48 (emphasis supplied) (internal citations, quotation marks, and alterations omitted).

¶ 59 AHD's website, Keycopter, is an interactive informational website. The website provides a technical library where subscribers can access instructions. Unlike the technical website present, in *Cohen*, the record does not disclose whether AHD charged a subscription for access or generated any revenue from any North Carolina customers' access. At oral argument counsel for AHD stated the aircraft owner's warranty card provided their access to Keycopter. Unlike the paid subscription service shown in *Cohen*, this Keycopter portal is not shown to contain a commercial nature from paid subscriptions. "A passive [w]eb site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction." *ALS Scan, Inc.*, 293 F.3d at 714.

¶ 60 When considering whether AHD's alleged contacts "related to" North Carolina, beyond mere "stream of commerce," AHD has not "purposefully availed" itself of our forum, and these contacts are not sufficient to support the trial court's assertion of specific personal jurisdiction. *Havey*, 172 N.C. App. at 817, 616 S.E.2d 648; N.C. Gen. Stat. § 1-75.4. No evidence tends to show AHD marketed, sold, or delivered its products to North Carolina. Even if true, as the trial court's "stream of commerce" "findings of fact" #2 and #3 assert, the mere manufacture and introduction of a product into the world's "stream of commerce" without "purposeful availment" is insufficient to establish personal jurisdiction in North Carolina. *Burger King Corp.*, 471 U.S. at 474-75, 85 L. Ed. 2d at 542; *Mucha*, 2021-NCSC-82 at ¶ 15, 378 N.C. at 173, 861 S.E.2d at 507-08. The order of the trial court finding and concluding personal jurisdiction exists in North Carolina over AHD is reversed.

**2. SHE**

¶ 61 Here, the product at issue is SHE's Arriel 1E2 engines, which powered the Helicopter. The engine is not a consumer product. It is manufactured, marketed, distributed, and sold solely as a component product for helicopters. Like in *Miller*, SHE has never sought nor served a market in North Carolina for standalone helicopter engines. *Miller*, 2022-NCCOA-55 at ¶ 36, 281 N.C. App. at 540, 868 S.E.2d at 903. SHE

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never advertised, sold, or distributed any engines for sale to individual users or consumers in North Carolina.

¶ 62 Beyond worldwide “stream of commerce” SHE also has not “purposefully availed” itself of our forum. *Havey*, 172 N.C. App. at 817, 616 S.E.2d at 648; see N.C. Gen. Stat. § 1-75.4. These contacts are not sufficient to support the trial court’s assertion of specific personal jurisdiction in North Carolina. *Id.* The mere introduction of a product into the “stream of commerce” without “purposeful availment” is insufficient to establish jurisdiction. *Burger King Corp.*, 471 U.S. at 474-75, 85 L. Ed. 2d at 542; *Mucha*, 2021-NCSC-82 at ¶ 15, 378 N.C. at 173, 861 S.E.2d at 507-08; *Miller*, 2022-NCCOA-55 at ¶ 19, 281 N.C. App. at 536, 868 S.E.2d at 901 (citation omitted). The order of the trial court concluding personal jurisdiction exists over SHE in North Carolina is reversed.

**V. Conclusion**

¶ 63 Plaintiffs bear the burden of proving jurisdiction. Plaintiffs have failed to show any of these activities by AHD or SHE sufficiently “arise out of *or relate to* the defendant’s contacts with the forum.” “In the sphere of specific jurisdiction, the phrase ‘relate to’ incorporates real limits, as it must to adequately protect defendants foreign to a forum.” *Ford Motor Co.*, 592 U.S. at \_\_\_, 209 L. Ed. 2d at 236.

¶ 64 As in *Goodyear*, a foreign entity cannot be haled into North Carolina’s courts because of the presence of even an affiliated American company present in or doing business in the forum. *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. at 918, 180 L.Ed.2d at 802.

¶ 65 This holding is limited to the foreign entity appellants, SHE and AHD, the only entities who appealed. Plaintiff has failed to prove a “causal connection,” “purposeful availment,” or activities in the forum “related to” the Defendants before us in order to establish personal jurisdiction between North Carolina and AHD and North Carolina and SHE.

¶ 66 The trial court’s orders denying AHD’s and SHE’s Rule12(b)(2) motions are reversed and this cause remanded for entry of dismissal of AHD and SHE. *It is so ordered.*

REVERSED AND REMANDED.

Judges COLLINS and GORE concur.

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COASTAL CONSERVATION ASSOCIATION, d/b/a CCA NORTH CAROLINA; BRUCE C. ABBOTT; CHARLES P. ADAMS, JR.; CONSTANTINE A. ARETAKIS, II; FREDERICK L. BERRY; ANDREW R. BOYD; HARRY T. BRANCH; TROY D. BRANHAM; RUPERT D. BROWN; JUDITH C. BULLOCK; WILLIAM L. BYRD, JR.; JOHNNY L. CANUP; MICHAEL D. CARTER; WILLIE T. CLOSS, JR.; KENNETH D. COOPER, JR.; L. AVERY CORNING, IV; PAUL N. COX; BENJAMIN M. CURRIN; DANIEL E. DAWSON; MARY F. DAWSON; CHARLES B. EFIRD; FRANK K. EILER; CHRISTOPHER ELKINS; DAN E. ESTREM; ANDREW P. GILLIKIN; LELAN E. HALLER, JR.; JOHN M. HISLOP; RAYMOND Y. HOWELL; JOEY S. HUMPHREY; THOMAS G. HURT; CLARK W. HUTCHINSON, JR.; ANDREW G. JONES, JR.; GEORGE M. KIVETT, JR.; JOHN C. KNIGHT, JR.; BRADFORD A. KOURY; CHARLES H. LAUGHRIDGE; CASEY M. LLOYD; MARILYN R. LOWE; CHARLIE LOYA, JR.; NICKIE N. LUCAS; BRUCE D. MACLACHLAN; EULISS D. MADREN; WILLIAM W. MANDULAK; DARRELL G. McCORMICK; TERESA A. D. McCULLOUGH; SAMUEL B. McLAMB, III; JAMES M. McMANUS, JR.; JOHN W. McQUAID; GEORGE R. MODE; JOHN V. MOON; DENNIS K. MOORE; KENNETH N. MOORE, JR.; WARREN S. MOORING; ELIJAH T. MORTON; DANIEL J. NIFONG; SADIE R. NIFONG; ROBERT B. NOWELL, JR.; ELBERT W. OWENS, JR.; WYATT E. PARCEL; VAN B. PARRISH; JAMES H. PARROTT; BRYAN C. PATE; ALEXANDRA S. PEYTON; HUNTER L. PEYTON; JEFFREY P. PICKERING; ROBERT R. RICE, II; ROBERT T. RICE; ORICE A. RITCH, JR.; MARK A. RUFFIN; PEARCE RUFFIN; ERIC J. SATO; SEAN P. SCULLY; LENNY T. SMATHERS; CARROLL W. SPENCER; JOHN R. SPRUILL; DAVID M. SUMMERS; JOHN B. TAGGART; JESSE H. WASHBURN, II; ANDREW J. WEBSTER; MELISSA N. WILLIAMS; VANDEXTER WILLIAMS; DONALD A. WILLIS, JR.; A. REXFORD WILLIS, III; JAN L. WILLIS; PHILLIP R. WOOD; RAYE P. WOODIN, III; JOSEPH G. YAGER, PLAINTIFFS

v.

STATE OF NORTH CAROLINA, DEFENDANT

No. COA21-654

Filed 6 September 2022

**1. Appeal and Error—interlocutory order—denial of motions to dismiss—assertion of sovereign immunity—adverse ruling on personal jurisdiction**

In an action for declaratory and injunctive relief—initiated by plaintiffs against the State for allegedly breaching the public trust doctrine—where the State filed motions to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1), (2), and (6), based on the defense of sovereign immunity, the trial court's interlocutory order denying the State's motions was immediately appealable pursuant to N.C.G.S. § 1-277 with regard to Rules 12(b)(2) (which constituted an adverse ruling on personal jurisdiction) and 12(b)(6) (as affecting a substantial right), but not with regard to Rule 12(b)(1).

**2. Waters and Adjoining Lands—public trust doctrine—coastal fisheries management—sovereign immunity doctrine**

An action initiated by a conservation group and citizens (together, plaintiffs) seeking declaratory and injunctive relief regarding the

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State's alleged breach of the public trust doctrine for failing to adequately manage North Carolina's coastal fisheries was not barred by the doctrine of sovereign immunity where plaintiffs were not asserting rights of ownership or attempting to enforce public trust rights against a private party, but sought judicial review of the State's alleged obligations to manage public trust lands.

**3. Constitutional Law—North Carolina—Art. XIV, sec. 5—conservation of coastal fisheries—applicability of immunity defenses—colorable claim**

In an action initiated by a conservation group and citizens (together, plaintiffs) seeking declaratory and injunctive relief regarding the State's alleged mismanagement of North Carolina's coastal fisheries, which plaintiffs asserted violated their constitutional right to harvest fish, the State was not entitled to the defenses of governmental or sovereign immunity where plaintiffs raised a colorable constitutional claim directly under Art. XIV, sec. 5 of the North Carolina Constitution (conservation of natural resources) for which no other adequate state remedy existed.

**4. Constitutional Law—North Carolina—Art. I, sec. 38—right to harvest fish—applicability of immunity defenses—colorable claim**

In an action initiated by a conservation group and citizens (together, plaintiffs) seeking declaratory and injunctive relief regarding the State's alleged mismanagement of North Carolina's coastal fisheries, which plaintiffs asserted violated their constitutional right to harvest fish, the State was not entitled to the defenses of governmental or sovereign immunity where plaintiffs raised a colorable constitutional claim directly under Art. I, sec. 38 of the North Carolina Constitution (right to hunt, fish, and harvest wildlife) for which no other adequate state remedy existed.

Appeal by Defendant from Order entered 28 July 2021 by Judge Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 26 April 2022.

*Poyner Spruill LLP, by Keith H. Johnson, Andrew H. Erteschik, John Michael Durnovich, and Stephanie L. Gumm, for plaintiffs-appellees.*

*Attorney General Joshua H. Stein, by Assistant Attorney General Scott A. Conklin and Special Deputy Attorney General Marc Bernstein, for defendant-appellant.*

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*Southern Environmental Law Center, by Alex J. Hardee and  
Derb S. Carter, Jr., for Amicus Curiae North Carolina Wildlife  
Federation and Sound Rivers.*

*John J. Korzen for Amicus Curiae Professor Joseph J. Kalo.*

HAMPSON, Judge.

**Factual and Procedural Background**

¶ 1 The State of North Carolina (the State) appeals from the trial court's Order denying its Motion to Dismiss pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. The Record before us—including the factual allegations made in Plaintiffs' Complaint, which we treat as true solely for purposes of this appeal—reflects the following:

¶ 2 On 10 November 2020, Coastal Conservation Association, d/b/a CCA North Carolina, Inc., and the other named individuals who are citizens and residents of North Carolina, (collectively, Plaintiffs) filed a Complaint against the State, alleging breach of trust under the public trust doctrine, N.C. Const. art. I, § 38, and N.C. Const. art. XIV, § 5. Specifically, Plaintiffs alleged:

The public-trust doctrine imposes a fiduciary duty on the State to manage and regulate the harvest of [coastal finfish and shellfish] in a way that protects the right of current and future generations of the public to use public waters to fish. As a result, the State may not allow the harvest of finfish or shellfish in public waters in quantities or by methods that cause unnecessary waste or impair the sustainability of fish stocks, which in turn threaten the right of current and future generations of the public to use such public waters to fish.

Plaintiffs alleged the State had breached this duty by permitting for-profit harvesting of finfish or shellfish in quantities or through methods that cause overexploitation or undue wastage to North Carolina's coastal fisheries resources. According to Plaintiffs' Complaint, the State:

has continued to allow—and even facilitated—several commercial fishing practices that result in substantial wastage of coastal fish stocks or their prey species, or result in critical habitat destruction. Those

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commercial fishing practices include trawling in estuarine waters with significant populations of juvenile finfish, and using “unattended” gillnets. . . . As a result, stocks of multiple fish species . . . have declined precipitously—84 to 98 percent—since the last major fisheries management reform legislation was enacted in North Carolina in 1997.<sup>1</sup>

Plaintiffs requested that the Court: declare that the State breached its obligation under the public-trust doctrine, Article I, Section 38 of the North Carolina Constitution, and Article XIV, Section 5 of the North Carolina Constitution; enjoin the State from committing further breaches of its obligations and retain jurisdiction to enforce the State’s compliance with that injunctive relief; tax the costs of the action to the State; and assign a Resident Superior Court Judge pursuant to Rule 2.2 of the Local Rules for Civil Superior Court of the Tenth Judicial District to preside over this action.

¶ 3 The State responded to Plaintiffs’ Complaint by filing a Motion to Dismiss pursuant to Rules 12(b)(1), (2), and (6) of the Rules of Civil Procedure. Specifically, the State alleged:

1. The plaintiffs have not pleaded facts that show that the State has waived its sovereign immunity, and the State has not in fact or law waived its sovereign immunity. The Complaint should be dismissed under Rule 12(b)(1), (2) and (6).
2. The plaintiffs lack standing to make a claim under the public trust doctrine because only the State can enforce the public trust doctrine. The claim should be dismissed under Rule 12(b)(1) and (6).
3. The Complaint does not state a claim upon which relief can be granted because the public trust doctrine does not create the type of fiduciary obligations upon which the plaintiffs rely. The Complaint should be dismissed under Rule 12(b)(6).
4. The Complaint does not state a claim upon which relief can be granted because the remedy requested would violate the constitutional provision requiring

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1. Plaintiffs’ Complaint contains over 100 pages of allegations including data supporting Plaintiff’s claim regarding the causal connection between these two commercial fishing practices and the decline in fish populations.

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the separation of powers. N.C. Const. art. I, § 6. The Complaint should be dismissed under Rule 12 (b)(6).

5. To the extent that the plaintiffs are alleging an independent claim under article I, section 38 of the North Carolina Constitution, the Complaint does not state a claim upon which relief can be granted under that provision because the Complaint does not allege facts that show that the State has abridged any of the plaintiffs' rights that are protected by article I, section 38. Any such claim should therefore be dismissed under Rule 12(b)(6).

6. To the extent that the plaintiffs are alleging an independent claim under article XIV, section 5 of the North Carolina Constitution, the Complaint does not state a claim upon which relief can be granted under that provision because article XIV, section 5 does not articulate any enforceable individual right but instead clarifies state policies and functions regarding environmental protection and creates a land conservation program. Any such claim should therefore be dismissed under Rule 12(b)(6).

¶ 4 On 9 June 2021 the trial court held a hearing on the State's Motion to Dismiss, and on 28 July 2021 the trial court entered an Order Denying Motion to Dismiss. The State filed written Notice of Appeal on 26 August 2021.

### **Appellate Jurisdiction**

¶ 5 **[1]** As an initial matter, we must first address whether we have appellate jurisdiction to review the trial court's Order. As the State acknowledges, the trial court's denial of the State's Motion to Dismiss is an interlocutory order. Generally, "a party has no right to immediate appellate review of an interlocutory order." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* However, N.C. Gen. Stat. § 1-277 (2021) allows a party to immediately appeal an order that either (1) affects a substantial right or (2) constitutes an adverse ruling as to personal jurisdiction.

¶ 6 Here, the State moved to dismiss Plaintiffs' causes of action pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil

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Procedure, based on the defense of sovereign immunity. “Our Courts generally recognize immunity as a defense that can be raised under Rules 12(b)(1), 12(b)(2), or 12(b)(6).” *Suarez v. Am. Ramp Co. (ARC)*, 266 N.C. App. 604, 610, 831 S.E.2d 885, 890 (2019).

Although the federal courts have tended to minimize the importance of the designation of a sovereign immunity defense as either a Rule 12(b)(1) motion regarding subject matter jurisdiction or a Rule 12(b)(2) motion regarding jurisdiction over the person, the distinction becomes crucial in North Carolina because G.S. 1-277(b) allows the immediate appeal of a denial of a Rule 12(b)(2) motion but not the immediate appeal of a denial of a Rule 12(b)(1) motion.

*Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327-328, 293 S.E.2d 182, 184 (1982). *See also Davis v. Dibartolo*, 176 N.C. App. 142, 144–45, 625 S.E.2d 877, 880 (2006) (declining to review interlocutory appeal of denial of motion to dismiss for lack of subject matter jurisdiction due to sovereign immunity under Rule 12(b)(1), but reviewing denial of Rule 12(b)(6) motion based upon governmental immunity); *Data Gen. Corp. v. Cty. of Durham*, 143 N.C. App. 97, 100, 545 S.E.2d 243, 245–46 (2001) (declining to review interlocutory appeal of denial of motion to dismiss due to sovereign immunity under Rule 12(b)(1), but reviewing denial of Rule 12(b)(2) motion for lack of personal jurisdiction based upon governmental immunity). Thus, for the purposes of this appeal, we only review the trial court’s denial of the State’s Rule 12(b)(2) and 12(b)(6) motions.

¶ 7 Our Court has held a “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).” *Can Am South, LLC v. State*, 234 N.C. App. 119, 124, 759 S.E.2d 304, 308 (2014). Likewise, “a denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable.” *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010). Thus, the Order is immediately appealable, and this Court may assert appellate jurisdiction over this matter.

### Issue

¶ 8 The dispositive issues on appeal are whether: (I) sovereign immunity bars Plaintiffs’ claims for injunctive and declaratory relief seeking judicial review of the State’s obligations and alleged breach of trust under the public trust doctrine; (II) Plaintiffs’ Complaint states a claim for relief on state constitutional grounds under N.C. Const. Art. XIV, Sec. 5

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—the Conservation of Natural Resources Clause—for enforcement of public trust doctrine rights; and (III) Plaintiffs’ Complaint states a claim for relief on state constitutional grounds under N.C. Const. Art. I, Sec. 38—Right to Hunt, Fish, and Harvest Wildlife—for enforcement of public trust doctrine rights.

### Analysis

#### I. Public-Trust Doctrine

¶ 9 [2] The State contends Plaintiffs’ Complaint is barred by the defense of sovereign immunity. Specifically, the State asserts the public trust doctrine, as a common-law doctrine, is subject to sovereign immunity. Therefore, the State argues Plaintiffs’ Complaint must be dismissed. “The doctrine of sovereign immunity—that the State cannot be sued without its consent—has long been the law in North Carolina.” *Smith v. State*, 289 N.C. 303, 309–310, 222 S.E.2d 412, 417 (1976). “The doctrine of sovereign immunity is judge-made in North Carolina and was first adopted by the North Carolina Supreme Court in *Moffitt v. Asheville*, 103 N.C. 237, 9 S.E. 695 (1889).” *Corum v. Univ. of N.C.*, 330 N.C. 761, 785, 413 S.E.2d 276, 291 (1992).<sup>2</sup> Since *Moffitt*, our Courts have been hesitant to disturb the doctrine of sovereign immunity. See *Steelman v. New Bern, N.C.*, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971) (“It may well be that the logic of the doctrine of sovereign immunity is unsound and that the reasons which led to its adoption are not as forceful today as they were when it was adopted. However, . . . we feel that any further modification or the repeal of the doctrine of sovereign immunity should

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2. We are cognizant of the United States Supreme Court’s recent discussion summarizing its own history of the doctrine of sovereign immunity in *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1493–95, 203 L. Ed. 2d 768 (2019) and our application of its holding in *Farmer v. Troy Univ.*, 276 N.C. App. 53, 2021-NCCOA-36, ¶¶ 15–24, *appeal dismissed*, 379 N.C. 164, 863 S.E.2d 621 (2021), and *review allowed in part, denied in part*, 379 N.C. 127, 863 S.E.2d 775 (2021). However, while “[t]he Supreme Court of the United States is the final authority on federal constitutional questions[,]” the North Carolina Supreme Court remains the authority on our state law issues and the final voice on the history of the law and jurisprudence of North Carolina. *State v. Elliott*, 360 N.C. 400, 421, 628 S.E.2d 735, 749 (2006); see also *Bulova Watch Co., Inc. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974) (“[I]n the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court[.]”); *Unemployment Compensation Comm’n v. Jefferson Standard Life Ins. Co.*, 215 N.C. 479, 2 S.E.2d 584, 589 (1939) (“Accordingly, it would appear settled that the matter here involved is one of state law, to be interpreted finally by this Court.”). Unless and until the North Carolina Supreme Court revisits its earlier determination that sovereign immunity in North Carolina is “judge-made” law, we are bound by its prior precedent. Moreover, we note this case does not involve another state’s claim of sovereign immunity in North Carolina courts.

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come from the General Assembly, not this Court.”). Nevertheless, our Courts have identified instances where sovereign immunity does not apply—including specifically where the State enters into a valid contract and, subsequently, breaches the contract. *Smith*, 289 N.C. at 320, 222 S.E.2d at 423–24 (“[W]henver the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract.”).

¶ 10 “[T]he following policy grounds are usually offered for immunity: a need to prevent the diversion of public funds to compensate for private purposes; a need to avoid disruption of public service and safety; a need to prevent governmental involvement in endless embarrassments, difficulties and losses subversive to the public interest; and the nonprofit nature of government should be reflected in non-liability.” *Id.* at 312, 222 S.E.2d at 419 (quoting *The National Association of Attorneys General, Sovereign Immunity: The Liability of Government and its Officials*, Jan. 1975, at 17).

¶ 11 Here, Plaintiffs are seeking declaratory and injunctive relief against the State seeking a declaration the State has breached its alleged obligations under the public trust doctrine and enjoining the State from further violations of its alleged obligations under the public trust doctrine. “The public trust doctrine is a common law principle providing that certain land associated with bodies of water is held in trust by the State for the benefit of the public.” *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 41, 621 S.E.2d 19, 27 (2005) (citing *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527–28, 369 S.E.2d 825, 828 (1988)). Although the doctrine arises from the common law, it is perhaps best understood as “an implied constitutional doctrine”—one that “springs from a fundamental notion of how government is to operate with regard to common heritage natural resources.” Harrison C. Dunning, *The Public Trust: A fundamental Doctrine of American Property Law*, 19 *Envtl. L.* 515, 523 (1989). North Carolina first recognized the public trust doctrine in the case of *Shepard’s Point Land Company* in 1903. There, our Supreme Court stated: the State “can no more abdicate its trust over property in which the whole people are interested, like navigable waters . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.” *Shepard’s Point Land Co. v. Atl. Hotel*, 132 N.C. 517, 528, 44 S.E. 39, 42 (1903), *overruled by Gwathmey v. State ex rel. Dep’t. of Env’t, Health, & Nat. Res.*, 342 N.C. 287, 464 S.E.2d 674 (1995); *see also, Stone v. Mississippi*, 101 U.S. 814, 820 (1879) (“[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away.”). In the years following

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*Shepard's Point*, our appellate courts had multiple occasions to examine the public trust doctrine and its application to navigable waters in North Carolina. Relevant to the case *sub judice*, three key principles have emerged.

¶ 12 First, “the public trust doctrine, established by the common law of this State, involves two concepts: (1) public trust lands, which are ‘certain land[s] associated with bodies of water [and] held in trust by the State for the benefit of the public[;]’ and (2) public trust rights, which are ‘those rights held in trust by the State for the use and benefit of the people of the State in common.’ ” *Town of Nags Head v. Richardson*, 260 N.C. App. 325, 334, 817 S.E.2d 874, 882 (2018) (quoting *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27). “Public trust rights attach to the [public trust lands]” and “ ‘include, but are not limited to the right to navigate, swim, hunt, fish, and enjoy all recreational activities’ offered by public trust lands.” *Id.* (quoting N.C. Gen. Stat. § 1–45.1 (2017)).

¶ 13 However, the right to hunt and fish does not exist in the abstract. The public must have access to harvestable wildlife and fish to have a meaningful opportunity to exercise these rights. *See U.S. v. Washington*, 853 F.3d 946, 965 (9th Cir. 2017), *aff'd*, 138 S. Ct. 1832 (U.S. 2018) (per curiam) (stating in the context of a Native American treaty guaranteeing access to fisheries that a “right of access to . . . fishing places would be worthless without harvestable fish.”). Indeed, “the State’s *wildlife population* is a natural resource of the State held by it in trust for its citizens.” *State v. Steward*, 40 N.C. App. 693, 695, 253 S.E.2d 638, 640 (1979) (emphasis added). *See also, Shepard's Point Land Co.*, 132 N.C. at 526, 44 S.E. at 41 (emphasis added) (“The principle has long been settled the States own the tidewaters themselves, *and the fish in them*, so far as they are capable of ownership while running . . . [but] [i]t is a title held in trust for the people of the State.”); *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 534, 369 S.E.2d 825, 826 (1988) (emphasis added) (“History and the law bestow the title of these submerged land *and their oysters* upon the State to hold in trust for the people.”); N.C. Gen. Stat. § 113–131(a) (2021) (“The marine and estuarine and wildlife resources of the State belong to the people of the State as a whole.”).

¶ 14 Second, there is a definite distinction between the State’s interest in public trust lands and the State claiming title to property against a private party, as might give rise to an action under N.C. Gen. Stat. § 41–10.1. *See* N.C. Gen. Stat. § 41–10.1 (2021) (“Whenever the State of North Carolina . . . asserts a claim of title to land . . . [the land owner] may bring an action in the superior court of the county in which the land lies against the State . . . .”); *see also, State v. Taylor*, 322 N.C. 433, 435,

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368 S.E.2d 601, 602 (1988) (holding the scope of the waiver of sovereign immunity in N.C. Gen. Stat. § 41–10.1 should be strictly construed). This principle is illustrated by *Fabrikant v. Currituck County*. There, the plaintiffs, who owned oceanfront property in Currituck County, brought suit against various defendants including the State, seeking a declaratory judgment that they had exclusive right of the portion of the beach between the high tide mark and the vegetation line, identified as the dry sand beach. 174 N.C. App. at 32, 621 S.E.2d at 22. Plaintiffs also sought injunctive relief to prevent the general public from trespassing over the dry sand beach areas surrounding their homes. *Id.*

¶ 15 The State filed a motion to dismiss based *inter alia* on sovereign immunity. *Id.* In response, the plaintiffs alleged since the public trust doctrine allowed the public access to their dry sand beaches, the State had effectively laid a claim of title to the land. *Id.* at 41, 621 S.E.2d at 27. Therefore, the plaintiffs contended their complaint’s allegations fell within the scope of N.C. Gen. Stat. § 41–10.1, thereby establishing a waiver of sovereign immunity. *Id.* at 39, 621 S.E.2d at 26.

¶ 16 This Court stated “the public trust doctrine cannot give rise to an assertion of ownership that would be available to any ‘private litigants in like circumstances.’ ” *Id.* at 42, 621 S.E.2d at 27 (quoting *Williams v. N.C. State Bd. of Educ.*, 266 N.C. 761, 765, 147 S.E.2d 381, 383 (1966). “Any party, public or private, can assert title to land on the strength of a deed, but only the State, acting in its sovereign capacity, may assert rights in land by means of the public trust doctrine.” *Id.* (citing *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 118, 574 S.E.2d 48, 54 (2002)). This Court concluded the State’s interest in public trust lands does not amount to a claim of title to land under N.C. Gen. Stat. § 41–10.1. *Id.* at 43, 621 S.E.2d at 25 (“Since the General Assembly chose to limit the waiver to an assertion of ‘claim of title to land,’ rather than use the broader ‘interest in real property,’ we must construe that language strictly and hold that a ‘claim of title to land’ requires more than just an interest in real property.”). As such, because the plaintiffs’ claims did not fall under the scope of N.C. Gen. Stat. § 41–10.1, that statute could also not be relied upon as a waiver of sovereign immunity. *Id.* Thus, this Court held the State had not waived sovereign immunity to plaintiffs’ claims for declaratory and injunctive relief seeking exclusive rights to the property at issue. *Id.* Therefore, N.C. Gen. Stat. § 41–10.1 does not constitute an express waiver of sovereign immunity as a defense to a claim by a private citizen asserting rights of ownership or exclusive access to public trust lands under the public trust doctrine. *See Id.*

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¶ 17 Third, only the State has standing to bring suit against a private corporation seeking “non-individualized, or public, remedies for alleged harm to public waters” under the public trust doctrine. *Neuse River Found.*, 155 N.C. App. at 118, 574 S.E.2d at 54. This Court set out this principle in the case of *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.* There, the plaintiffs filed suit against three hog farming companies alleging defendants improperly handled hog waste, resulting in massive pollution and contamination of the Neuse, New, and Cape Fear Rivers, and those rivers’ tributaries and estuaries. *Id.* at 112, 574 S.E.2d at 50. The plaintiffs’ claims were based in part on the public trust doctrine. *Id.* This Court held the plaintiffs did not have standing to bring a claim under the public trust doctrine against a private corporation as “only the [S]tate, through the Attorney General, is authorized to bring in a representative capacity for and on behalf of the using and consuming public of this State actions deemed to be advisable in the public interest.” *Id.* at 117, 574 S.E.2d at 53 (citing *Idaho v. Coeur D’Alene Tribe*, 521 U.S. 261, 284, 138 L. Ed. 2d 438, 457 (1997)).<sup>3</sup>

¶ 18 Applying these three key principles to the case *sub judice* provides more context for Plaintiffs’ claims. First, as Plaintiffs allege, protecting fisheries falls within the purview of the public trust doctrine,<sup>4</sup> and “the State can no more abdicate this duty than it can abdicate its police powers in the administration of government and the preservation of the peace.” *Shepard’s Point Land Co.*, 132 N.C. at 528, 44 S.E. at 42. Second, Plaintiffs here are not asserting rights of ownership or exclusive access to public trust lands. To the contrary, Plaintiffs’ claims are broadly premised on the State’s dominion over public trust property and obligation to enforce the public trust. Thus, the claims asserted here are distinguishable from the claims of property rights in *Fabrikant*. Third, and concomitantly, Plaintiffs are not attempting to enforce public trust rights against a private party—i.e. suing commercial fishermen for their role in the depletion of fish populations. Instead, Plaintiffs are bringing an action directly against the State for an alleged breach of its obligation to manage and protect fisheries for the benefit of the general public. Therefore, this case does not implicate the holding in *Neuse River*

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3. The public trust doctrine “uniquely implicate[s] sovereign interests[,]” and the Court will not interfere when the relief requested “would divest the State of its sovereign control over submerged lands, lands with a unique status in the law and infused with a public trust the State itself is bound to respect.” *Coeur D’Alene Tribe*, 521 U.S. at 284, 138 L. Ed. 2d at 457.

4. See *Steward*, 40 N.C. App. at 695, 253 S.E.2d at 640; *Shepard’s Point Land Co.*, 132 N.C. at 526, 44 S.E. at 41.

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*Company*. Given this particular context, it does not appear that our Courts have had opportunity to directly address whether sovereign immunity bars the type of claim brought by Plaintiffs seeking to compel the State to enforce alleged obligations under the public trust doctrine. Our review of the development of North Carolina law applicable to both sovereign immunity and the public trust doctrine leads us to conclude sovereign immunity does not bar Plaintiffs' claim implicating the public trust doctrine in this case.

¶ 19 In *Gwathmey v. State ex rel. Department of Environment, Health, & Natural Resources*, our Supreme Court recognized the State may sometimes act contrary to the public interest and stated “the ‘public trust’ doctrine [is] a tool for judicial review of state action affecting State-owned submerged land underlying navigable waters, including estuarine marshland . . .” 342 N.C. at 293, 464 S.E.2d at 677. Indeed, even though *Gwathmey*, in part overruled *Shepard’s Point*<sup>5</sup>—the original case adopting the public trust doctrine—the essential principle remains the same: the State owns tidal lands and waters for the benefit of the public, subject to “concomitant restraints.” *Credle*, 322 N.C. at 525, 369 S.E.2d at 827.

¶ 20 Application of sovereign immunity in this case, however, would effectively reduce the public trust doctrine to nothing more than a “fanciful gesture” and prevent judicial review—contemplated by *Gwathmey*—as a plaintiff would never have the “opportunity to enter the courthouse doors and present his claims.” *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 340–41, 678 S.E.2d 351, 355 (2009). Moreover, the policy reasons usually offered for sovereign immunity such as the need to prevent the diversion of public funds to compensate for private purposes are inapplicable in this case. Plaintiffs are not requesting the State compensate a private individual/corporation for alleged damages but are seeking an injunction preventing the State from committing breaches of its alleged obligations under the public trust doctrine.

¶ 21 Thus, because of the nature of the public trust doctrine as a tool for judicial review of the State’s actions as trustee of fisheries, we conclude sovereign immunity does not apply in this case. Therefore, Plaintiffs’ claims for declaratory and injunctive relief against the State for breach

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5. “We reject . . . *Shepard’s Point Land Co.* to the extent that it implies that the public trust doctrine completely prohibits the General Assembly from conveying lands beneath navigable waters to private parties without reserving public trust rights. That position is without authority in either our statutes or our Constitution.” *Gwathmey*, 342 N.C. at 302, 464 S.E.2d at 683.

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of its alleged duties under the public trust doctrine are not barred by sovereign immunity.

II. Conservation of Natural Resources Clause

¶ 22 **[3]** Alternatively, presuming *arguendo* a public trust doctrine claim is otherwise barred by sovereign immunity, Plaintiffs' Complaint also presents sufficient allegations of a claim arising directly under Article XIV, § 5 of our State Constitution.

¶ 23 Generally, sovereign immunity bars an action against the State unless the State has waived immunity or consented to the suit. *Taylor*, 322 N.C. at 435, 368 S.E.2d at 602. However, the doctrine of sovereign immunity will not stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed under the North Carolina Constitution. *Corum*, 330 N.C. at 785–86, 413 S.E.2d at 291. Thus, a direct constitutional claim will survive a Rule 12(b)(6) motion to dismiss, notwithstanding the doctrine of sovereign or governmental immunity. *Craig*, 363 N.C. at 340–41, 678 S.E.2d at 355–56.

¶ 24 Our Supreme Court has developed a three-part test to determine whether a plaintiff's complaint has sufficiently alleged a claim for relief under our State Constitution. "First, to allege a cause of action under the North Carolina Constitution, a state actor must have violated an individual's constitutional rights." *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 16.

¶ 25 "Second, the claim must be colorable." *Id.* "A 'colorable claim' is '[a] plausible claim that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law)." *Id.* at ¶ 17 (quoting *Colorable*, Black's Law Dictionary (11th ed. 2019)). "In other words, the claim must present facts sufficient to support an alleged violation of a right protected by the State Constitution." *Id.*

¶ 26 "Lastly, there must be no adequate state remedy." *Id.* at ¶ 18. "No adequate state remedy exists when 'state law [does] not provide for the type of remedy sought by the plaintiff.'" *Id.* (quoting *Craig*, 363 N.C. at 340, 678 S.E.2d at 356). "[A] claim that is barred by sovereign or governmental immunity is not an adequate remedy." *Id.* "To be considered adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Id.* (quoting *Craig*, 363 N.C. at 340–41, 678 S.E.2d at 355).

¶ 27 Here, Plaintiffs alleged the State, acting through two administrative agencies—the North Carolina Division of Marine Fisheries and the North

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Carolina Marine Fisheries Commission—failed to protect Plaintiffs’ constitutionally guaranteed right to harvest fish under Art. XIV, § 5.

¶ 28 Next, Plaintiffs have alleged a colorable constitutional claim. Article XIV, § 5 was added to our State Constitution in 1972 and states: “[i]t shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry . . . .” N.C. Const. art. XIV, § 5. Our Court interpreted this amendment in *Town of Nags Head v. Richardson* as tasking the State with a constitutional duty to not only protect the public lands, but also the public trust rights attached thereto. 260 N.C. App. 325, 334, 817 S.E.2d 874, 883 (2017) (“The State is tasked with protecting these rights pursuant to the North Carolina Constitution[.]”). See also *Credle*, 322 N.C. at 532, 369 S.E.2d at 831 (Art. XIV, § 5 “mandates the conservation and protection of public lands and waters for the benefit of the public.”).

¶ 29 Plaintiffs alleged the State breached this constitutional duty by “mismanaging North Carolina’s coastal fisheries resources.” Specifically, Plaintiffs alleged the State has mismanaged the fisheries by “permitting, sanctioning, and even protecting two methods of harvesting coastal fin-fish and shrimp in State public waters”—shrimp trawling and “unattended” gillnetting—“that result in enormous resource wastage[;]” “refusing to address and remedy chronic overfishing of several species of fish[;]” and, “tolerating a lack of reporting of any harvest by the majority of commercial fishing license holders for more than a decade.” Plaintiffs alleged “the State’s mismanagement of coastal fisheries resources . . . has eliminated or, at a minimum, severely curtailed the public’s right to fish for [popular fish species].” Indeed, Plaintiffs’ Complaint contains extensive data points documenting the stock status and the stock population trends of certain fish species. Thus, the alleged facts here support Plaintiffs’ contention the State did not protect the harvestable fish population “for the benefit of all its citizenry.” N.C. Const. art. XIV, § 5. As such, Plaintiffs have alleged a colorable constitutional claim.

¶ 30 Finally, looking at whether an adequate state remedy exists, Plaintiffs seek declaratory and injunctive relief to remedy the State’s breach of trust. Assuming arguendo the public trust doctrine claim is barred by sovereign immunity, this remedy cannot be redressed through other means, as an adequate “state law remedy [does] not apply to the facts alleged” by Plaintiffs. *Craig*, 363 N.C. at 342, 678 S.E.2d at 356. Thus, alternatively, Plaintiffs have alleged a colorable constitutional claim for which no other adequate state law remedy exists. Therefore, sovereign or governmental immunity cannot bar Plaintiffs’ claim.

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III. Right to Hunt, Fish, and Harvest Wildlife Clause

¶ 31 **[4]** Alternatively, Plaintiffs' Complaint also alleges a claim arising directly under Article I, § 38 of our state Constitution that the State has failed to protect Plaintiffs' constitutionally protected right to harvest fish.

¶ 32 To determine whether Plaintiffs' Complaint presents sufficient allegations of a claim arising directly under Article I, we employ the same three-part test set forth in the preceding section of this Opinion. "First, a state actor must have violated an individual's constitutional rights." *Deminski*, 2021-NCSC-58, ¶ 16. "Second, the claim must be colorable." *Id.* "Lastly, there must be no 'adequate state remedy.'" *Id.*

¶ 33 Section 38 was added to Article I of our State Constitution in 2018 by amendment proposed by legislative initiation and adopted by popular vote. *See* N.C. Const. Art. XIII, Sec. 4 (providing for constitutional amendment by legislative initiation). It states:

The right of the people to hunt, fish, and harvest wildlife is a valued part of the State's heritage and shall be forever preserved for the public good. The people have a right, including the right to use traditional methods, to hunt, fish, and harvest wildlife, subject only to laws enacted by the General Assembly and rules adopted pursuant to authority granted by the General Assembly to (i) promote wildlife conservation and management and (ii) preserve the future of hunting and fishing. Public hunting and fishing shall be a preferred means of managing and controlling wildlife. Nothing herein shall be construed to modify any provision of law relating to trespass, property rights, or eminent domain.

N.C. Const. Art. I, § 38.

¶ 34 The State contends the language of this provision places no affirmative constitutional mandate on the State to preserve the right of the people to hunt, fish, and harvest wildlife for the public good. We disagree. "In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere." *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510 (2004). "The plain meaning of words may be construed by reference to 'standard, nonlegal dictionaries.'" *Id.* (quoting *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 326 N.C. 133, 152, 388 S.E.2d 557, 568 (1990)).

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¶ 35 It is first significant that this provision is found in Article I of our Constitution titled “Declaration of Rights.” N.C. Const. art. I. In general, Article I recognizes and establishes “essential principles of liberty and free government.” N.C. Const. art. I, preamble. “The fundamental purpose for its adoption was to provide citizens with protection from the State’s encroachment upon these rights.” *Corum*, 330 N.C. at 782, 413 S.E.2d at 290. “Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State.” *Id.* “[I]t is the judiciary’s responsibility to guard and protect those rights.” *Id.* at 785, 413 S.E.2d at 291.

¶ 36 The first sentence of Section 38 makes clear the right to fish belongs to the people. Moreover, its inclusion in Article I indicates the General Assembly intended for this right to be protected against encroachment by the State. Indeed, this right is “subject only to laws . . . and rules . . . to (i) promote wildlife conservation and management and (ii) preserve the future of . . . fishing.” N.C. Const. art. I, § 38.

¶ 37 The plain meaning of the next phrase in the first sentence “shall be forever preserved” places an affirmative duty on the State to protect the people’s right to fish. “Shall” means “has a duty to” or “must” and imposes “imperative or mandatory” obligations on the party to which “shall” applies. *Shall*, Black’s Law Dictionary (11th ed. 2019); *Internet E., Inc. v. Duro Commc’ns, Inc.*, 146 N.C. App. 401, 405–06, 553 S.E.2d 84, 87 (2001). Forever, means “for a limitless time.” *Forever*, Merriam-Webster’s Collegiate Dictionary 328 (7th ed. 1970). “Preserve” means “to keep safe from injury, harm or destruction.” *Preserve*, Merriam-Webster at 673. Thus, the plain meaning of this phrase indicates the General Assembly, when drafting the proposed amendment, intended to create an affirmative duty on the State to preserve the right of the people to fish and harvest fish. However, the right to fish and harvest fish would be rendered meaningless without access to fish. *See Washington*, 853 F.3d at 965; *Steward*, 40 N.C. App. at 695, 253 S.E.2d at 640. Therefore, the State’s duty necessarily includes some concomitant duty to keep fisheries safe from injury, harm, or destruction for all time.

¶ 38 The history of Section 38 supports this conclusion. Section 38 was initiated by the North Carolina General Assembly after the National Rifle Association (NRA) “spearhead[ed] [a] campaign for Right to Hunt and Fish state constitutional amendments.” *Why does NRA support Right to Hunt and Fish (RTHF) state constitutional amendments?*, NRA-ILA (last visited June 14, 2022), <https://www.nraila.org/get-the-facts/hunting-and-conservation/why-does-nra-support-right-to-hunt-and-fish-rthf-state-constitutional-amendments>). As part of this campaign, the NRA

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released a model amendment, which closely resembles North Carolina's amendment in Article I, § 38. However, the NRA model amendment does not include the phrase "shall be forever preserved." *See Id.* In drafting the proposed amendment, which eventually became Section 38, the General Assembly could have used the NRA's model language, but instead it specifically chose to add an additional phrase imposing a mandatory duty on the State. "Under well-settled canons of statutory canons of statutory construction, we must conclude that this change had meaning." *Wells Fargo Bank, N.A., v. Am. Nat'l Bank and Trust Co.*, 250 N.C. App. 280, 281, 791 S.E.2d 906, 908 (2016); *see also N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) (quoting *Rodriguez v. United States*, 480 U.S. 522, 525 (1987)) ("[w]hen a legislative body 'includes particular language . . . it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion"); *Emerson v. Cape Fear Country Club, Inc.*, 259 N.C. App. 755, 761, 817 S.E.2d 402, 407 (2018) ("When the General Assembly adopts verbatim some provisions of a model code and rejects others, we assume that the General Assembly consciously chose to author its own alternate provisions.").

¶ 39 In sum, both the plain language and history of Article I, § 38 support the conclusion this provision imposes an affirmative duty on the State to preserve the people's right to fish and harvest fish. This includes some duty to preserve fisheries for the benefit of the public. In this case, Plaintiffs' have alleged facts, which if proven, may tend to show the State did not properly manage the fisheries so as to forever preserve the fish populations for the benefit of the public. *See* N.C. Const. art. I, § 38. As such, Plaintiffs have alleged a colorable constitutional claim under Article I, § 38.

¶ 40 Finally, looking at whether an adequate state remedy exists, here again, Plaintiffs seek declaratory and injunctive relief to remedy the State's breach of their duty to protect the right to fish and harvest fish. Again, presuming *arguendo* the public trust doctrine claim was to be barred by sovereign immunity, Plaintiffs' alleged wrong cannot be redressed through other means, as an adequate "state law remedy [does] not apply to the facts alleged" by Plaintiffs. *Craig*, 363 N.C. at 342, 678 S.E.2d at 356. Thus, Plaintiffs have alleged a colorable constitutional claim for which no other adequate state law remedy exists. Therefore, sovereign or governmental immunity cannot bar Plaintiffs' claim. Consequently, the trial court did not err in denying the State's Motion to Dismiss pursuant to Rules 12(b) (2) and (6) on the basis of sovereign immunity.

IN RE B.W.C.

[285 N.C. App. 284, 2022-NCCOA-590]

**Conclusion**

¶ 41 Accordingly, for the foregoing reasons, we affirm the trial court's Order Denying the State's Motion to Dismiss. "In so ruling, we express no opinion on the ultimate merits, if any, of plaintiffs' allegations and claims." *Locklear v. Lanuti*, 176 N.C. App. 380, 387, 626 S.E.2d 711, 716 (2006) (holding the allegations in the complaint were sufficient to survive a 12(b)(6) motion to dismiss).

AFFIRMED.

Judges MURPHY and WOOD concur.

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 IN THE MATTER OF B.W.C.

No. COA22-124

Filed 6 September 2022

**Juveniles—delinquency—indirect contempt—prior adjudication of undisciplined—notice—allowable disposition**

There was no error in the trial court's adjudication of delinquency for indirect contempt based on a juvenile's failure to meet various school attendance and performance conditions imposed by the court after a prior adjudication of undisciplined. The juvenile's due process and statutory rights were not violated where the juvenile was given several warnings regarding contempt prior to the delinquency petition being filed, and the disposition of delinquency for indirect contempt was expressly allowed by the applicable statutes.

Appeal by juvenile-appellant from order entered 19 October 2021 by Judge Angela G. Hoyle in Gaston County District Court. Heard in the Court of Appeals 9 August 2022.

*Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin Szany, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for juvenile-appellant.*

## IN RE B.W.C.

[285 N.C. App. 284, 2022-NCCOA-590]

ARROWOOD, Judge.

¶ 1 Juvenile-appellant “Brian”<sup>1</sup> appeals from an order adjudicating him as delinquent for indirect contempt and placing him on probation for six months. For the following reasons, we affirm the trial court.

I. Background

¶ 2 On 30 March 2021, a juvenile petition was filed in Gaston County District Court alleging that Brian, then fifteen years old, was an undisciplined juvenile for truancy in that he “was unlawfully absent” from high school, having accrued “a total of 58 absences[,] [i]n violation of 7B-1501(27)(a)[.]” Brian admitted to truancy.

¶ 3 The trial court entered an order adjudicating Brian as undisciplined on 15 April 2021 (the “adjudication order”). The adjudication order also provided that the matter would be continued for disposition until 7 June 2021 “under the following conditions: . . . contempt warning given in open court see attached AOC-J-209[.]”

¶ 4 The trial court filed an additional, separate order on the same day (the “second order”). In the second order, the trial court expressly required Brian to “attend school each and every day when it is in session and have no unexcused absences, tardies[,] or suspensions from school”; to “complete all classroom and homework assignments as issued by school officials”; to “sign up for in person school and start attending [M]onday 4/18/2021”; and to “log on for virtual school for 4/16/2021[.]” The second order also provided that Brian “verbally acknowledged [he] understand[s] that violation of the above conditions may result in him . . . being held in Contempt.”

¶ 5 Following a hearing held on 7 June 2021, the trial court entered a juvenile disposition order on 8 June 2021 (the “disposition order”). The disposition order placed Brian under protective supervision of a court counselor for three months and required him to “[r]emain on good behavior and not violate any laws[,]” “[a]ttend school regularly[,]” “[m]aintain passing grades in at least 4 courses[,]” and “[r]eport to a court counselor as often as required by the court counselor.” The disposition order also provided: “contempt warning order dated 04/15/2021 still remains.”

¶ 6 On 26 August 2021, “a Motion for Review was filed alleging [Brian] [had] violated the conditions of protective supervision by ‘refusing to attend school’ on August 23<sup>rd</sup>, August 25<sup>th</sup>, and August 26<sup>th</sup> 2021.” On

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1. A pseudonym is used throughout to protect the identity of the juvenile.

## IN RE B.W.C.

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27 August 2021, a juvenile petition was filed alleging that Brian was delinquent in that he “did violate a contempt warning set forth by District Court on June 7, 2021, instructing that the ‘juvenile will attend school each and every day as outlined by the school’. The juvenile has accumulated 3 unexcused absences since the court date. In violation of 5A-12(b) Indirect Contempt[.]” The petition also alleged the offense in question was in violation of N.C. Gen. Stat. § 5A-31(c).

¶ 7 Brian filed a motion to dismiss on 18 October 2021, arguing that “[t]he current incarnation of N.C. Gen. Stat. § 7B-2505” read together with § 7B-2503 did not allow the trial court to pursue delinquency actions following an adjudication of undisciplined, and emphasizing the General Assembly’s distinction between “children adjudicated undisciplined versus children adjudicated delinquent[.]” Thus, Brian argued the juvenile delinquency petition filed against him violated his due process and statutory rights.

¶ 8 The matter came on for adjudication, motion for review, and violation of protective supervision hearing on 18 October 2021 in Gaston County District Court, Judge Hoyle presiding. After hearing Brian’s counsel’s arguments to dismiss the delinquency petition and after reading the written motion to dismiss, the trial court denied the motion. Brian then admitted to indirect contempt and to violating his protective supervision.

¶ 9 The trial court ordered that Brian be placed on “probationary supervision of a court counselor for six months.” The trial court also ordered, among other things, that Brian “attend school regularly, maintain passing grades in at least four courses, . . . meet with the court counselor to figure out how to do that, and the school representative[,] . . . [s]ubmit to random drug tests[,]” and abide by a 9:00 p.m. to 6:00 a.m. curfew. Brian filed notice of appeal on the same day.

## II. Discussion

¶ 10 On appeal, Brian argues that the trial court erred in denying his motion to dismiss, and in doing so violated N.C. Gen. Stat. §§ 7B-2503 and 7B-2505, as well as Brian’s due process rights. Specifically, Brian argues that “the State’s procedure of seeking a delinquency adjudication for contempt in response to noncompliance with protective supervision or a court order that arises out of an undisciplined adjudication goes against what is contemplated by and authorized by dispositional provisions of Section 7B.” “We review a trial court’s denial of a [juvenile’s] motion to dismiss *de novo*.” *In re S.M.S.*, 196 N.C. App. 170, 171, 675 S.E.2d 44, 45 (2009) (citation omitted).

## IN RE B.W.C.

[285 N.C. App. 284, 2022-NCCOA-590]

¶ 11 “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.” *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted). Our General Statutes provide that a fifteen-year-old juvenile is delinquent if he “commits indirect contempt . . . as defined in G.S. 5A-31.” N.C. Gen. Stat. § 7B-1501(7)(a) (2021). The behavior of a juvenile who engages in “[w]illful disobedience of, resistance to, or interference with a court’s lawful process, order, directive, or instruction or its execution” constitutes contempt. N.C. Gen. Stat. § 5A-31(a)(3) (2021). Such contempt is indirect when it is exercised outside of the presence of a court. *Compare* N.C. Gen. Stat. § 5A-31(b) with § 5A-31(c). “Indirect contempt by a juvenile may be adjudged and sanctioned only pursuant to the procedures in Subchapter II of Chapter 7B of the General Statutes.” N.C. Gen. Stat. § 5A-33 (2021).

¶ 12 Brian’s argument on appeal relies on N.C. Gen. Stat. §§ 7B-2503 and 7B-2505, addressing, respectively, dispositional alternatives for undisciplined juveniles and violation of protective supervisions by undisciplined juveniles. Though these statutes may have controlled the initial juvenile petition alleging that Brian was undisciplined, they ceased to control the moment Brian acted in violation of the trial court’s disposition order requiring him to attend school regularly and do not take into consideration the trial court’s multiple contempt warnings. *See In re Walker*, 282 N.C. 28, 38, 191 S.E.2d 702, 709 (1972) (“The fact that a child initially has been found to be undisciplined and placed on probation is merely incidental to a later petition and motion alleging delinquency based on violation of the terms of probation.”).

¶ 13 Under a plain reading of N.C. Gen. Stat. §§ 7B-1501 and 5A-31, it is clear that fifteen-year-old Brian committed indirect contempt when he violated his disposition order by failing to attend school regularly, an action which was done outside of the direct presence of the trial court. N.C. Gen. Stat. §§ 5A-31, 7B-1501. Under N.C. Gen. Stat. § 5A-33, it was proper for the trial court to find Brian delinquent as a result of such contempt, as a juvenile’s indirect contempt may be “adjudged and sanctioned *only* pursuant to the procedures in Subchapter II of Chapter 7B of the General Statutes[,]” which contains N.C. Gen. Stat. § 7B-1501. N.C. Gen. Stat. § 5A-33 (emphasis added). Furthermore, Brian was put on notice on multiple occasions—specifically, in the adjudication order, the second order, and the disposition order—that such failure on his part would result in his being held in contempt.

¶ 14 Accordingly, the trial court acted in accordance with controlling legislature and did not err by denying Brian’s motion to dismiss.

## IN RE FORECLOSURE OF GEORGE

[285 N.C. App. 288, 2022-NCCOA-591]

III. Conclusion

¶ 15 For the foregoing reasons, we conclude that the trial court did not err by denying Brian’s motion to dismiss.

AFFIRMED.

Chief Judge STROUD and Judge COLLINS concur.

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IN THE MATTER OF THE PROPOSED FORECLOSURE OF A CLAIM OF LIEN FILED ON CALMORE GEORGE AND HYGIENA JENNIFER GEORGE BY THE CROSSINGS COMMUNITY ASSOCIATION, INC. DATED AUGUST 22, 2016, RECORDED IN DOCKET NO. 16-M-6465 IN THE OFFICE OF THE CLERK OF COURT OF SUPERIOR COURT FOR MECKLENBURG COUNTY REGISTRY BY SELLERS, AYERS, DORTCH & LYONS, P.A. TRUSTEE

No. COA22-33

Filed 6 September 2022

**1. Attorney Fees—motion to set aside foreclosure sale of home—to collect homeowner’s association fees—Planned Community Act**

In a case where a homeowner’s association sold petitioners’ home in a foreclosure sale to collect petitioners’ unpaid association fees, after which the trial court granted petitioners’ motion under Civil Procedure Rule 60(c) to set aside the sale, the court erred in denying petitioners’ subsequent request for attorney fees where petitioners qualified as the “prevailing party” in a “civil action relating to the collection of assessments” for purposes of the Planned Community Act.

**2. Damages and Remedies—restitution—voided foreclosure sale of home—damage to home—ejection-related expenses**

In a case where a homeowner’s association sold petitioners’ home in a foreclosure sale to collect petitioners’ unpaid association fees, after which the trial court granted petitioners’ motion under Civil Procedure Rule 60(c) to set aside the sale, the court abused its discretion in declining to award petitioners any restitution after their home had been partially demolished while in the buyer’s possession and where plaintiffs were subjected to a variety of expenses following their ejection from the home.

## IN RE FORECLOSURE OF GEORGE

[285 N.C. App. 288, 2022-NCCOA-591]

**3. Damages and Remedies—restitution—voided foreclosure sale of home—buyer—unclean hands—unjust enrichment**

After the trial court granted petitioners' motion under Civil Procedure Rule 60(c) to set aside the foreclosure sale of their home for lack of proper notice, the court did not abuse its discretion in declining to award restitution to the buyer for the purchase price of the home. Specifically, the buyer was barred from recovering under the doctrine of unclean hands where the record showed the buyer knew about the defective notice of the sale, proceeded to buy the home for very little money, refused to allow petitioners to repurchase the home for the auction price, and then sold the home to a third party at a much higher price. Further, the buyer's unclean hands precluded it from recovering on a theory that the homeowner's association that sold petitioners' home was unjustly enriched by the voided sale.

Appeal by Petitioners, and cross-appeal by Intervenors, from order entered 20 August 2021 by Judge Nathaniel J. Poovey in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 August 2022.

*Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin, for Petitioners-Appellants Calmore and Hygiena George.*

*Sellers, Ayers, Dortch, & Lyons, P.A., by Michelle Massingale Dressler, for Respondent-Appellee/Cross-Appellee The Crossings Community Association.*

*James, McElroy & Diehl, P.A., by Preston O. Odom, III, for Intervenor-Appellee/Cross-Appellant KPC Holdings.*

*DeVore, Acton & Stafford, P.A., by Derek P. Adler, for Intervenor-Appellee/Cross-Appellant National Indemnity Group.*

GRIFFIN, Judge.

¶ 1

Petitioners Calmore George and Hygiena Jennifer George appeal from an order denying their request for restitution and attorneys' fees. The Georges assert that the trial court erred in finding that they did not qualify for recovery of attorneys' fees under N.C. Gen. Stat. § 47F-3-116, and further argue that the trial court abused its discretion in failing to award restitution under N.C. Gen. Stat. § 1-108. Intervenor KPC Holdings has filed a cross-appeal asserting that the trial court abused its discretion

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in failing to award restitution for the cost of the invalidated foreclosure sale. We reverse the decision of the trial court which withheld attorneys' fees and restitution from the Georges. As to the cross-appeal, we affirm the trial court's decision not to award restitution to KPC.

**I. Factual and Procedural History**

¶ 2 This case is an appeal following remand of *In re George*, 377 N.C. 129, 2021-NCSC-35. A full statement of the facts from this case can be found in the prior appeal; however, “we limit our discussion in this opinion to the facts and procedural history relevant to the issues currently before us.” *Premier, Inc. v. Peterson*, 255 N.C. App. 347, 348, 804 S.E.2d 599, 601 (2017).

¶ 3 The Georges owned a home in Charlotte located in the Crossings Community subdivision. On 22 August 2016, the Crossings Community Association, Inc. (the “Association”), filed a claim of lien in the amount of \$204.75 against the Georges' property—the amount of unpaid homeowner's association fees.

¶ 4 On 11 October 2016, a notice of hearing was filed which stated that the Association intended to foreclose on the property to collect the unpaid fees. On 12 October 2016, Deputy Sheriff Shakita Barnes of the Mecklenburg County Sheriff's Office mistakenly served personal notice of foreclosure upon the Georges' daughter, Jeanine George.

¶ 5 The nonjudicial foreclosure sale was subsequently initiated, and on 12 January 2017, KPC purchased the property at auction for \$2,650.22. On 21 March 2017, KPC conveyed the property to National Indemnity Group, with the sale secured by a promissory note and deed of trust in the amount of \$150,000.

¶ 6 On 18 April 2017, the Georges filed a motion to set aside the foreclosure sale and the subsequent transactions pursuant to N.C. R. Civ. P. 60(c), claiming that notice had not been properly served. On 17 July 2017, National Indemnity was introduced as an intervening party by the trial court.

¶ 7 On 9 August 2017, the trial court entered an order concluding that the Georges had not been properly served with notice of foreclosure and invalidating the foreclosure sale and the subsequent conveyances for lack of personal jurisdiction.

¶ 8 On 3 November 2017, KPC and National Indemnity filed a motion for relief from judgment pursuant to N.C. R. Civ. P. 60(b)(6), requesting that the trial court vacate the previous order on the grounds that they

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were good faith purchasers for value and that the Georges had received constitutionally sufficient service. On 15 March 2018, the trial court entered an order concluding that neither KPC nor National Indemnity qualified as a good faith purchaser for value for purposes of N.C. Gen. Stat. § 1-108 and denying their motion for relief.

¶ 9 On appeal, the Supreme Court of North Carolina determined that “the trial court did not abuse its discretion in determining that KPC Holdings and National Indemnity were not entitled to good faith purchaser for value status.” *In re George*, 2021-NCSC-35, ¶ 29. The trial court “had a rational basis for concluding that KPC Holdings paid a grossly inadequate price to purchase the property from the trustee and . . . had ample reason to question the sufficiency of the notice of the pendency of the foreclosure proceeding.” *Id.* ¶ 32. Further, the Court affirmed the trial court’s determination that “proper service of process had not been effectuated.” *Id.* “[G]iven [the trial court’s] decision to invalidate the results of the foreclosure proceeding and the resulting property transfers[,]” this case was subsequently remanded “for consideration of the issue of whether an award of restitution as authorized by [N.C. Gen. Stat. § 1-108] would be appropriate.” *Id.*

¶ 10 The Georges seek to recover restitution after their home had been partially demolished while in the possession of Respondent and Intervenor. During the time that the Georges were excluded from the property, demolition work had begun on the home and “all the appliances” and “every bit of flooring” had been removed. The Georges also request restitution for other expenses, including an outstanding property tax liability of \$11,931.55, alternative living expenses incurred while displaced from the home, and lost rental income. The Georges further seek to recover attorneys’ fees related to the Rule 60(c) motion which set aside the foreclosure. On cross-appeal, KPC seeks to recover the \$2,650.22 payment made to the Association to purchase the home at auction.

¶ 11 On 20 August 2021, the trial court entered an order denying all motions for attorneys’ fees and restitution. The Georges and KPC each timely filed notice of appeal from the order.

## II. Analysis

### A. Attorneys’ Fees

¶ 12 [1] We first consider whether the trial court erred in failing to award any attorneys’ fees to the Georges under N.C. Gen. Stat. § 47F-3-116. The Georges assert that they are entitled to an award of reasonable

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attorneys' fees because they are the "prevailing party" in a "civil action relating to the collection of assessments." We agree.

¶ 13 The North Carolina Planned Community Act ("PCA") provides in part that "[a]ny judgment, decree, or order in any judicial foreclosure or civil action relating to the collection of assessments *shall* include an award of costs and reasonable attorneys' fees for the prevailing party[.]" N.C. Gen. Stat. § 47F-3-116(g) (2021) (emphasis added). "We review a trial court's decision whether to award mandatory attorney's fees *de novo*." *Willow Bend Homeowners Ass'n, Inc. v. Robinson*, 192 N.C. App. 405, 418, 665 S.E.2d 570, 573 (2008).

¶ 14 "[T]he action created by N.C.G.S. § 47F-3-116 is one in which a homeowners' association forecloses on a lien created under N.C.G.S. § 47F-3-116(a) for unpaid assessments." *Id.* Prior to 2013, N.C. Gen. Stat. § 47F-3-116(e) required an award of attorneys' fees for "[a] judgment, decree, or order in any action brought under this section." N.C. Gen. Stat. § 47F-3-116(e) (2011). In 2013, the statute was amended with broader and more inclusive language, now requiring an award of attorneys' fees in "*any* judgment, decree or order in *any* judicial foreclosure or civil action relating to the collection of assessments." N.C. Gen. Stat. § 47F-3-116(g) (2013) (emphasis added).

¶ 15 Here, in order for the Georges to recover under N.C. Gen. Stat. § 47F-3-116(g), they must establish: (1) that they were the prevailing party, and (2) that they prevailed in a civil action relating to the collection of assessments. *Id.*

¶ 16 The Georges have successfully challenged the order permitting foreclosure of the home. In granting the Georges' Rule 60 motion, the trial court set aside the foreclosure sale and the subsequent transfers of the deed for lack of proper service, thereby granting the relief sought by the Georges. *In re George*, 2021-NCSC-35, ¶ 32 ("[W]e hold . . . the Court of Appeals correctly affirmed the trial court's determination that proper service of process had not been effectuated upon Mr. George."). Accordingly, we hold that the Georges are a "prevailing party" under N.C. Gen. Stat. § 47F-3-116(g). We are confident that such a result fits within the broad reach of "prevailing" in "*any* judgment, decree, or order." N.C. Gen. Stat. § 47F-3-116(g) (emphasis added). Respondent's contention that the Georges must "prevail" in the underlying foreclosure action is an impermissibly narrow reading of the statute.

¶ 17 Further, it is clear to this Court that the Georges prevailed in a "civil action relating to the collection of assessments." *Id.* "The action created by [N.C. Gen. Stat. §] 47F-3-116 is one in which a homeowners'

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association forecloses on a lien . . . for unpaid assessments,” and the Rule 60 motion was necessary for the Georges to recover where the Association had foreclosed upon the home to collect the unpaid dues. *See Willow Bend*, 192 N.C. App. at 418, 665 S.E.2d at 578.

¶ 18 The broad nature of the statute’s language convinces this Court that the Rule 60 motion is included within the meaning of “*any* . . . civil action *relating* to the collection of assessments.” Denying recovery to the Georges here would run counter to the expansive protections afforded by this statute to homeowners, who in this case would be otherwise burdened with the cost of the Association’s failure to notify. As such, the trial court erred in failing to award reasonable attorneys’ fees as mandated by N.C. Gen. Stat. § 47F-3-116.

**B. Restitution for the Georges**

¶ 19 [2] We now consider whether the trial court abused its discretion in failing to award restitution to the Georges under N.C. Gen. Stat. § 1-108. The Georges assert that they are entitled to at least some restitution after their home was partially demolished while in the possession of Respondents and Intervenors, and they seek to recover for a variety of expenses that resulted from their ejection from the property. We agree.

¶ 20 N.C. R. Civ. P. 60(b) “allows a party to obtain relief from a final judgment or order . . . [where] the judgment is void or any other reason justifying relief from the operation of the judgment exists.” *In re George*, 2021-NCSC-35, ¶ 23 (quoting N.C. R. Civ. P. 60(b)) (internal quotation marks omitted). The authority granted to a trial judge “is equitable in nature . . . [and] appellate review is limited to determining whether the court abused its discretion.” *Id.* (citations omitted). An abuse of discretion occurs when the trial court’s determinations are “manifestly unsupported by reason.” *Id.* (citation omitted).

¶ 21 “If a judgment is set aside pursuant to Rule 60(b) or (c) of the Rules of Civil Procedure and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs.” N.C. Gen. Stat. § 1-108 (2021).

¶ 22 This Court has found that a property owner may be entitled to restitution even where she has failed to set aside the deed pursuant to N.C. R. Civ. P. 60. *In re Ackah*, 255 N.C. App. 284, 293–94, 804 S.E.2d 794, 800 (2017) (“On remand, the superior court may enter an order not inconsistent with this opinion, which may include, for example, relief for Ms. Ackah in the form of restitution from the HOA, as authorized by N.C. Gen. Stat. § 1-108.”); *see also County of Mecklenburg v. Ryan*, 281 N.C. App. 646, 2022-NCCOA-90, ¶ 42 (2022).

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¶ 23 Here, we hold that the trial court abused its discretion in failing to award any restitution for the damages suffered by the Georges. While *In re Ackah* stands for the proposition that an owner who fails to recover her property may be entitled to restitution, it does not expressly limit the award of restitution to instances in which the property is lost. *See In re Ackah*, 255 N.C. App. at 293–94, 804 S.E.2d at 800.

¶ 24 The recovery of a partially demolished home is a strikingly insufficient remedy for the extensive damages that the Georges have suffered from the defective foreclosure proceeding and Respondent’s and Intervenor’s actions in bad faith. Refusal to award any form of restitution here is “manifestly unsupported by reason,” and is thus an abuse of the trial court’s discretion.

**C. Cross-Appeal: Restitution for KPC**

¶ 25 [3] KPC asserts that the trial court abused its discretion in denying restitution for the \$2,650.22 purchase price of the voided foreclosure sale. KPC argues that despite its failure to qualify as a good faith purchaser for value entitled to the protection of N.C. Gen. Stat. § 1-108, it should still be able to recover the purchase price of the home. We disagree.

¶ 26 Our Supreme Court has held that “[o]ne who seeks equity must do equity.” *Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998). “When equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion. This discretion is normally invoked by considering an equitable defense, such as unclean hands or laches, or by balancing equities, hardships, and the interests of the public[.]” *Bartlett Milling Co., L.P. v. Walnut Grove Auction and Realty Co., Inc.*, 192 N.C. App. 74, 92–93, 665 S.E.2d 478, 492 (2008) (citations and quotation marks omitted).

¶ 27 “The doctrine of clean hands is an equitable defense which prevents recovery where the party seeking relief comes into court with unclean hands.” *Ray v. Norris*, 78 N.C. App. 379, 384, 337 S.E.2d 137, 141 (1985). “[T]his Court has stated the clean hands doctrine denies equitable relief only to litigants who have acted in bad faith, or whose conduct has been dishonest, deceitful, fraudulent, unfair, or overreaching in regard to the transaction in controversy.” *Brissett v. First Mount Vernon Indus. Loan Ass’n*, 233 N.C. App. 241, 255, 756 S.E.2d 798, 810 (2014) (citation and internal quotation marks omitted).

¶ 28 In the prior appeal, our Supreme Court affirmed that “[there is] a rational basis for concluding that KPC Holdings paid a grossly inadequate price to purchase the property from the trustee and . . . had ample reason

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to question the sufficiency of the notice of the pendency of the foreclosure proceeding[.]” *In re George*, 2021-NCSC-35, ¶ 32. More specifically, the record reveals that KPC was made aware of the notice defect after discussions with the Georges’ counsel. After KPC was informed of the potential defect, it declined to allow the Georges to repurchase the property for the auction price. KPC instead demanded that the Georges pay \$150,000 to have the property returned and “almost immediately . . . [deeded the property] to National Indemnity Group for \$150,000.”

¶ 29        Though the trial court lacked a rational basis for withholding restitution to the Georges, we do hold that the trial court acted within its discretion in denying restitution to KPC. Such an abuse of discretion would occur “only when the trial court’s determinations are manifestly unsupported by reason.” *In re George*, 2021-NCSC-35, ¶ 23 (internal quotation marks omitted). In this Court’s view, it is reasonable for the trial court to have determined that KPC’s actions in bad faith bar its recovery.

¶ 30        Nor are we convinced that KPC should recover on a theory of unjust enrichment. “The doctrine of unjust enrichment was devised by equity to exact the return of, or payment for, benefits received under circumstances where it would be unfair for the recipient to retain them without the contributor being repaid or compensated.” *Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761 (1984). However, it is fundamental that “[o]ne who seeks equity must do equity.” *Creech*, 347 N.C. at 529, 495 S.E.2d at 913. KPC’s unclean hands provided the trial court with a rational basis for declining to disgorge the Association of this benefit.

¶ 31        Therefore, we hold that the trial court acted within its discretion in denying restitution to KPC for the sale price of the home.

### III. Conclusion

¶ 32        For the reasons stated herein, the decision of the trial court is affirmed, in part, and reversed, in part, and this case is remanded for consideration of the issue of what constitutes a reasonable award of attorneys’ fees and restitution for the Georges.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges ZACHARY and WOOD concur.

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[285 N.C. App. 296, 2022-NCCOA-592]

IN THE MATTER OF THE ESTATE OF  
BOBBY RONALD GERRINGER, DECEASED

No. COA21-556-2

Filed 6 September 2022

**Estates—elective share—statute amended during appeal to superior court—remand for application of new statute**

In an estate proceeding, where the portion of the clerk of court's order awarding an elective share of the estate to decedent's wife was appealed to the superior court, the superior court erred by sua sponte raising the issue of whether the clerk had used the correct values in its calculation and issuing a new order awarding a different elective share. Because a new version of the applicable statute went into effect while the matter was on appeal to the superior court (and the estate proceeding was not final), the clerk's order was no longer based on good law and the superior court should have remanded the matter to the clerk for application of the amended statute.

Appeal by Petitioner from order entered 21 April 2021 by Judge Lora C. Cabbage in Guilford County Superior Court. Originally heard in the Court of Appeals 23 March 2022. An opinion vacating the superior court's order and remanding to the superior court with instructions to remand to the clerk of court for further proceedings was filed by this Court on 21 June 2022. Petition for Rehearing was filed by Petitioner on 26 July 2022, granted on 3 August 2022, and heard without additional briefs or oral argument. This opinion supersedes the previous opinion filed on 21 June 2022.

*Narron Wenzel, P.A., by Benton Sawrey and M. Kemp Mosley, for Petitioner-Appellant.*

*Casey Gerringer, pro se Respondent-Appellee.*

COLLINS, Judge.

¶ 1 Petitioner appeals the superior court's order awarding her an elective share of her late husband's estate. We vacate the superior court's order and remand to the superior court with instructions to remand to the clerk of court for further proceedings.

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**I. Background**

¶ 2 Bobby Ronald Gerringer (“Decedent”) died testate in December 2017. Patricia Gerringer (“Petitioner”) had been Decedent’s wife for approximately forty-five years at the time he died. Casey Lynn Gerringer (“Respondent”) is Decedent’s son. Decedent’s last will and testament was submitted to the Guilford County Clerk of Court in February 2018 and accepted for probate in common form. Decedent’s will named Respondent executor of the estate and devised the entirety of his estate to Respondent.

¶ 3 On 20 February 2018, Petitioner filed a Petition for Elective Share by Surviving Spouse (“Petition”), seeking an elective share of 50% of Decedent’s net estate, pursuant to N.C. Gen. Stat. § 30-3.1.

¶ 4 A preliminary hearing on the Petition was held before the Guilford County Assistant Clerk of Court (“Clerk”) on 6 August 2018. A central issue at the hearing was what portion of three joint bank accounts held by Decedent and Respondent as joint tenants with right of survivorship should be included in the value of Decedent’s net estate. The Clerk ordered Respondent to prepare a statement of Decedent’s assets, pursuant to N.C. Gen. Stat. § 30-3.4(e2), and set a future hearing date at which Respondent could offer evidence of his contribution to the joint accounts. The Clerk also ordered a partial distribution of Decedent’s estate in an amount of \$158,617.47 be paid to Petitioner, without prejudice to either party.

¶ 5 Respondent submitted a statement of Decedent’s assets on 5 September 2018, which showed total assets of \$670,625.35. In addition to real property, personal property, and life insurance benefits, the statement listed two accounts held by Decedent alone, naming Respondent the sole beneficiary, and three joint accounts held by Decedent and Respondent as joint tenants with rights of survivorship in the amounts of \$386,630.39; \$12,650.53; and \$143,659.91, for a total of \$542,940.83.

¶ 6 A hearing was held before the Clerk on 24 September 2018 to determine what percentage of the value of the joint accounts should be included in the value of Decedent’s net estate. Respondent testified about his contributions to the three joint accounts as follows: Respondent deposited money into the joint accounts “a couple of different times.” He deposited an unspecified amount in the year 2000 and again in 2010 or 2011, but did not have bank records confirming those deposits. He deposited \$22,000 on 8 August 2014 and withdrew \$35,000 that same day. Three days before Decedent died, Respondent transferred \$250,000 from one of the joint accounts to another of the joint accounts. At the

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hearing, Respondent also informed the Clerk that Decedent's stepson, Anthony Gerringer, had filed a claim for \$109,200 for personal services to the Decedent and Decedent's estate and that Respondent had denied the claim.

¶ 7 The Clerk entered her Order Awarding Elective Share ("Clerk's Order") on 7 November 2018, awarding Petitioner an elective share of fifty percent of the Decedent's net estate. The Clerk's Order found and concluded, in part:

8. Pursuant to the calculation of values listed on the Statement of Total Assets filed in this matter, the Total Assets of this Estate are \$670,625.35.

9. Total Net Assets of the Estate are defined by North Carolina statute as the total assets reduced by claims and by year's allowances to persons other than the surviving spouse. One claim has been filed in this matter on October 4, 2018, by Anthony C. Gerringer, in the amount of \$109,200.00. On September 6, 2018, the Executor filed a letter with the Clerk of Superior Court denying the claim made by Anthony C. Gerringer. No year's allowances to persons other than the surviving spouse have been allotted. Therefore, the Total Net Assets of this Estate are \$670,625.35.

10. Pursuant to N.C. [Gen. Stat.] § 30-3.1, the applicable share of Total Net Assets to which the surviving spouse is entitled is  $\frac{1}{2}$  of Total Net Assets, a value of \$335,312.68.

11. Pursuant to N.C. [Gen. Stat.] § 30-3.2, Property Passing to Surviving Spouse equals zero.

12. The amount of the elective share Petitioner is entitled to is determined by the following calculation: [ $\$335,312.68 - 0 = \$335,312.68$ .]

13. Parties agree that [Petitioner] has already received a partial distribution of her elective share in the amount of \$158,617.47 from the Executor. The balance of the elective share then remaining due is \$176,695.20. ( $\$335,312.68 - \$158,617.47 = \$176,695.20$ ).

¶ 8 The Clerk thus ordered Respondent to deliver a check to Petitioner in the amount of \$176,695.20.

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¶ 9 Respondent, through counsel, appealed the Clerk’s Order on 21 November 2018. Respondent’s sole alleged error was that the Clerk “ordered that the elective share would be one-half (1/2) of the gross assets without taking into consideration in (sic) an outstanding claim in excess of \$100,000.00. Thus, [the Clerk’s] Order Awarding Elective Share entered on November 7, 2018 is not based upon the net estate.” Between the time that Respondent filed his appeal and the time the appeal came on for hearing before the superior court, Respondent’s attorney withdrew. The attorney filed a claim against the estate for attorney’s fees for \$9,541.

¶ 10 Respondent’s appeal was heard by the superior court on 23 March 2021. Respondent, appearing pro se, argued that the Clerk’s Order had failed to consider outstanding claims against the estate, including the Decedent’s stepson’s \$109,200 claim and Respondent’s counsel’s claim for \$9,541. The superior court *sua sponte* raised the issue of whether the Clerk had used the correct value of the joint accounts when calculating Decedent’s net estate.

¶ 11 The superior court entered its Order Awarding Elective Share (“Superior Court’s Order”) on 21 April 2021 finding, in part:

13. That after the review this Court determined that [] while the Assistant Clerk of Court found that pursuant to [N.C. Gen. Stat.] § 30-3.2(3f), fifty percent (50%) of the funds held in the joint accounts with the right of survivorship, listed on the statement of total assets filed September 6, 2018, were to be included in the sum of values used to calculate total assets, that the Assistant Clerk of Court erroneously used the total amount of funds in the aforementioned accounts as part of her calculation of the Total Assets of the Estate that were to be used in calculating the elective share due to the Petitioner [].

14. That this Court agrees [N.C. Gen. Stat. §] 30-3.2(3f) allows only one half of the total funds in the joint accounts with the right of survivorship to be used in the calculation of Total Assets of the deceased when it comes to determining the amount of Petitioner’s elective share.

15. That this Court recalculated only the Joint Accounts with Right of Survivorship using one

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half of the total amount in each account and finds the following:

....

16. That when the recalculation is completed, the total of the Total Assets to be used in the calculation to determine the amount due Petitioner under the Elective Share statute is: \$399,154.98.

....

19. That this Court finds that attorney fees due out of the Estate are due to Attorney Tom Maddox in the amount of \$9,541.00.

20. That this Court finds that claims due to be paid from the Estate are \$11,989.30.

21. That this Court finds that Total Assets of the Estate of Bobby Ronald Gerringer are \$399,154.98 – \$21,530.30 = \$377,624.68.

22. That this Court finds the Total Assets of the Estate of Bobby Ronald Gerringer is \$377,624.68 for the purpose of calculating the Elective Share that is due to Petitioner [].

23. That this Court finds the Elective Share statute provides that Petitioner [] is entitled to one half of the Total Assets of the Estate of Bobby Ronald Gerringer which equates to: \$377,624.68 [divided by] 2 = \$188,812.34.

24. That this Court finds that the final amount remaining due to Petitioner [] from the Estate of Bobby Ronald Gerringer is: \$188,812.34 – \$158,617.47 = \$30,194.87.

¶ 12 The superior court ordered Respondent to deliver a cashier's check to Petitioner "in the amount of \$30,194.87 made payable to [Petitioner], representing the payment to her of the balance of the Claim for Elective Share owed to her." Petitioner timely appealed the Superior Court's Order.

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## II. Discussion

## A. Standard of Review

¶ 13 The clerk of court has “jurisdiction of the administration, settlement, and distribution of estates of decedents including, but not limited to, estate proceedings as provided in [N.C. Gen. Stat. §] 28A-2-4.” N.C. Gen. Stat. § 28A-2-1 (2021). Section 28A-2-4(a) provides that the clerk has “original jurisdiction of estate proceedings.” *Id.* § 28A-2-4(a) (2021). “Estate proceedings” are “matter[s] initiated by petition related to the administration, distribution, or settlement of an estate, other than a special proceeding.” *Id.* § 28A-1-1(1b). In estate proceedings, the clerk shall “determine all issues of fact and law . . . [and] enter an order or judgment, as appropriate, containing findings of fact and conclusions of law supporting the order or judgment.” *Id.* § 1-301.3(b).

¶ 14 “On appeal to the superior court of an order of the clerk in matters of probate, the [superior] court . . . sits as an appellate court.” *In re Estate of Pate*, 119 N.C. App. 400, 402, 459 S.E.2d 1, 2 (1995) (citation omitted). The superior court’s standard of review is as follows:

Upon appeal, the judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following:

- (1) Whether the findings of fact are supported by the evidence.
- (2) Whether the conclusions of law are supported by the findings of facts.
- (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

N.C. Gen. Stat. § 1-301.3(d) (2021).

¶ 15 The appellant must make specific exceptions to any finding or conclusion in the clerk’s order with which he disagrees. *In re Swinson’s Estate*, 62 N.C. App. 412, 415, 303 S.E.2d 361, 363 (1983). “[T]he [superior court] may review any of the clerk’s findings of fact when the finding is properly challenged by specific exception and may thereupon either affirm, modify or reverse the challenged findings.” *Id.* at 416, 303 S.E.2d at 363 (quoting *In re Taylor*, 293 N.C. 511, 519, 238 S.E.2d 774, 778 (1977)). Unchallenged findings of fact “are presumed to be supported by competent evidence and are binding on appeal.” *In re Estate of Harper*, 269 N.C. App. 213, 215, 837 S.E.2d 602, 604 (2020) (citation omitted).

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¶ 16 “The standard of review in [the Court of Appeals] is the same as in the superior court.” *Pate*, 119 N.C. App. at 403, 459 S.E.2d at 2-3. Errors of law by the superior court, including whether the superior court has applied the correct standard of review, are reviewed de novo. *In re Estate of Johnson*, 264 N.C. App. 27, 32, 824 S.E.2d 857, 861 (2019).

**B. Superior Court’s Review of Clerk’s Order**

¶ 17 The dispositive issue on appeal is whether the superior court erred in its review of the Clerk’s Order.

¶ 18 N.C. Gen. Stat. § 30-3.1(a), which governs the elective share of a surviving spouse, provides as follows:

The surviving spouse of a decedent who dies domiciled in this State has a right to claim an ‘elective share’, which means an amount equal to (i) the applicable share of the Total Net Assets. . . less (ii) the value of Net Property Passing to Surviving Spouse<sup>1</sup> . . . .

N.C. Gen. Stat. § 30-3.1 (2021). The “applicable share” of the Total Net Assets for a surviving spouse who had been married to the decedent for 15 years or more is 50%. *Id.* § 30-3.1(a)(4). “Total Net Assets” are “[t]he total assets reduced by year’s allowances to persons other than the surviving spouse and claims.” *Id.* § 30-3.2(4). “Total assets” are defined by N.C. Gen. Stat. § 30-3.2 and include property held jointly with right of survivorship. *Id.* § 30-3.2(3f)(c).

¶ 19 At the time that the Clerk heard the matter in September 2018 and entered the Clerk’s Order in November 2018, N.C. Gen. Stat. § 30-3.2(3f)(c)(2) provided that

property held by the decedent and one or more other persons other than the surviving spouse as joint tenants with right of survivorship is included [in the calculation of “total assets”] to the following extent:

I. All property attributable to the decedent’s contribution.

II. The decedent’s pro rata share of property not attributable to the decedent’s

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1. Net Property Passing to Surviving Spouse is “[t]he Property Passing to Surviving Spouse reduced by (i) death taxes attributable to property passing to surviving spouse, and (ii) claims payable out of, charged against or otherwise properly allocated to Property Passing to Surviving Spouse.” N.C. Gen. Stat. § 30-3.2(2c) (2021).

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contribution, except to the extent of property attributable to contributions by a surviving joint tenant.

The decedent is presumed to have contributed the jointly owned property unless otherwise proven by clear and convincing evidence.

N.C. Gen. Stat. § 30-3.2(3f)(c)(2) (2018).

¶ 20

However, between entry of the Clerk's Order in November 2018 and the superior court hearing Respondent's appeal in April 2021, the North Carolina General Assembly amended N.C. Gen. Stat. § 30-3.2(3f)(c). This amendment became effective on 30 June 2020 and "applies to estate proceedings to determine the elective share which are not final on [30 June 2020] because the proceeding is subject to further judicial review." S.L. 2020-60, § 1. The amended version of N.C. Gen. Stat. § 30-3.2(3f)(c)(2) reads as follows:<sup>2</sup>

Property held by the decedent and one or more other persons as joint tenants with right of survivorship is included [in the calculation of "total assets"] to the extent of the decedent's pro rata share of property attributable to the decedent's contribution.

The decedent and all other joint tenants are presumed to have contributed in-kind in accordance with their respective shares for the jointly owned property unless otherwise proven by clear and convincing evidence.

N.C. Gen. Stat. § 30-3.2(3f)(c) (2021).

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2. The amended N.C. Gen. Stat. § 30-3.2(3f)(c)(2) deleted the marked-through text and added the bolded text, as illustrated below:

Property held by the decedent and one or more other persons ~~other than the surviving spouse~~ as joint tenants with right of survivorship is included [in the calculation of "total assets"] to the ~~following~~ extent:

~~I. All property attributable to the decedent's contribution.~~

~~II. The~~ **extent of the** decedent's pro rata share of property ~~not~~ attributable to the decedent's **contribution**, ~~except to the extent of property attributable to contributions by a surviving joint tenant.~~

The decedent ~~is and all other joint tenants are~~ presumed to have contributed **in-kind in accordance with their respective shares for** the jointly owned property unless ~~contribution by another is~~ **otherwise** proven by clear and convincing evidence.

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¶ 21 In this case, Petitioner is seeking an elective share of Decedent's estate. The estate proceeding to determine Petitioner's elective share was not final on 30 June 2020 because the Clerk's Order was, and still is, subject to further judicial review. Accordingly, while the former statute applied to the proceeding before the Clerk, the amended statute applied to the proceeding on appeal in the superior court. Consequently, the findings of fact and conclusions of law in the Clerk's Order were based on a statute that was no longer "good law" when the superior court reviewed it. As a result, the superior court could not review the Clerk's order under the applicable standard of review and should have remanded the matter to the Clerk with instructions to apply the amended statute.<sup>3</sup> *See, e.g., Johnson*, 264 N.C. App. at 34, 824 S.E.2d at 862 ("When the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings.") (citation omitted). In light of our holding, we do not reach Petitioner's remaining arguments.

### III. Conclusion

¶ 22 We vacate the Superior Court's Order and remand the case to the superior court with instructions to remand to the clerk of court for further proceedings. The clerk of court may, in its discretion, receive more evidence.

VACATED AND REMANDED.

Judges ZACHARY and WOOD concur.

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3. It is not clear from the record or transcript that the superior court was aware that N.C. Gen. Stat. § 30-3.2 had changed between the date the matter was heard by the Clerk and the date the matter was heard in the superior court on appeal.

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IN THE MATTER OF M.T. AND K.T.

No. COA21-755

Filed 6 September 2022

**1. Child Abuse, Dependency, and Neglect—permanency planning—cessation of reunification efforts—non-accidental injuries to one child—lack of progress on case plan**

The trial court did not abuse its discretion by directing DSS to cease reunification efforts between a mother and her two children where the children had been removed from the home as a result of unexplained non-accidental injuries to one of the children when he was less than six months old, including multiple fractures, other internal injuries, and retinal hemorrhages in both eyes. Sufficient competent evidence supported the trial court's unchallenged findings of fact addressing each of the factors in N.C.G.S. § 7B-906.2(d), and the court made a reasoned decision based on the mother's lack of an adequate explanation for all of the child's injuries and on the mother's incomplete progress on her case plan.

**2. Termination of Parental Rights—grounds for termination—abuse or neglect—non-accidental injuries to one child—likelihood of future neglect**

The trial court properly terminated a mother's parental rights to her two children on the grounds of abuse (one child) and neglect (both children) where the children had been removed from the home due to unexplained non-accidental injuries to one of the children when he was less than six months old, including multiple fractures, other internal injuries, and retinal hemorrhages in both eyes. Competent evidence supported the court's findings of fact, which in turn supported its conclusions of law that there would be a repetition of neglect if the children were returned to the mother's care based on the mother's lack of a reasonable explanation for all of her son's injuries and on her lack of progress in addressing the issues that led to the children's removal.

**3. Termination of Parental Rights—disposition phase—parent's expert witness—exclusion of testimony**

In the disposition phase of a termination of parental rights proceeding, the trial court did not abuse its discretion by excluding testimony from one of the mother's expert witnesses where it made a reasoned decision that the expert's opinion would not be helpful or

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relevant because she lacked information about the mother or the specific facts of the case, she did not know how social services operated in North Carolina, and her data on families and child welfare was not based on research from North Carolina.

Appeal by respondent-mother from orders entered on or about 13 October 2020 and 5 July 2021 by Judge Shamielka L. Rhinehart in District Court, Durham County. Heard in the Court of Appeals 9 August 2022.

*Miller & Audino, LLP, by Jeffrey L. Miller, and Elizabeth Simpson, for appellant-respondent mother.*

*Michelle FormyDuval Lynch and Matthew D. Wunsche, for appellee guardian ad litem.*

*The Law Office of Derrick J. Hensley, PLLC, by Derrick J. Hensley, and Elizabeth P. Kennedy-Gurnee for appellee-petitioner Durham County Department of Social Services.*

*Jaelyn Maffetore, for Amicus Curiae The ACLU of North Carolina Legal Foundation.*

*Kathleen Lockwood and Nisha Williams, for Amicus Curiae North Carolina Coalition Against Domestic Violence.*

*Laura Holland, Quisha Mallette, and Sarah Laws, for Amici Curiae North Carolina Justice Center and North Carolina Community Bail Fund of Durham.*

*Tin, Fulton, Walker & Owen, PLLC, by Abraham Rubert-Schewel, for Amicus Curiae North Carolina NAACP.*

STROUD, Chief Judge.

¶ 1 All cases involving abuse, neglect, and dependency of children or termination of parental rights arising from physical abuse of a baby are tragic; cases arising from serious and life-threatening non-accidental injuries to a baby are perhaps the most challenging and tragic of all. Here, as in most cases involving life-threatening non-accidental injuries to a baby, there is no direct evidence of exactly what happened. A baby cannot tell anyone what happened, and no one, other than someone who

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hurt the baby, saw what happened. Trial courts must often make these difficult and momentous decisions based upon circumstantial evidence and evaluation of credibility and weight of the evidence. In this case, the trial court carefully considered evidence from many witnesses and hundreds of pages of exhibits and reports, including medical records, presented at hearings held over many days. The trial court entered several orders over four years and ultimately entered an order of termination of parental rights, setting out the facts about the abuse, the parents, and the children in thoughtful and careful detail. The trial court also painstakingly considered the best interests of the children before deciding that under the law, Mother's parental rights must be terminated.

¶ 2 In addition to the difficult issues regarding the abuse of the baby, we note several organizations have filed amicus, or "friend of the court," briefs to present arguments regarding larger issues they contend this case presents. Those briefs address issues including: the "disproportionate and negative impact of the child welfare system on marginalized racial groups;" the "role of race in the proceeding;" the concern that "responses to domestic violence in the child welfare system" may create greater trauma for the children; and the effects of "wealth-based pre-trial incarceration" on families. We do not discount any of the concerns presented by Amici, but as an appellate court, we can address only the issues presented by the facts of this case and the law as established by the General Assembly and prior caselaw. The trial court's job, ultimately, is to make hard decisions based upon the evidence presented, with the best interests of these two young children, Mark and Ken,<sup>1</sup> as its primary consideration. And our job, as an appellate court, is to determine if the trial court did that job correctly, in accord with the law. Because the trial court did that difficult job correctly, we affirm the trial court's order.

¶ 3 Respondent Mother appeals from the trial court's order ceasing reunification in an abuse, neglect, and dependency proceeding and from its order terminating parental rights as to both her children Ken and Mark.<sup>2</sup> After granting Mother's Petition for Writ of Certiorari ("PWC") to review the trial court's order ceasing reunification, we determine the trial court did not abuse its discretion because it made a reasoned decision based on its Findings regarding Mother's progress on her case plan and the still unexplained nature of some of Ken's injuries and conditions that led

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1. We use stipulated pseudonyms to protect the identity of the minor children.

2. The same orders ceased reunification efforts with Father and terminated his parental rights, but Father does not appeal.

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to the abuse and neglect proceeding. Because competent evidence supports the trial court's Findings of Fact and those Findings support the trial court's Conclusions of Law, the trial court properly adjudicated termination of Mother's parental rights on the grounds of neglect as to both Mark and Ken and on the grounds of abuse as to Ken pursuant to North Carolina General Statute § 7B-1111(a)(1) (2019). Because we conclude the abuse and neglect grounds were proper, we do not address the other ground for termination, willful failure to make reasonable progress under North Carolina General Statute § 7B-1111(a)(2). Finally, because the trial court made a reasoned decision in excluding testimony from one of Mother's experts at the dispositional phase of the termination proceeding, the trial court did not err on those grounds. We therefore affirm.

**I. Background**

¶ 4 On or about 5 January 2018, Durham County Department of Social Services ("DSS") filed a juvenile petition alleging Ken and Mark were neglected and dependent and that Ken was abused. The petition arose from a report of medical neglect in early December 2017 after Ken, who at that time was under six months old and had only been home from the hospital a short time following his premature birth, was taken to the emergency room and diagnosed with "a head bleed, seizures and possible blood loss in the abdomen." At the time, Ken's "prognosis was unclear." According to the petition, further testing revealed Ken had "skull fractures, rib fractures in various stages of healing and retinal hemorrhages in both eyes" that "[a]ccording to the medical team" were "significant head injuries from non-accidental trauma consistent with physical abuse." As a result of those injuries, at the time the petition was filed, Ken still "require[d] twenty-four hour care, three medications, numerous follow-up medical appointment[s], . . . therapies," and "monitoring for a blood clot in his leg." Finally, the petition noted while the perpetrator of the abuse had not been identified "[t]he parents were the sole care providers of the children and could not offer any explanation" for Ken's injuries such that his "risk of further injury . . . [was] too great."

¶ 5 While the petition noted Mark had "no special needs or identified injuries," it alleged he was neglected because he "live[d] in an injurious environment due to the abuse and neglect of his sibling" Ken. As a result, DSS sought nonsecure custody of both children, which the trial court granted the same day.

¶ 6 On 25 June 2018, following a hearing held the same day, the trial court entered an order adjudicating Ken abused, dependent, and neglected and adjudicating Mark neglected based on stipulated Findings

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of Fact made with clear and convincing evidence. The trial court found Ken had been born prematurely, was released from the hospital in early November 2017 and twice had medical appointments in November where no one noted concerns for unexplained injuries. The trial court also recounted the parents taking Ken to the ER for “changed behavior” including “lack of crying, and voiding for two days, and foot jumping, and twitching, cranky and decreased eating for one day.” The Findings then expanded upon the extent and “life-threatening” nature of Ken’s injuries and conditions when presented at the hospital on 3 December 2017 that led to the DSS report:

12. The Emergency Department sought a CANMEC [a child abuse evaluation] consult for initial concerns for medical neglect due to the delay in seeking treatment, concern for malnutrition, and possible head trauma. The child, [Ken], received immediate critical care treatment for imminent or life-threatening deterioration of the following conditions: endocrine crisis, metabolic crisis, shock, trauma, central nervous system failure or compromise and respiratory failure for status epilepticus, profound anemia and profound hypoglycemia. His body temperature was 94 degrees. He was intubated. He was admitted to the hospital where he remained until December 30, 2017.

The trial court also found diagnostic testing revealed Ken’s additional injuries listed in DSS’s initial petition as well as “brain injuries due to trauma and oxygen loss.” The trial court further found, consistent with the petition, Ken required twenty-four hour care and multiple medications with “[t]he long term consequences of his injuries . . . unknown.”

¶ 7

After recounting Ken’s injuries, the trial court made Findings related to possible causes. Ken’s medical providers ruled out “genetic or medical causes for the injuries” and determined they were “consistent with non-accidental or inflicted trauma on one or multiple occasions with at least the occurring [sic] between” the period when Ken had his last medical appointment and when he was taken to the hospital. A child abuse expert not affiliated with the hospital reviewed and “concur[red]” with the findings Ken “clear[ly]” suffered abuse and “probabl[y] experienced neglect and medical neglect.” The trial court found—again in a Finding stipulated to by both parents—during this period of time when Ken’s injuries were caused, “[t]he parents were the sole care providers,” and, despite being “informed of the medical findings on several occasions,” they “could not or would not offer any explanation for the child’s injuries.”

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Specifically, the parents “both den[ied] inflicting any non-accidental trauma and [were] unaware of any event that may have caused the injuries alleged,” but they “reviewed the medical evidence” and consented to the Findings to show “their willingness to cooperate with” DSS and the court.

¶ 8 Beyond the Findings on Ken’s injuries and potential causes, the trial court noted Mark “has no special needs or identified injuries” although “due to back and forth over consent from the parents” a diagnostic test for injuries was not “timely . . . completed.” Following Ken’s admission to the hospital and DSS’s subsequent involvement, Mark was placed with his maternal grandparents, but that placement only lasted about a month before Father’s “disruptive behavior” and the grandmother’s health made it “no longer viable.” As such, no relative placement was available for the children.

¶ 9 Based on these Findings, the trial court concluded Ken was abused, neglected, and dependent and Mark was neglected. The trial court then entered an order adjudicating the same.

¶ 10 After a hearing that immediately followed the abuse, neglect, and dependency adjudication, the trial court entered a disposition order on 28 August 2018. After incorporating its adjudication order Findings, the trial court noted how still “[n]o one ha[d] come forth and provided an explanation as to how [Ken] was injured.” The trial court also found Mother did not believe the grandparents had injured Ken when they had cared for him previously. The parents told the social worker they believed Ken was injured while at the hospital following his premature birth, but Mother had taken Ken for doctor appointments after his initial discharge and “no medical concerns” were noted either time. The trial court further found the parents’ belief the hospital caused the injuries was “unreasonable” and “perplex[ing]” since two separate experts in child abuse, including an expert retained by the parents for a second opinion, opined the injuries were “non-accidental” and sustained during a period of time when the parents were sole caretakers.

¶ 11 In its remaining Findings in the disposition order, the trial court addressed: Mother’s care for Ken in the relevant time period, parents’ “pattern of refusing medical treatment for both” Mark and Ken, the lack of viability of potential relative placements, a text message Father sent while high saying “When I’m not high I’m a very negative, abusive and ugly person,” parents’ employment and engagement with services, and DSS’s recommendations and reasonable efforts. The trial court then made ultimate Findings that it was contrary to the children’s best interests to be

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returned home because of (1) the lack of explanation as to how Ken sustained his multiple injuries and (2) the risk from “[t]he parents’ pattern of refusing medical treatment.”

¶ 12 Based on these Findings, the trial court concluded DSS made reasonable efforts; it was in the children’s best interests that DSS have legal custody and placement authority; and the parents should engage in services to remediate the cause of the adjudication and have only supervised visitation. The trial court then granted DSS legal custody and placement authority with supervised visitation for the parents; DSS also would “continue to explore potential kinship placements and continue to make reasonable efforts to reunify the family.” The trial court also ordered both Mother and Father to engage in the following services: “[a] submit to a comprehensive Parenting Capacity Assessment, follow the recommendations of the assessment; [b] complete a parenting class and demonstrate that the children will be physically safe in [their] care; [c] demonstrate during visitation what is learned in parenting classes; [d] submit to random drug screens.” As part of these services, the trial court ordered their “therapy is not to be solely about their feelings related to the loss of the children. The Court has questions about what happened to [Ken] which should be explored in therapy.”

¶ 13 Over the following two years, the trial court held three review and permanency planning hearings that produced three orders. We only recount the relevant portions from the first two orders because they are not at issue in this appeal. In the final of the three permanency planning orders, the trial court ceased reunification efforts. Since Mother challenges the trial court’s decision to cease reunification efforts in her appeal, we review that order in more detail.

¶ 14 The trial court entered its first review and permanency planning order on 12 April 2019 following hearings on 19 February and 21 March of that year. In relevant part, the trial court first found both parents had been in jail since November 2018 “on charges arising from the injuries [Ken] received” and had “been unable to post bond or to engage in services.” The trial court also made Findings about a new explanation Mother gave for Ken’s injuries. Specifically, Mother testified her stepfather had abused her and he had access to Ken. The trial court rejected this explanation, finding the stepfather causing Ken’s injuries was “contrary to what [Mother] stipulated to” in the adjudication order and contrary “to the established window of the occurrence of the injuries.” The trial court also “question[ed]” why Mother had previously suggested her stepfather and mother (i.e. the maternal grandparents) to DSS as people who could take the children pursuant to a safety plan. As a result,

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the trial court expressed its “continue[d] . . . concern[] that there is no plausible explanation for the injuries” because the parents were the only caretakers during the time period the court had found the injury was sustained. The trial court then found the children could not be returned to either parent “as there [was] still no credible explanation for how [Ken] was injured and the parents remain[ed] incarcerated.”

¶ 15 After making Conclusions of Law about DSS’s reasonable efforts and the children’s best interests, the trial court ordered DSS would retain custody and placement authority and the parents would have visitation with Mark “as long as it [was] not contraindicated by his behavior” and no visitation with Ken while incarcerated, with supervised visitation to resume if they were released from jail. The trial court set the permanent plan as adoption with a secondary plan of reunification and tertiary plan of guardianship. The trial court finally ordered the parents engage in the same services as in its initial disposition order with DSS to “determine what, if any, services can be accessed in the jail and make referrals, if possible.”

¶ 16 The trial court entered its second review and permanency planning order on 22 November 2019 following a hearing on 11 September 2019. In relevant part, the trial court first found the parents “were recently released” from jail on the charges related to Ken’s injuries. Specifically, Mother had been released in July 2019. The trial court expressed its “continue[d] . . . concern[] that there is no plausible explanation for [Ken’s] injuries” and that neither Mother nor Father knew “how and why [Ken] sustained his injuries.” Finally, the trial court found the parents had stopped visiting with Mark while incarcerated because they did not want him “to see them behind the glass.” In this regard, the trial court also noted Mark “act[ed] out in daycare” following a visit with Mother at the jail. His “concerning and disruptive . . . behavior” continued following visits after Mother’s release from jail.

¶ 17 After entering Conclusions of Law on DSS’s reasonable efforts and the best interests of the children, the trial court ordered DSS would continue to have legal custody and placement authority. The trial court also suspended visitation for both parents and would reevaluate visitation based on “medical and mental health records . . . as well as updated information as would normally be available in [a] full permanency planning review hearing.” Finally, “[a]ny and all provisions of the previous order not inconsistent with” the instant order would remain in effect, including that the parents engage in the previously-ordered services.

¶ 18 On or about 13 October 2020, the trial court filed the third and final permanency planning review order following hearings held on

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10 February and 6–7 July 2020; the hearing was not completed until July 2020 because of an extended adjournment due to the COVID-19 pandemic.<sup>3</sup> To separate this order from the prior permanency planning orders, as relevant to Mother’s appeal of this order, we refer to this order as the October 2020 Order.

¶ 19 In the October 2020 Order, the trial court made numerous Findings of Fact based on clear, cogent, and convincing evidence. First, the trial court recounted the evidence and testimony it reviewed, DSS’s “reasonable efforts” at relative placement, and the current well-being of the two children with their current placement determining it was in their best interest to remain in that placement. The trial court then addressed the history of the children’s adjudication, incorporating and “re-iterat[ing]” some Findings from that order. Further, the trial court made updated Findings about the still-pending felony charges both parents faced as a result of Ken’s injuries, Mother’s release from jail, and how Mother believed her criminal charges were in the “process of being deferred.” As part of this summary of pending charges, the trial court found Father had a pending assault by strangulation charge, in which Mother was the victim. Related to that incident, the trial court made Findings on the history of domestic violence Father perpetrated against Mother including that Mother “desire[d] to file a permanent domestic protective order but” had not done so and that Father had not threatened or physically abused Mother prior to the children coming into DSS care.

¶ 20 As part of recounting the case history, the trial court reiterated the four services Mother was ordered to undertake:

- a) submit to a comprehensive Parenting Capacity Assessment, follow the recommendations of the assessment;
- b) complete a parenting class and demonstrate that the children will be physically safe in her care;
- c) demonstrate during visitation what is learned in parenting classes;
- d) submit to random drug screens

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3. Orders of the Chief Justice of the North Carolina Supreme Court postponed most in-person court proceedings between 13 March and 1 June 2020. *See* Order of the Chief Justice Emergency Directives 1 to 2 (13 Mar. 2020) (postponing for 30 days); Order of the Chief Justice Emergency Directives 1 to 7 Postponing Court Proceedings Until June 1 (2 April 2020).

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It then made a Finding about Mother's progress on the services explaining Mother completed some parenting programs, tested negative on a random drug screen, and completed a parental capacity assessment. Mother had a no-contact order with Ken, and the trial court suspended her visitation in the previous order. Later, the trial court found the parenting class's "safety information was limited to childproofing the home and discussion of child health as in what to do if the child is sick or injured." The trial court also found the parental capacity evaluation failed to adequately address a referred question relating to the continued lack of explanation for Ken's injuries.

¶ 21 The trial court made extensive findings regarding the continued lack of explanation for Ken's injuries. First, the trial court noted an email from Father to the social worker in May 2020 in which Father said "When [Ken] came home I actually dropped him on accident. He landed very hard on the floor and immediately started seizing. I was so scared I didn't know what to do. [Mother] wasn't home. I had been smoking and drinking . . . and yea, that's what happened." (Ellipses in original.) The trial court then made findings about how Mother had learned about the email and noted she "believes" Father caused Ken's injuries but "did not ask any further questions" such that "the court observed no curiosity from the [M]other to find out what happened or more about the [F]ather's disclosure." The trial court also found the social worker told the original hospital evaluators about Father's statement and they did not change their original opinion of abuse because "this new information does not explain all of [Ken]'s symptoms and injuries."

¶ 22 As a result of this evidence and the trial court's credibility determination about Father's email, the court made numerous Findings on its continuing concerns about the lack of explanation for Ken's injuries and conditions. For example, the trial court explained none of the versions of events presented to it "explain [Ken]'s poor state of health at the time he was presented . . . to include being malnourished and having skull fractures, retinal hemorrhages and other fractures of differing ages."

¶ 23 In its final relevant Findings, the trial court determined reunification efforts "would clearly be unsuccessful and inconsistent with the minor children's health or safety" in part because of the continued lack of explanation of Ken's injuries and the varied explanations over time. The trial court also found DSS made reasonable efforts and visitation was not in the children's best interests.

¶ 24 Based on these Findings, the trial court concluded it was in the children's best interests for DSS to retain legal custody and placement

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authority, visitation to be suspended, and Mother to complete the services previously ordered. It also concluded reunification efforts with Mother and Father “would be clearly unsuccessful and inconsistent with the minor children’s health or safety” such that DSS was relieved of further reunification efforts and the primary permanent plan would be adoption with a secondary plan of guardianship. Finally, the court concluded it was “in the children’s best interests that . . . DSS file a proceeding to terminate parental rights within sixty (60) days of this hearing.” The court entered an order that aligned with its Conclusions of Law and specifically restated the services Mother needed to undertake to “correct the conditions” that led to the children’s adjudication.

¶ 25 As ordered to by the later filed written order entered on or about 13 October 2020, DSS filed a “Motion and Petition for Termination of Parental Rights” on 13 July 2020. (Capitalization altered.) After recounting the past proceedings as laid out above, DSS alleged the following as grounds for terminating Mother’s parental rights:

- a. The [M]other has abused and/or neglected the children, and the children are neglected and abused children within the meaning of G.S. 7B-101 (1) and (15). The children have been previously adjudicated neglected and/abused, have been previously neglected and/or abused, and there is a reasonable likelihood of neglect if they were returned to the [M]other.
- b. The [M]other has willfully left the children in foster care for more than twelve (12) months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made within twelve (12) months in correcting those conditions which led to the removal of the children.
- c. The children have been placed in the custody of . . . DSS and the [M]other, for a continuous period of six (6) months next preceding the filing of the petition, has willfully failed for such period to pay a reasonable portion of the cost of care for the children although physically and financially able to do so.
- d. The [M]other has committed murder or voluntary manslaughter of another child of the parent or other child residing in the home; has aided, abetted or voluntarily solicited to commit murder or voluntary manslaughter of the child, another child of the

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parent, or other child residing in the home; has committed felony assault that results in serious bodily injury to the child, another child of the parent, or other child residing in the home, or has committed murder or voluntary manslaughter of the other parent of the child.

Mother filed an answer 11 August 2020.

¶ 26 The trial court held hearings on the termination of parental rights in May 2021. It heard extensive testimony, over five days, during both the adjudication and disposition stages of the proceedings. As relevant to the issues on appeal, Mother called Dr. Jessica Pryce as a witness during the disposition phase; she was “tendered and accepted as an expert in child welfare policy and practice.” According to her proffered report, Dr. Pryce sought to testify about racial disparity and disproportionality in child welfare systems, domestic violence and such systems, and evidence about the importance of avoiding family separation based upon research about the long term impact of foster care versus kin placement. During some foundational testimony, both DSS and the Guardian ad Litem (“GAL”) objected to Dr. Pryce’s testimony on grounds including lack of foundation and relevance. After extended voir dire and arguments from the parties on whether the expert should be allowed to testify, the trial court excluded the testimony because it was “irrelevant.” Mother’s counsel then submitted the expert’s report as an offer of proof.

¶ 27 Following these hearings, on or about 5 July 2021, the trial court entered an order terminating parental rights. Within the order, the trial court included sections on both adjudication and disposition.

¶ 28 For the adjudication order, the trial court made Findings of Fact by clear, cogent, and convincing evidence. First, the trial court took judicial notice of its prior orders and made a number of Findings related to jurisdiction and procedural matters. It then recounted the original removal of Mark and Ken from their home, incorporating most of the Findings stipulated to in the abuse, neglect, and dependency adjudication order. The trial court further recounted its initial disposition order Findings as well as the four services it ordered Mother to undertake “to remediate or remedy behaviors or conditions which led or contributed to the children’s adjudication or the Court’s decision to remove custody of the children” from her. Lastly as to the pure procedural history, the trial court recounted relevant parts of its first two review and permanency planning orders including the parents’ changing explanations, the

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court's continued concern about the lack of explanation for Ken's injuries, and the need for services to redress that lack of explanation.

¶ 29 The trial court then made updated Findings on Mother's compliance with the services it had previously ordered. After incorporating its Findings from the October 2020 Order, the trial court determined "there [was] no change of circumstances" as to the parental capacity evaluation and reiterated the initial evaluation "failed to fully, objectively and adequately address the conditions that led to the removal of the children from the home." Similarly, the trial court found Mother still had not "engaged in any parenting class which fully and completely addressed the medical and safety reasons that the child [Ken] came into care." Overall, the trial court determined Mother "participated in services that do not address the reason the children came into care."

¶ 30 The trial court also made numerous Findings on the continued lack of explanation for Ken's injuries and its attempts to receive one. First, the trial court incorporated many of its Findings from the October 2020 Order. Then, the trial court explained how Father's email explanation "has no weight and there is no credibility to it," although in the wake of the email, Father pleaded guilty to child abuse charges and the prosecutor voluntarily dismissed Mother's charges. The court found, though, Mother believed Father's email and had no explanation "for each of [Ken]'s conditions" when he arrived at the hospital. After noting that the parents were Ken's sole caretakers in the relevant period, the trial court addressed testimony from two medical experts in child abuse pediatrics, including one who was Mother's expert; both experts determined Ken's injuries were the result of non-accidental trauma and were not explained by the events described in Father's email. The trial court noted it had "pleaded and begged for information as to what happened to" Ken but it remained unexplained.

¶ 31 Finally, the trial court made Findings on the history of domestic violence perpetrated by Father against Mother, finding there was no domestic violence before the removal of the children from the home, and a series of ultimate Findings as to the grounds for termination alleged in the petition. As to the neglect ground, the trial court found a "likelihood of repetition of neglect and abuse" because of the continued lack of explanation for Ken's injuries and Mother and Father's "failure to adequately and timely address the issues that led to the removal of the juveniles from the home." As to the willfully leaving the children in foster care ground, the trial court found the children had been in foster care for over twelve months and Mother and Father "willfully failed or refused" to "complete court ordered services" in that neither had made

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“reasonable progress under the circumstances to correct the conditions that led to the juveniles’ removal.”

¶ 32 Based on those Findings, the trial court entered adjudication Conclusions of Law, determining grounds existed to terminate Mother and Father’s parental rights for abuse as to Ken and neglect as to Ken and Mark under North Carolina General Statute § 7B-1111(a)(1) and for willfully leaving the juveniles with DSS for over 12 months and willfully failing to make reasonable progress in correcting the conditions that led to the children’s removal from the home under North Carolina General Statute § 7B-1111(a)(2). The trial court also concluded the additional ground of committing a felony assault inflicting serious injury applied only to Father, not Mother. DSS chose not to proceed on the other ground in the petition, so the trial court concluded it was not established.

¶ 33 Having found grounds to terminate parental rights, the trial court proceeded to the dispositional phase. After incorporating all the adjudication Findings, the trial court made additional Findings on the children’s current placement, the “strong likelihood of adoption” in that placement, the bond with the parents, and the bond with the “potential adoptive parents.” The trial court then concluded it was in the best interest of the children that the parents’ rights be terminated. The trial court then entered an order terminating Mother and Father’s parental rights, giving legal and physical custody with placement authority to DSS, and directing DSS to “continue to follow through with the adoption process.”

¶ 34 Mother filed written notice of appeal from the order terminating parental rights to our Supreme Court, with appeal to this Court as an alternative given a then-recent change in law, on 14 July 2021. She filed an amended notice of appeal of the same order to this Court on 23 July 2021.

## II. Legal Background and Issues Presented

¶ 35 To help better situate Mother’s arguments, we start by giving a brief background of juvenile proceedings around abuse, neglect, and dependency as well as termination of parental rights.

¶ 36 Parents have a constitutional right to “custody of their child and to determine the care and supervision suitable for their child.” *In re Montgomery*, 311 N.C. 101, 106, 316 S.E.2d 246, 250 (1984) (citing *Santosky v. Kramer*, 455 U.S. 745, 758–59, 71 L.Ed.2d 599, 610 (1982)). “The constitutional parental right is, of course, not absolute.” *In re E.B.*, 375 N.C. 310, 315–16, 847 S.E.2d 666, 671 (2020) (citing *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019)). But it is a “fundamental liberty

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interest which warrants due process protection.” *Id.*, 375 N.C. at 316, 847 S.E.2d at 671 (quoting *In re Montgomery*, 311 N.C. at 106, 316 S.E.2d at 250 (internal quotations and citations omitted)).

¶ 37 Juvenile abuse, neglect, and dependency proceedings and termination of parental rights proceedings include specific statutory procedures to provide such due process protections. *See* N.C. Gen. Stat. § 7B-100 (2021) (directing courts to interpret and construe abuse, neglect, and dependency and termination of parental rights statutes “[t]o provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents”); *see also, e.g., In re Montgomery*, 311 N.C. at 114–15, 316 S.E.2d at 255 (summarizing statutory protections under termination of parental rights statutes and how they “adequately assure” parents receive “procedural due process protection”); *In re J.C.*, 380 N.C. 738, 2022-NCSC-37, ¶ 6 (explaining “statutory burden of proof by clear cogent, and convincing evidence” provided for in North Carolina General Statute § 7B-1109(f) (on adjudication hearings for terminations of parental rights) “protects a parent’s constitutional due process rights as enunciated by” *Santosky*); *In re K.W.*, 272 N.C. App. 487, 491, 846 S.E.2d 584, 589 (2020) (addressing how same statutory burden of proof in abuse, neglect, and dependency proceedings “assure[s] due process of law” (quoting N.C. Gen. Stat. § 7B-802 (2019))); *In re Eckard*, 148 N.C. App. 541, 547, 559 S.E.2d 233, 236 (2002) (discussing parents’ constitutional rights in context of abuse, neglect, and dependency hearings).

¶ 38 Turning to the specific statutory procedures that protect parents’ constitutional rights, both abuse, neglect, and dependency proceedings and termination of parental rights proceedings follow a two-step process. *See In re K.W.*, 272 N.C. App. at 491, 846 S.E.2d at 589 (“A proceeding to protect an allegedly abused, neglected, or dependent juvenile requires two hearings.”); *In re A.W.*, 377 N.C. 238, 2021-NCSC-44, ¶ 34 (“Our Juvenile Code provides for a two-step process for termination of parental rights proceedings consisting of an adjudicatory stage and a dispositional stage.” (quoting *In re Z.A.M.*, 374 N.C. 88, 94, 839 S.E.2d 792, 796–97 (2020) (in turn citing N.C. Gen. Stat. §§ 7B-1109, 1110 (2019)))).

¶ 39 Focusing on abuse, neglect, and dependency proceedings first, this Court has recently explained the two steps as follows:

First, the trial court holds an adjudicatory hearing to determine if a child is abused, neglected, or dependent. [*In re O.W.*, 164 N.C. App. 699, 701, 596 S.E.2d 851, 853 (2003).] At this stage, heightened

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requirements are in place to “protect the rights of . . . the juvenile’s parent” and “assure due process of law.” N.C. Gen. Stat. § 7B-802 (2019). The trial court must apply the Rules of Evidence, N.C. Gen. Stat. § 7B-804 (2019), and can find a child abused, neglected, or dependent only if that status is proven “by clear and convincing evidence.” N.C. Gen. Stat. § 7B-805 (2019).

If the trial court finds at adjudication that the allegations in a petition have been proven by clear and convincing evidence and concludes based on those findings that a juvenile is abused, neglected, or dependent, the court then moves on to an initial disposition hearing. N.C. Gen. Stat. § 7B-901 (2019). At this stage, the trial court, in its discretion, determines the child’s placement based on the best interests of the child. *O.W.*, 164 N.C. App. at 701, 596 S.E.2d at 853.

*In re K.W.*, 272 N.C. App. at 491, 846 S.E.2d at 589 (alterations in original). Following the initial disposition hearing and order, the trial court continues to conduct review or permanency planning hearings. *See* N.C. Gen. Stat. § 7B-906.1 (eff. 1 Oct. 2021) (mandating court conduct such hearings with certain required components).<sup>4</sup> At permanency planning hearings, the trial court must adopt one or more of the listed statutory permanent plans including, as relevant here, reunification, adoption, and guardianship. N.C. Gen. Stat. § 7B-906.2(a) (eff. 1 Oct. 2021); *see also* N.C. Gen. Stat. § 7B-906.2(a) (2019) (including same provisions in previous version). This concurrent planning “shall continue until a permanent plan is or has been achieved.” N.C. Gen. Stat. § 7B-906.2(a1) (eff. 1 Oct. 2021); *see also* N.C. Gen. Stat. § 7B-906.2(a1) (2019) (including same provisions in previous version).

¶ 40

The two-step process for termination of parental rights resembles that of abuse, neglect, and dependency proceedings:

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4. Section 7B-906.1 had changes go into effect 1 October 2021, which was after the trial court entered the order terminating parental rights on appeal here, but the changes relevant to our discussion here merely added new language clarifying the difference between permanency planning hearings and review hearings. *See* 2021 North Carolina Laws S.L. 2021-132, § 1(h) (1 Sept. 2021) (indicating changes to language of § 7B-906.1(a) and then changes to other sub-sections); *see also* 2021 North Carolina Laws S.L. 2021-100, § 10 (6 Aug. 2021) (updating language to reflect difference between permanency planning and review hearings in additional parts of § 7B-906.1).

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In conducting a termination of parental rights proceeding, the trial court begins by determining whether any of the grounds for termination delineated in N.C.G.S. § 7B-1111(a) exist. *See* N.C.G.S. § 7B-1109 (2019). “At the adjudicatory stage, the petitioner bears the burden of proving by ‘clear, cogent, and convincing evidence’ the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes.” *In re A.U.D.*, 373 N.C. 3, 5–6, 832 S.E.2d 698 (2019) (quoting N.C.G.S. § 7B-1109(f)). “If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage,” *id.* at 6, 832 S.E.2d 698, at which it “determine[s] whether terminating the parent’s rights is in the juvenile’s best interest.” N.C.G.S. § 7B-1110(a) (2019).

*In re A.E.*, 379 N.C. 177, 2021-NCSC-130, ¶ 13 (alterations in original). Unlike an abuse, neglect, and dependency proceeding, once the termination of parental rights proceeding reaches a disposition terminating rights, the trial court does not undertake further actions. *See* N.C. Gen. Stat. § 7B-1112 (2021) (“An order terminating the parental rights *completely and permanently terminates* all rights and obligations of the parent to the juvenile and of the juvenile to the parent arising from the parental relationship . . . .” (emphasis added)).

¶ 41

Turning to Mother’s arguments, they fit within three of the four possible stages between abuse, neglect, and dependency and termination of parental rights proceedings. She does not present any arguments as to the abuse, neglect and dependency adjudication order, to which she consented. Within the abuse, neglect and dependency disposition stage, Mother argues “[t]he trial court erred in eliminating reunification as a permanent plan.” Turning to the termination of parental rights adjudication stage, Mother makes three arguments: (1) Findings of Fact 82–83 and 85–88 are “not supported by the evidence” and the Findings present other issues; (2) “[t]he trial court erred in terminating Mother’s parental rights to each of her two children based on abuse or neglect”; and (3) “[t]he trial court erred in terminating Mother’s parental rights on the ground she willfully failed to make reasonable progress.” Finally, on the termination of parental rights disposition stage, Mother contends “[t]he trial court erred as a matter of law by excluding relevant evidence mandated for consideration” as to “best interest.” We review each of Mother’s arguments in turn.

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**III. Elimination of Reunification as a Permanent Plan**

¶ 42 [1] Mother first argues the trial court “erred in eliminating reunification as a permanent plan for Mother.” Specifically, she asserts the order eliminating reunification, which we are calling the October 2020 Order, “was not based on sufficient evidence and was not supported by the evidence or findings sufficient to support the conclusion.” Then, she contends the court erred for the reasons stated in *In re J.M., N.M.*, 276 N.C. App. 291, 2021-NCCOA-92.

**A. Preservation of Issue for Appeal**

¶ 43 Before reaching the merits, we address whether this issue is properly before us. Both GAL and DSS argue Mother failed to preserve her appeal of the October 2020 Order eliminating reunification as a permanent plan. In recognition of her failure to “timely and properly appeal” the October 2020 Order, Mother has filed a petition for writ of certiorari (“PWC”) as to the Order and, in the alternative, asks us to use our power under Rule of Appellate Procedure 2 to suspend the Rules of Appellate Procedure as to proper filing of an appeal.

¶ 44 In our discretion, we grant Mother’s PWC to allow us to “review the order eliminating reunification together with an appeal of the order terminating parental rights.” *See In re C.H.*, 2022-NCSC-84, ¶ 18 (quoting N.C. Gen. Stat. § 7B-1001(a2)) (granting PWC as to orders ceasing reunification and recognizing statute directing this Court to hear such appeals, when properly filed, with order terminating parental rights). Granting a PWC in this situation is appropriate since there is a statutory mandate to vacate an order terminating parental rights “[i]f the order eliminating reunification is vacated or reversed.” N.C. Gen. Stat. § 7B-1001(a2) (eff. 1 Oct. 2021). Further, Mother filed a “Notice to Preserve Right of Appeal” of the October 2020 Order; it was merely untimely. (Capitalization altered.) For these reasons and in the exercise of our discretion, we grant Mother’s PWC. Because we grant the PWC, we decline to invoke Rule 2.

**B. Standard of Review**

¶ 45 “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.*, 273 N.C. App. 427, 429, 848 S.E.2d 749, 751 (2020) (quoting *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007)); *see also In re J.H.*, 373 N.C. 264, 267–268, 837 S.E.2d 847, 850 (2020) (listing same standard

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of review in part relying on *In re C.M.*, 183 N.C. App. at 213, 644 S.E.2d at 594). “At the disposition stage, the trial court solely considers the best interests of the child.” *In re J.H.*, 373 N.C. at 268, 837 S.E.2d at 850 (quotations and citations omitted). “The trial court’s findings of fact are conclusive on appeal if supported by any competent evidence.” *Id.*, 373 N.C. at 267, 837 S.E.2d at 850 (quotations and citations omitted). “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.” *Id.*, 373 N.C. at 268, 837 S.E.2d at 850 (quotations and citations omitted).

**C. Analysis**

¶ 46 Mother asserts the October 2020 Order “was not based on sufficient evidence and was not supported by the evidence or findings sufficient to support the conclusion” and the trial court erred for the reasons stated in *In re J.M.* Specifically as to *In re J.M.*, Mother argues the October 2020 Order included “numerous findings which confirmed Mother’s continuing suitability as a parent entitled to reunification” including her completion of her case plan, “glowing reports” from the “parental capacity expert and the parenting instructor,” employment, a new residence, ending her relationship with Father, and “believe[ing] Father’s confession that he injured Ken.” Mother contends her “only failure was being unable to explain Ken’s 2017 injuries to the personal satisfaction of the Judge, which is an insufficient basis to eliminate reunification” under *In re J.M.*

¶ 47 As to the first argument, Mother fails to identify any specific Findings of Fact not supported by the evidence, so she has failed to preserve any challenges to the Findings. *See Dalenko v. Collier*, 191 N.C. App. 713, 719, 664 S.E.2d 425, 429 (2008) (concluding party failed to preserve challenge to findings of fact because she “failed to assign error to specific findings of fact by the trial court, and instead resort[ed] to a broadside attack on the order ‘that its finding are not support by pleadings, submissions, evidence of record and arguments of the parties . . .’” (ellipses in original)); *In re Y.I.*, 262 N.C. App. 575, 579, 822 S.E.2d 501, 504 (2018) (determining mother abandoned her challenge to three specifically named findings of fact because she “wholly fail[ed] to support her contention with explanation or citation to the record”).

¶ 48 As a result, we only consider Mother’s argument the trial court erred based on *In re J.M.* For that argument, we must decide whether the trial court abused its discretion in ceasing reunification efforts based on the best interest of the children. *See In re J.H.*, 373 N.C. at 267–68, 837 S.E.2d at 850 (explaining our courts review orders ceasing reunification

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for abuse of discretion and that, as with any order at the disposition stage, the trial court only considers the child's best interests).

¶ 49 “At a permanency planning hearing, ‘reunification shall be a primary or secondary plan unless,’ *inter alia*, ‘the court makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile’s health or safety.’ ” *Id.*, 373 N.C. at 268, 837 S.E.2d at 850 (alterations from original omitted) (quoting N.C. Gen. Stat. § 7B-906.2(b) (2019)). The court also “must make findings ‘which shall demonstrate the degree of success or failure toward reunification’ including:

‘(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.*, 373 N.C. at 268, 837 S.E.2d at 850–51 (quoting N.C. Gen. Stat. § 7B-906.2(d)).

¶ 50 Mother does not argue the trial court failed to make these required Findings, nor could she. As to Mother’s case plan and her progress thereon (requirements (1) and (2) above), the trial court recounted the four elements of the case plan including:

a) submit to a comprehensive Parenting Capacity Assessment, follow the recommendations of the assessment;

b) complete a parenting class and demonstrate that the children will be physically safe in her care;

c) demonstrate during visitation what is learned in parenting classes;

d) submit to random drug screens

The trial court then made findings that Mother completed parenting programs in 2018 and 2019 and submitted to a random drug screen in 2018. In a later Finding, the trial court noted the program’s “safety information was limited to childproofing the home and discussion of child health

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as in what to do if the child is sick or injured.” As to visitation, the trial court noted both parents were subject to a no-contact order with Ken and visitation as to Mark was suspended in September 2019. The trial court specifically found the suspension of visitation “was providently entered and continues to be in the best interest of the children” based on a recommendation from Mark’s therapist, since adoption was the primary plan. Further, the trial court noted the parenting coach “ha[d] not observed the parents interacting with their children” since the parenting class. Finally, the trial court found Mother “completed a Parenting Capacity Evaluation,” and we will address the court’s additional, more specific Findings on the parenting capacity evaluation below when we address Mother’s main argument.

¶ 51 As to Mother’s availability to the court, DSS, and GAL (requirement (3)), the trial court recounted in numerous Findings Mother’s contact with it, DSS, and the GAL. For example, the trial court noted how Mother had attended a previous hearing in April 2020, “maintained sporadic communication with” DSS, and “text[ed] the Social Worker monthly to get updates on the children and to see photos.”

¶ 52 As to the final § 7B-906.2(d) factor, the trial court made multiple Findings regarding Mother acting “in a manner inconsistent with the health or safety of the juvenile.” N.C. Gen. Stat. § 7B-906.2(d)(4). For example, the trial court found:

63. Reunification efforts with the [M]other and [F]ather would clearly be unsuccessful and inconsistent with the minor children’s health or safety, because: there is still no explanation as to how [Ken] was injured and how he came to be in the state of health as presented on December 3, 2017 despite the various accounts and the case pending for more than two (2) years. The [F]ather’s account of one sole incident is inconsistent with the injuries which were of different ages according to the medical evidence previously adduced by this court. Further reunification efforts with [M]other or [F]ather would be unsuccessful and inconsistent with the health and safety of both children based on the parents’ inability to provide a safe, stable and secure home free of domestic violence and substance use. The Court finds that the safety risk to [Mark], as a child in the home of the abused sibling, continues to be great based on the lack of forthright explanation by the parents, as

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well as the minimized domestic violence and substance abuse issues.

The trial court's previous Findings made clear it was referring to Father when discussing the substance abuse issues and perpetration of the domestic violence, at least as against Mother.

¶ 53 Mother argues the trial court erred in eliminating reunification because she “completed her case plan,” received “glowing reports” from her parental capacity expert and parenting instructor, and only failed “to explain Ken’s 2017 injuries to the personal satisfaction of the Judge, which is an insufficient basis to eliminate reunification” under *In re J.M.* We conclude the trial court did not abuse its discretion in ceasing reunification efforts because it made a “reasoned decision” that Mother had not completed her case plan and it properly considered Mother’s lack of explanation as to Ken’s 2017 injuries. See *In re J.H.*, 373 N.C. at 268, 837 S.E.2d at 850 (explaining an abuse of discretion only occurs when trial court’s ruling “could not have been the result of a reasoned decision”).

¶ 54 First, Mother’s summary of her case plan progress does not align with the trial court’s unchallenged Findings of Fact. Specifically, while Mother emphasizes the parental capacity expert’s evaluation and the parenting instructor’s feedback, the trial court made numerous Findings explaining why it gave reduced weight to this evidence.

¶ 55 As to the parental capacity evaluation, the trial court explained:

58. Both parents underwent a Parenting Capacity Evaluation by April Harris Britt and Dr. Harris Britt testified in this matter as to her findings on February 10, 2020.

59. The court thoroughly reviewed the Parenting Capacity Evaluations. *There were three referral questions as follows: First, “[parents] [have] some parenting capacity; however, it is concerning that [they] [are] not willing to disclose what happened to [Ken]. Can [they] parent effectively and meet his [sic] child’s needs?”* Second, “Is [parent] willing and able to keep [his/her] children safe from harm” and third, “Is [parent] able to provide and care for [his/her] children without relying on significant others for support”.

60. The complete medical records from [the hospital] were provided for [Mark] and [Ken] by DSS to Dr. Harris-Britt but her report states that they “could

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not be reviewed as the disc was password protected”. On the other hand, Dr. Harris Britt did review medical records of Dr. Michael Holick and Dr. Daniel Ostrovsky as to causation of [Ken]’s injuries. In fact, she did review Petitioner’s Exhibit #6 which is the letter that summarizes the care and condition of [Ken]. This letter is clear that [Ken] was in poor health when he was presented to Duke Hospital. He was malnourished, had bleeding on the brain and had numerous fractures of different ages, both old and newer. Dr. April Harris-Britt reviewed the court orders in this case. *The Court has a continued concern about what happened to [Ken] because the Court does not have any explanations from either parent at the time of the completion of the PCE. Although Dr. Harris-Britt did not have the entire medical record for [Ken], she formed an opinion that [Mother] can provide safety to her children. Dr. Harris-Britt looked at the previous court orders and the Court has been consistent in articulating its concern of what caused [Ken]’s injuries. This Court is perplexed in how Dr. Harris-Britt didn’t believe it was important as to what happened to [Ken] to be factored in her formulating her opinion that [M]other could parent [Ken] and [Mark] safely. She didn’t think she needed to review the Duke medical records in order to assess the parenting capacity of the parents.*

61. As for reviewing and considering the orders of this court, Dr. Harris Britt considered the initial Disposition order #11, 12 (Finding of Fact) 13 and 14 most of which were not the salient causation findings regarding the abuse and lack of explanation for the abuse. *This court has been consistently concerned with how [Ken] was injured and the court orders reflect this concern. The first question in the PCE reflects this concern as well.* Dr. Harris Britt concluded that [M]other and [F]ather would be safe parents. This court is perplexed as to how the Duke medical records were not relevant to that assessment.

(Emphasis added; all other alterations in original except changes to names of children, removal of names to protect the children’s identity, and “[sic].”)

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¶ 56 Throughout its Findings on the parental capacity evaluation, the trial court repeatedly emphasized the importance of receiving an explanation for Ken’s injuries. The Findings indicate the trial court did not fully credit the evaluation because the evaluation failed to address that important question and did not include a review of records of Ken’s injuries. These concerns about the parental capacity evaluations then link directly to the court’s ultimate Findings reunification efforts would be unsuccessful and inconsistent with the children’s health, safety, and welfare. For example, the trial court emphasized “there is still no explanation as to how [Ken] was injured and how he came to be in the state of health” in December 2017. Thus, the trial court determined the parenting capacity evaluation Mother received did not address one of the questions the trial court noted as a reason for the referral and therefore did not credit the evaluation.

¶ 57 In addition to its concerns about the parenting capacity evaluation, the trial court questioned whether the parenting class adequately addressed the reasons the children were removed from the home as required by the case plan. Specifically, the trial court found the parenting class’s “safety information was *limited* to childproofing the home and discussion of child health as in what to do if the child is sick or injured.” (Emphasis added.)

¶ 58 The trial court’s questioning of the parental capacity evaluation and parenting class is important because it undermines Mother’s argument she completed her case plan and thus the only reason for the cessation of reunification efforts was her failure to explain the injuries. A trial court can consider failure to make adequate progress on a case plan when determining whether to cease reunification efforts. *See* N.C. Gen. Stat. § 7B-906.2(d)(1) (requiring a trial court to make Findings on whether the parent is making “adequate progress within a reasonable period of time under the plan” at permanency planning hearings); *see also In re J.R.*, 279 N.C. App. 352, 2021-NCCOA-491, ¶¶ 33, 37 (finding credible evidence the mother was “not making adequate progress within a reasonable time under case plan” and then determining that finding and others “support the trial court’s cessation of reunification efforts”). As long as the trial court’s view of the evidence is reasonable, it is binding on appeal even if that view is contrary to a party’s characterization of the evidence on appeal. *See In re L.R.L.B.*, 377 N.C. 311, 2021-NCSC-49, ¶ 26 (finding binding on appeal a trial court’s “contrary evaluation” of whether a mother made adequate progress by engaging with certain services because the trial court’s view was reasonable based on the evidence). Thus, the trial court’s questions about the evaluation and parenting class

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help demonstrate it made a reasoned decision, and thus did not abuse its discretion, in ceasing reunification efforts.

¶ 59 Turning to the trial court’s emphasis on the lack of explanation for Ken’s injuries directly, the trial court did not abuse its discretion in ceasing reunification efforts on those grounds. As an initial matter, we note Mother relies on *In re JM*, 276 N.C. App. 291, 2021-NCCOA-92, and our Supreme Court granted discretionary review of that decision after the parties (and Amici) completed briefing in this appeal. GAL, with support of DSS, filed a motion to “continue oral argument and hold [the] case in abeyance” as a result of the Supreme Court’s action, but we denied that motion. (Capitalization altered.) Further, we note Mother’s response in objection to GAL’s motion argued “the logic and reason and precedent supporting the principles involved in the issues before this Court remain valid and appropriate for arguments” even though *In re J.M.* itself is “stayed by supersedeas pending the Supreme Court’s decision.”

¶ 60 The trial court made numerous unchallenged Findings of Fact regarding the failure of the parents, and specifically Mother, to explain Ken’s injuries “and condition at the time he was presented for treatment,” which was key to its ultimate Finding required to cease reunification efforts. Specifically, even after receiving Father’s emailed statement from 13 May 2020 that he dropped Ken and Ken “immediately started seizing,” the trial court remained “baffled” because “[c]onsidering [Ken]’s numerous injuries . . . the [F]ather’s statement does not explain [Ken]’s other conditions (his low temperature, low blood sugar, hypoglycemia and other conditions).” The trial court made that Finding based in part on the unchanged opinions of the doctors who originally evaluated Ken for child abuse: “The Social Worker apprised Dr. Lyndsay Terrell and Dr. Karen St. Claire at [the hospital] about the [F]ather’s statement. The original opinions and diagnosis still stand as this new information does not explain all of [Ken]’s symptoms and injuries.”

¶ 61 The trial court also explained how none of the parents’ previous explanations fully explained Ken’s injuries either:

The Court has been given different versions of events from the parents throughout the case to explain [Ken]’s injuries and condition when he was presented to [the hospital] on December 3, 2017 at the time of the filing of the petition. At first, the parents said it was the fault of [hospital] providers, as a malpractice allegation. Then, they alleged it was the stepfather who caused the injuries. Now there is

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the [F]ather's statement as to a one-time fall occurring while the [F]ather was under the influence. None of these accounts explain [Ken]'s poor state of health at the time he was presented on December 3, 2017, to include being malnourished and having skull fractures, retinal hemorrhages and other fractures of differing ages. It is notable that [Ken] was examined at [the hospital] prior to that date, on November 9, 2017, and was found to be at a healthy baseline without injury, retinal hemorrhages, malnutrition or fractures as demonstrated by the medical records in evidence."

Thus, the trial court had ample support for its ultimate Finding about the continued lack of explanation of Ken's injuries.

¶ 62

The trial court also made certain Findings specific to Mother and her lack of explanation. While the trial court found Mother "believes that the [F]ather injured" Ken, the trial court also noted certain inconsistencies with Mother's view of the events. For example, while Father's email explained Mother was not home when Father dropped Ken on the floor and Ken immediately started seizing, the trial court noted:

The [M]other also claims that the [F]ather was rarely left in the home with the children and they were there together with the children. The [M]other continues to report that she noticed that when she was changing [Ken]'s diaper and his upper body was twitching, and he was looking in one spot and that is when she decided to take him to the hospital. This is at the point where she noticed something was not right with [Ken].

The trial court also repeatedly highlighted instances when Mother could have sought to gain more information but did not. For example, the trial court found:

The [M]other gave testimony about her knowledge of the [F]ather's emails to the social worker. According [to] the [M]other, she was informed by her cousin about the [F]ather's emails. *The [M]other did not ask any further questions and the court observed no curiosity from the [M]other to find out what happened or more about the [F]ather's disclosure.* The [M]other contacted her attorney.

(Emphasis added.)

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¶ 63 These Findings explain why the trial court “remain[ed] gravely concerned that *neither parent* is providing the *full picture* on [Ken]’s injuries.” (Emphasis added.) They also clarify what the trial court believed Mother needed to do to satisfy its concerns, namely better understand the cause of *all* of Ken’s injuries, not just the ones potentially explained by Father’s email admission.

¶ 64 These Findings regarding the lack of explanation for the injuries are a valid ground on which to cease reunification efforts. In the similar context of termination of parental rights adjudications, which Mother’s favored case of *In re J.M.* relies upon, *see In re J.M.*, ¶¶ 29–30 (citing to *In re Y.Y.E.T.*, 205 N.C. App. 120, 695 S.E.2d 517 (2010), before contrasting the facts there to *Y.Y.E.T.*); *Y.Y.E.T.*, 205 N.C. App. at 127–28, 695 S.E.2d at 521–22 (discussing the trial court’s attempt to discover the cause of the child’s non-accidental injuries under a heading on terminating parental rights), our Courts have found a continued failure to explain children’s injuries adequate grounds to find a likelihood of future neglect of the child by a parent.<sup>5</sup> *E.g.*, *In re D.W.P.* 373 N.C. 327, 339–40, 838 S.E.2d 396, 405–06 (2020) (discussing Mother’s lack of explanation for her child David’s injuries before concluding “Respondent-mother acknowledges her responsibility to keep David safe, but she refuses to make a realistic attempt to understand how he was injured or to acknowledge how her relationships affect her children’s wellbeing. These facts support the trial court’s conclusion that the neglect is likely to reoccur if the children are returned to respondent-mother’s care.”).

¶ 65 For example, in *In re Y.Y.E.T.*, this Court found the parents “refusal to accept responsibility for the child’s injury indicate[d] that the conditions which led to the child’s initial removal from [their] home ha[d] not been corrected.” 205 N.C. App. at 129, 695 S.E.2d at 523. In that case, the trial court had been unable to “conclusively determine who was the perpetrator of the injury” but knew the child’s injury “was not accidental” and was indicative of child abuse such that “[a]s the child’s sole care providers, it necessarily follow[ed] that [the parents] were jointly and individually responsible for the child’s injury. Whether each [parent] directly caused the injury by inflicting the abuse or indirectly caused the injury by failing to prevent it, each [parent] is responsible.” *Id.*, 205 N.C. App. at 128–29, 695 S.E.2d at 523–24. Based on those facts and a finding the parents were protecting each other, this Court held the trial court

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5. We also do not have precedent on cessation of reunification efforts in the context of unexplained injuries that must have been caused by at least one of the two parents given *In re J.M.* is subject to a stay.

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“properly determined that the repetition of abuse or neglect [was] probable.” *Id.*, 205 N.C. App. at 129, 695 S.E.2d at 523.

¶ 66 Here, similar to *In re Y.Y.E.T.*, the trial court found Ken’s injuries were non-accidental and indicative of child abuse. The trial court had already previously found in the stipulated-to adjudication order that Mother and Father “were the sole care providers of the children during the time of the injuries to” Ken. Further, even accepting Father’s explanation that he dropped Ken one time, the trial court found numerous other aspects of Ken’s condition when he was taken to the hospital remained unexplained. Thus, the trial court could not “conclusively determine” who caused all of Ken’s conditions but could still permissibly determine both parents were responsible for Ken’s condition either directly or indirectly. *In re Y.Y.E.T.*, 205 N.C. App. at 128–29, 695 S.E.2d at 522–23. While the trial court here did not specifically find Mother was protecting Father, it had concerns about the plausibility of Mother’s explanations of events and her lack of interest in trying to learn more information about what happened to Ken. Therefore, we conclude the trial court properly determined reunification efforts would be inconsistent with the children’s health or safety based on Mother’s failure to fully explain Ken’s injuries and condition when admitted to the hospital.

¶ 67 Mother’s progress on her case plan does not change our determination. Parental compliance with a case plan alone is not always sufficient to preserve parental rights. See *In re L.G.G.*, 379 N.C. 258, 2021-NCSC-139, ¶ 34 (explaining parental compliance with a case plan “does not preclude a finding of neglect” (citations and quotations omitted)). In the similar best interest context for termination of parental rights, this Court explained, “[P]arents must demonstrate acknowledgment and understanding of why the juvenile entered DSS custody as well as changed behaviors.” *In re Y.Y.E.T.*, 205 N.C. App. at 131, 695 S.E.2d at 524. For example, in *In re L.G.G.*, the parents “completed substantially all of their case plan but, despite their participation, they have shown that they have not gleaned sufficient insight into why their . . . children came into DSS custody.” *In re L.G.G.*, ¶ 34. Here, we have addressed how the trial court did not believe the parenting capacity evaluation or the parenting class Mother took part in adequately addressed the reasons for her children being in DSS custody because they failed to explain or teach Mother to prevent the injuries and conditions Ken had when presented at the hospital. Thus, even with Mother’s progress on her case plan, the trial court’s reasons for its decision still withstand our scrutiny.

¶ 68 Mother first argues *In re J.M.* supports her positions, but even assuming *arguendo* the case was not subject to a pending appeal to our

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Supreme Court, we are not persuaded. First, *In re J.M.* is distinguishable from this case for several reasons. The facts regarding the specific injuries to the child in *In re J.M.* are similar in that the child, Nellie, was about four months old when her parents took her to the hospital after she “became completely silent and limp.” *In re J.M.*, ¶ 2. At the hospital, a “CAT scan showed an acute subdural hematoma” and additional testing revealed “severe multilayer retinal hemorrhages to both eyes and rib fractures that appeared to be several days old.” *Id.*, ¶¶ 2–3. Nellie’s doctor determined her injuries “were highly specific for child abuse.” *Id.*, ¶ 3.

¶ 69

But aside from the types of tragic injuries involved, *In re J.M.* then proceeds quite differently from this case both procedurally and factually. For example, neither parent was charged with any criminal offense arising from Nellie’s injuries, nor did either parent plead guilty to any crime. As relevant to the evidence regarding how the injuries may have occurred and the trial court’s evaluation of that evidence, this Court noted in *In re J.M.* that DSS had not conducted a proper investigation of the injuries, leaving open a question as to whether either parent actually caused the injuries. *Id.*, ¶ 51. Specifically, two older step-siblings, ages 10 and 14, lived in the home with Nellie and her parents, but

DSS did not interview Respondent-Mother’s older two children in the home during their investigation of Nellie’s injuries.

DSS offers no reason why it failed to interview Respondent-Mother’s older children. The trial court found, in the adjudication order, Jon and Nellie were under Respondents’ exclusive custody and care based on the statements made by the Respondents to social workers and police regarding their care of Nellie. It is unreasonable to presume, however, that parents have eyes on their children at all times. Parents and children must sleep at some point, and presumably, parents must tend to other children or to household needs, allowing for children to be left without eyes-on supervision for some periods of time, no matter how short.

Pursuant to N.C. Gen. Stat. § 7B-300, DSS is required “to establish protective services for juveniles alleged to be abused, neglected, or dependent. [The p]rotective services shall include the screening of reports, the performance of an assessment using either a family assessment response or an investigative

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assessment response . . . .” N.C. Gen. Stat. § 7B-300 (2019). This Court in its discretion takes judicial notice that the policies and protocols that guide and govern family assessments and investigative assessments, “CPS Family and Investigative Assessments, Policy, Protocol, and Guidance,” (“DSS’s Assessment Manual”), are found in North Carolina’s Child Welfare Manual published by the North Carolina Department of Health and Human Services. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2019).

The “purpose of the [Child Protective Services] Assessment is to . . . determine if . . . [t]he child is safe within the home and, if not, what interventions can be implemented that will ensure the child’s protection and maintain the family unit intact if reasonably possible.” N.C. Dep’t of Health & Hum. Servs., *CPS Family and Investigative Assessments Policy, Protocol, and Guidance*, 1 (July 2019), <https://policies.ncdhhs.gov/divisional/social-services/child-welfare/policy-manuals/modified-manual-1/assessments.pdf>.

DSS can approach an instance of alleged neglect, abuse, and dependency through a “Family Assessment,” or “Investigative Assessment. [Footnote]” Both methods require face-to-face interviews with *all children residing in the home*. N.C. Dep’t of Health & Hum. Servs., *CPS Family and Investigative Assessments Policy, Protocol, and Guidance*, 64, 69 (July 2019), <https://policies.ncdhhs.gov/divisional/social-services/child-welfare/policy-manuals/modified-manual-1/assessments.pdf>. (emphasis added).

*Id.*, ¶¶ 46–51 (alterations in original except for footnote removal).

¶ 70

Aside from these factual differences, *In re J.M.* turned on two key facts: (1) the mother there “engaged in all services required of her in order to correct the conditions that led to the removal of the children and that she had objectively learned from and benefitted from the services”; and (2) the mother acknowledged the child’s injuries were “nonaccidental” but could not explain the cause of the injuries because she was not present for them. *Id.*, ¶¶ 30–31. As to the first fact, the trial court here found, in a series of unchallenged Findings of Fact, Mother’s parental capacity evaluation and parenting class did not correct the conditions of removal because they failed to fully address the still unexplained nature

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of *all* of Ken's injuries. As to the second fact, while Mother acknowledged Father's email and believed it, the trial court still had concerns about the plausibility of Mother's explanations of events and her lack of interest in trying to learn more information about what happened to Ken. Given these factual differences from the situation in *In re JM*, the trial court made a reasoned decision in ceasing reunification efforts and thus did not abuse its discretion even when considering that case.

¶ 71 Mother also argues, in her reply brief, the cases on which we rely are distinguishable, albeit in the context of her argument about termination of parental rights adjudication on abuse or neglect grounds. We reject each of her attempts to distinguish the cases. First, Mother argues *In re L.G.G.* is distinguishable because there neither parent would acknowledge the source of the children's "significant sexualized behaviors." Here, the trial court found Mother failed to acknowledge the "full picture" of the extensive injuries and ailments Ken presented when admitted to the hospital could not be explained by Father's admission he dropped Ken once. While the factual scenarios were different, the lack of acknowledgement of all the reasons for DSS involvements were similar. Second, Mother argues *In re Y.Y.E.T.* is distinguishable because here there was "a valid and positive" parental capacity evaluation. As we have laid out above, the trial court made unchallenged Findings of Fact recounting its misgivings about the evaluation here, particularly that the evaluation failed to fully address the still-unexplained nature of *all* of Ken's injuries.

¶ 72 After our review, we conclude the trial court did not abuse its discretion in ceasing reunification efforts. The trial court made the required Findings of Fact, and it made a reasoned decision in ceasing reunification efforts based on its Findings on Mother's case plan progress and the still unexplained nature of some of Ken's injuries and ailments.

#### IV. Termination of Mother's Parental Rights-Adjudication Issues

¶ 73 [2] Beyond her argument about ceasing reunification at the disposition stage of the abuse, neglect, and dependency proceeding, Mother also argues the trial court erred "in terminating [her] parental rights [as] to each of her two children." As to the adjudication stage of the termination of parental rights proceeding, Mother makes three arguments: (1) Findings of Fact 82–83 and 85–88 are "not supported by the evidence" and present other issues; (2) "[t]he trial court erred in terminating Mother's parental rights to each of her two children based on abuse or neglect"; and (3) "[t]he trial court erred in terminating Mother's parental rights on the ground she willfully failed to make reasonable progress." After

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addressing the standard of review at the termination of parental rights adjudication stage, we address each argument in turn.

**A. Standard of Review**

¶ 74 Our Supreme Court has recently described the standard of review for the adjudication stage of termination of parental rights proceedings as follows:

“We review a district court’s adjudication under N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law.” *In re J.S.*, 374 N.C. 811, 814[, 845 S.E.2d 66] (2020) (cleaned up) (quoting *In re N.P.*, 374 N.C. 61, 62–63[, 839 S.E.2d 801] (2020)). “Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal.” *In re B.R.L.*, 379 N.C. 15, 2021-NCSC-119, ¶ 11, (quoting *In re T.N.H.*, 372 N.C. 403, 407[, 831 S.E.2d 54] (2019)). “A trial court’s finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding.” *In re A.L.*, 378 N.C. 396, 2021-NCSC-92, ¶ 16 (quoting *In re B.O.A.*, 372 N.C. 372, 379[, 831 S.E.2d 305] (2019)). “ ‘[T]he issue of whether a trial court’s adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)’ is reviewed de novo by the appellate court.” *In re M.R.F.*, 378 N.C. 638, 2021-NCSC-111, ¶ 7 (alteration in original) (quoting *In re T.M.L.*, 377 N.C. 369, 2021-NCSC-55, ¶ 15). “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 T.M.L.*, 377 N.C. 369, 2021-NCSC-55, ¶ 15 (cleaned up) (quoting *In re C.V.D.C.*, 374 N.C. 525, 530 (2020)).

*In re M.K.*, 2022-NCSC-71, ¶ 12.

**B. Challenged Findings of Fact**

¶ 75 Mother first argues Findings of Fact 82–83 and 85–88 are “not supported by the evidence” and present other issues. We review each finding in turn and determine whether they are supported by clear, cogent, and convincing evidence. *In re M.K.*, ¶ 12.

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¶ 76 Mother argues Finding of Fact 82 “is a conclusion of law and not supported by the evidence as to” her. Finding 82 recounts:

At the time of this termination hearing, the Petitioner demonstrated by and through the evidence presented that the conditions rising to the level of neglect existed during the pendency of the termination action. There is no change in the safety risk to the children. There continues to be no explanation for [Ken]’s injury and medical condition as it existed on December 3, 2017. This continues to present a significant safety risk for [Mark] and [Ken] should they be returned to the care of either parent. Returning these children to their parents is a risk that this court cannot afford to take. There is a likelihood of repetition of neglect and abuse if the juveniles were returned to the home of the Respondents based upon the findings of fact herein.

¶ 77 Mother attempts to argue both this is a Conclusion of Law and is not supported by the evidence, which is the standard of review we apply to Findings of Fact. *In re M.K.*, ¶ 12. But we “are obliged to apply the appropriate standard of review to a finding of fact or conclusion of law, regardless of the label which it is given by the trial court,” *In re J.S.*, 374 N.C. at 818, 845 S.E.2d at 73, so we must determine whether this is a Finding or Conclusion. While in the past this Court and our Supreme Court have “characterized . . . grounds for termination as both an ‘ultimate finding’ and a ‘conclusion’ of law,” we treat discussions of the grounds for termination as conclusions of law. *See In re D.A.A.R.*, 377 N.C. 258, 2021-NCSC-45, ¶ 38 (applying conclusion of law standard of review to a ground for termination). The evidence of neglect and the likelihood of repetition of neglect and abuse relate directly to the ground for termination in North Carolina General Statute § 7B-1111(a)(1). *See* N.C. Gen. Stat. § 7B-1111(a)(1) (2019) (permitting termination of parental rights on the ground the parent “has abused or neglected the juvenile”); *In re L.G.G.*, ¶ 20 (“Termination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent.” (quoting *In re R.L.D.*, 375 N.C. 838, 841, 851 S.E.2d 17 (2020)). Therefore, we treat Finding 82 as a Conclusion of Law. *See In re D.A.A.R.*, ¶ 38 (treating grounds for termination as conclusions of law for purposes of review). Since Mother already separately argues “[t]he trial court erred in terminating [her] parental rights to each of her

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two children based on abuse or neglect,” we will review Finding 82 below when we discuss that argument.

¶ 78 Although Mother does not include similar statements about the remaining Findings of Facts she challenges being Conclusions of Law, Findings 83, 85, and 86 are also Conclusions of Law. Finding 83 focuses on the “probability neglect will be repeated” and Findings 85 and 86 concern Mother and Father “willfully” leaving Ken and Mark in placement outside the home and “willfully fail[ing] or refus[ing]” to “complete court ordered services and services on the case plan” such that they did not make “reasonable progress under the circumstances to correct the conditions that led to the juveniles’ removal.” Finding 83 thus addresses the same legal question as Finding 82, which was in reality a Conclusion of Law on the ground for adjudication in § 7B-1111(a)(1). Similarly, Findings 85 and 86 use language that mirrors the ground for termination in § 7B-1111(a)(2): “The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile.” N.C. Gen. Stat. § 7B-1111(a)(2). Therefore, they are Conclusions of Law as well under *In re D.A.A.R.*, ¶ 38. As with Finding 82, we address these Findings below when discussing Mother’s challenges to the trial court’s adjudication on the grounds of abuse or neglect and of willful failure to make reasonable progress.

¶ 79 Finding of Fact 87 states:

The court has pleaded and begged for information as to what happened to [Ken]. It remains unexplained. The [M]other has participated in services that do not address the reason the children came into care. Presented with the risk of substantial death, with these two children, the parents were supposed to protect them, and they did not protect these children. At this time, the environment the children lived in on or about November 7, 2017 through December 3, 2017 still exists. After the children have been in the care of the agency for the last three (3) years, neither the [F]ather nor the [M]other have explained the injuries.

Mother’s only argument about the Finding is that it “reveal[s] the court’s improper shifting of the burden of proof to Mother. Mother could not explain what she did not know,” always appeared in court, and “answered every question about Ken’s injuries.” Mother thus only challenges the

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last sentence of the Finding about neither Father nor Mother explaining the injuries.

¶ 80 Mother does not point to any place where she explained the injuries, nor could she as she acknowledges, so the trial court had competent evidence to make this Finding. The trial court also made other Findings recounting how it did not have an explanation of all of Ken's injuries. For example, it incorporated its Findings of Fact from the October 2020 Order ceasing reunification efforts that we recounted above. The trial court also explicitly found Mother gave sworn testimony that she could not explain the injuries but believed Father caused them:

At the termination hearing, the Mother . . . gave sworn testimony and was asked specifically if she had any explanation for each of [Ken]'s conditions as he was presented to the hospital on December 3, 2017. Mother testified that she had no explanation for any of the injuries except that she believed the Father was the cause and she believed his explanation in his email on May 13, 2020.

¶ 81 But we appreciate Mother's argument is not that Finding 87 is unsupported by the evidence, as a traditional challenge to a finding of fact would be, but rather she challenges how the trial court used her lack of explanation of Ken's injuries. Essentially, she argues she was required to prove a negative, and "[t]he law generally does not require a party to prove a negative . . ." *Ochsner v. N.C. Department of Revenue*, 268 N.C. App. 391, 410, 835 S.E.2d 491, 504 (2019). And in cases involving this type of non-accidental injuries to a baby, there is often no direct evidence of what happened. The baby cannot tell what happened, and there was no witness to the events causing the injuries. Trial courts must often make these very difficult and momentous decisions based upon circumstantial evidence and evaluation of credibility and weight of the evidence available.

¶ 82 While Mother is correct DSS has the burden of proof in the adjudication proceeding, *see, e.g., In re A.E.*, ¶ 13 (noting petitioner bears burden of proof at adjudication stage of termination of parental rights proceeding); N.C. Gen. Stat. § 7B-1111(b) ("The burden in these proceedings is on the petitioner or movant to prove the facts justifying termination by clear and convincing evidence."), the trial court here did not shift that ultimate burden to Mother. Rather, the trial court addressed Mother's lack of explanation here because it was relevant to its consideration of two grounds for terminating parental rights DSS alleged, namely Mother's

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abuse or neglect of the children and her willful failure to make “reasonable progress . . . in correcting those conditions which led to the removal of the juvenile.” N.C. Gen. Stat. § 7B-1111(a)(1)–(2). As we discuss more below when we address the abuse or neglect termination ground, the lack of explanation relates to neglect or abuse because it speaks to the likelihood of future neglect or abuse. *See In re D.W.P.*, 373 N.C. at 339–40, 838 S.E.2d at 405–06 (explaining a failure to understand how child was injured helped support “the trial court’s conclusion that the neglect is likely to reoccur”). The lack of explanation also touches Mother’s reasonable progress, or lack thereof, because the trial court repeated its explanations, as recounted above, of how her parental capacity evaluation did not address its referral questions and added the evaluation “failed to fully, objectively and adequately address the conditions that led to the removal of the children from the home.” Thus, the trial court’s focus on Mother’s lack of explanation did not shift the burden to her but rather helped it evaluate whether DSS had met its burden as to the grounds for adjudication.

¶ 83 Mother’s final challenge to a Finding of Fact is to Finding 88, which states:

That on or about July 7, 2020 the court entered an order eliminating reunification as a permanent plan and ceasing further reunification efforts with the Respondent Parents. The court finds the following facts would continue to support a finding that further reunification efforts would clearly be unsuccessful or inconsistent with the juvenile’s health or safety:

- a. Mother . . . continues to have no explanation for [Ken]’s injuries which is a risk to their health and safety.
- b. The parents have not participated in any other services since the July 7, 2020 hearing which directly address the reasons the children were removed, their safety or her accountability for [Ken]’s condition as he was presented on December 3, 2017.
- c. There has been no substantial change in circumstances since the entry of the July 7, 2020 permanency planning order and the court re-adopts the findings of fact from that order and finds that

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they were providently entered with regard to the issue of elimination of reunification.

d. Respondent Father was convicted of a felony assault that resulted in a serious bodily injury of [Ken] and as a condition of his conviction, he is prevented from having contact with his children.

Within this long Finding, Mother specifically argues she “accepted and believed Father was responsible for Ken’s injuries.” She also contests the court’s determination of no substantial change in circumstances since entry of the 7 July 2020 permanency planning order. We address each contention in turn.

¶ 84 As to her first contention, Mother is correct she testified she believed Father’s explanation that he dropped Ken. The trial court found as much in unchallenged Finding 46. But the trial court also made other Findings indicating Mother’s belief of Father’s explanation was not sufficient. First, the trial court made an unchallenged Finding Father’s email “ha[d] no weight and there [was] no credibility to it.” Second, the trial court made unchallenged Findings that Father’s explanation could not explain the full extent of the injuries. In fact, Mother’s own medical expert even rejected the idea Father accidentally dropping Ken once could explain any condition beyond the skull fractures. The trial court’s Finding 88(a)—its last adjudicatory Finding—took into account all of these previous, unchallenged and therefore binding, Findings of Fact. Thus, when the trial court found Mother continues to have no explanation, it in essence found Mother had no *reasonable* or even *medically defensible* explanation for Ken’s injuries, and Mother could not credibly believe Father’s explanation since his email did not account for the full extent of the injuries. That sort of credibility determination is within the trial court’s purview, and we cannot disturb it on appeal. *See In re A.R.A.*, 373 N.C. 190, 196, 835 S.E.2d 417, 422 (2019) (explaining “it is well-established that a district court has the responsibility to pass upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom” (quotations, citations, and alterations omitted)).

¶ 85 Mother’s belief in Father’s emailed explanation also contradicts her own explanation of events. Specifically, Father’s email said he dropped Ken at a time when Mother was not home. But, as the trial court found in an unchallenged Finding of Fact, Mother repeatedly testified from the initial disposition hearing to the termination hearing that she was “in the home caring for” Ken and Mark “*continuously*” from when Ken initially

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came home from the hospital to when he was admitted in December 2017 with the serious injuries and conditions at issue here. (Emphasis added.) Mother could not have been both at home continuously as she testified and also not home when Father dropped Ken as Father's email she believed explained. This discrepancy again further reinforces the trial court's determination Mother's understanding of the harm that came to Ken was not *reasonable*.

¶ 86

Mother also argues “[t]he findings in the July 7 permanency planning order show changed circumstances in favor of Mother” and otherwise contests Finding 88's statement there has not been a substantial change in circumstances since that order such that the trial court “providently” ceased reunification efforts. To a large extent we have already rejected this argument above when we addressed why the trial court did not believe, in the October 2020 Order ceasing reunification, that circumstances changed in favor of Mother to the extent she now argues. To the extent it was unclear before, the trial court also made further unchallenged Findings on why it discounted the parental capacity evaluation and Mother's parenting classes. The trial court found:

37. As to the parenting capacity evaluation, there is no change of circumstances presented at the termination hearing and no new evidence presented as to any updated opinion of Dr. Harris Britt. Because Dr. April Harris-Britt did not take into consideration the Duke medical records (8,000 pages of medical records on disc – Petitioner's Ex. 3) or this court's prior adjudicatory findings pertaining to [Ken]'s injuries set forth in the June 25, 2018 Adjudication Order, *her original evaluation failed to fully, objectively and adequately address the conditions that led to the removal of the children from the home.*

. . . .

40. *At the time of the termination hearing, neither the Mother . . . or the Father . . . had engaged in any parenting class which fully and completely addressed the medical and safety reasons that the child [Ken] came into care, especially the facts that were of the most concern to this court to include [Ken]'s low blood sugar/hypoglycemia, low body temperature and cachectic (wasted away) appearance at the time of his admission in*

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*addition to [Ken]’s other brain injuries, fractures and retinal hemorrhages.* The court’s concern for the physical safety of [Ken], and [Mark] as a sibling in the home, was not alleviated by the testimony or the letter submitted by Ms. Lea Ray [the parenting class witness] because this was not covered in her courses and there was not any other evidence of any other services which addressed this concern.

(Emphasis added.) While Mother correctly states the court did not require any other services since July 2020, Mother also failed to address the trial court’s concerns about the services she had undertaken and their inadequacy.

¶ 87 Mother’s other two changed circumstances also do not convince us the trial court’s Finding of no *substantial* changed circumstances was unsupported by the evidence. First, Mother indicates she “pursued restoration of her visitation.” While true, she did that before the trial court entered its October 2020 Order ceasing reunification efforts, so no change happened between the October 2020 Order and the termination of parental rights, especially considering the October 2020 Order ordered visitation remain suspended. Second, while Mother correctly points out the criminal charges against her were dismissed, the trial court could still reasonably decide how much weight to give that and determine if it was a substantial change in circumstances within the leeway provided by the abuse of discretion standard of review for cessation of reunification efforts that Finding 88 addresses. *See In re J.H.*, 373 N.C. at 267–68, 837 S.E.2d at 850 (explaining a dispositional order of an abuse, neglect, and dependency proceeding is reviewed for abuse of discretion and an abuse of discretion only occurs when the trial court has failed to make a reasoned decision). As such, we reject Mother’s challenges to Finding 88.

¶ 88 We have now addressed all of Mother’s challenges to Findings of Fact. We determine Findings 82–83 and 85–86 were in reality Conclusions of Law on the grounds for termination of parental rights, so we discuss those challenges below with our review of those grounds. We also find clear, cogent, and convincing evidence supports Findings 87 and 88, so we reject Mother’s challenges to those Findings.

### C. Termination on Abuse or Neglect Ground

¶ 89 Turning to the legal grounds for termination, Mother argues “[t]he trial court erred in terminating [her] parental rights to each of her two children based on abuse or neglect.” Specifically, Mother contends

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“[t]he evidence and findings were insufficient to show a reasonable likelihood Mother would neglect or abuse Ken if he was returned to her custody” because she “fully complied with and completed her case plan” and because the trial court failed to “address any clear and convincing evidence of changed circumstances of a substantial risk of abuse or neglect by Mother at the time of the termination hearing.” As to Mark, Mother specifically asserts the neglect adjudication “is based on the circumstances relating to Ken’s abuse or neglect in 2017” and “[t]here are no supported findings establishing the presence of other factors with a nexus to Mark or to the likelihood he would be neglected by Mother if his custody was returned to her.” We provide a general overview of the relevant law and then address the adjudication of each child.

¶ 90 Relevant to these arguments by Mother, the trial court determined grounds exist to terminate Mother’s parental rights under North Carolina General Statute § 7B-1111(a)(1). Under § 7B-1111(a)(1):

The court may terminate the parental rights upon a finding of one or more of the following:

(1) The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101.

N.C. Gen. Stat. § 7B-1111(a)(1). The trial court specifically determined both parents “have abused [Ken] and neglected both the juveniles.”

¶ 91 Under North Carolina General Statute § 7B-101, the definitions of abused juvenile and neglected juvenile in effect at the time the trial court terminated parental rights were, in relevant part:

(1) Abused juveniles.—Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker:

a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;

b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;

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(15) Neglected juvenile.—Any juvenile less than 18 years of age . . . (ii) whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or . . . who lives in an environment injurious to the juvenile’s welfare . . . . In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(1), (15) (eff. 1 Dec. 2019 to 30 Sept. 2021).<sup>6</sup>

¶ 92

As our Supreme Court has recently explained,

Generally, “[t]ermination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing.” *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). However, “if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent.” *Id.* at 843, 788 S.E.2d at 167.

*In re J.J.H.*, 376 N.C. 161, 167, 851 S.E.2d 336, 341–42 (2020) (block quoting *In re J.O.D.*, 374 N.C. 797, 801–02, 844 S.E.2d 570, 575 (2020)). The trial court is required “to evaluate the likelihood of future neglect on the basis of an analysis of any ‘evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.’” *In re N.B.*, 377 N.C. 349, 2021-NCSC-53, ¶ 12 (quoting *In re Z.V.A.*,

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6. The definition of neglect changed shortly after the trial court entered its order terminating parental rights. See *In re M.K.*, ¶ 32 n.4 (summarizing changes). The trial court here found Mother and Father neglected Mark and Ken “by creating an environment which was injurious to the juveniles’ welfare and by failing to provide proper care and supervision of the juveniles” which tracks with the new statutory language:

“(15) Neglected juvenile.—Any juvenile less than 18 years of age . . . (ii) whose parent, guardian, custodian, or caretaker does any of the following: a. Does not provide proper care, supervision, or discipline. . . . e. Creates or allows to be created a living environment that is injurious to the juvenile’s welfare.” N.C. Gen. Stat. § 7B-101(15) (eff. 1 Dec. 2021); see also N.C. Gen. Stat. § 7B-101(15) (eff. 1 Oct. 2021 to 30 Nov. 2021) (including same relevant language with different subsection numbering).

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373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019)). “Thus, when a child has been separated from their parent for a long period of time, the petitioner must prove (1) prior neglect of the child by the parent and (2) a likelihood of future neglect of the child by the parent,” *In re D.W.P.*, 373 N.C. at 339, 838 S.E.2d at 405, based on an analysis of any evidence of changed circumstances between the time of neglect and the termination hearing.

¶ 93 Here, Mother’s arguments only focus on the likelihood of future neglect as to both Ken and Mark. We also note the trial court made an unchallenged Finding of Fact that Mother had previously consented to all the facts that led to an adjudication in an abuse, neglect, and dependency proceeding of Ken as abused and both Ken and Mark as neglected. See *In re J.J.H.*, 376 N.C. at 167, 851 S.E.2d at 341–42 (noting trial court finding children had previously been adjudicated neglected immediately after setting out the two required steps when children have been separated from their parents for a time before the termination proceeding). Thus, we examine only the likelihood of future neglect.

¶ 94 The trial court’s Conclusion of Law for § 7B-1111(a)(1) states:

That grounds exist to terminate the parental rights of the Respondents [Mother] and [Father] as to the juveniles [Mark] and [Ken] pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) in that both the Respondents have abused [Ken] and neglected both the juveniles by creating an environment which was injurious to the juveniles’ welfare and by failing to provide proper care and supervision of the juveniles. There is a reasonable probability that such abuse and neglect would be continued and would be repeated if the juveniles were to be returned to the care, custody, or control of the Respondents [Mother] and [Father], jointly and severally.

¶ 95 As explained above, some of the trial court’s ultimate Findings of Fact, which we treat as Conclusions of Law, explain its reasoning for this Conclusion in more detail. See *In re K.L.T.*, 374 N.C. 826, 845, 845 S.E.2d 28, 42 (2020) (treating ultimate findings made in support of conclusion of law under § 7B-1111(a)(1) as conclusions of law that need to be supported by findings of fact). Specifically, Findings 82 and 83 explain why the trial court determined “[t]here is a reasonable probability that such abuse and neglect would be continued and would be repeated if the juveniles were to be returned to the care, custody, or control” of Mother and Father. Findings 82 and 83 provide:

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82. At the time of this termination hearing, the Petitioner demonstrated by and through the evidence presented that the conditions rising to the level of neglect existed during the pendency of the termination action. There is no change in the safety risk to the children. There continues to be no explanation for [Ken]'s injury and medical condition as it existed on December 3, 2017. This continues to present a significant safety risk for [Mark] and [Ken] should they be returned to the care of either parent. Returning these children to their parents is a risk that this court cannot afford to take. There is a likelihood of repetition of neglect and abuse if the juveniles were returned to the home of the Respondents based upon the findings of fact herein.

83. Respondent Mother[']s . . . and Respondent Father [']s . . . failure to adequately and timely address the issues that led to the removal of the juveniles from the home constitutes neglect. That failure to adequately and timely address the neglectful behaviors, renders the Respondents incapable of providing adequate care and supervision of the juveniles. The probability that the neglect will be repeated and said incapability will continue in the future is high given the failure of the Respondents to address and alleviate the issues.

¶ 96 The trial court's unchallenged, and therefore binding, Findings of Fact support the challenged ultimate Findings 82 and 83. As to Finding 82, the trial court repeatedly emphasized the lack of complete explanation for Ken's injuries and condition when he was admitted to the hospital as well as the trial court's concern about such lack of explanation. First, the trial court specifically incorporated Findings of Fact 33–39 and 53–57 from its October 2020 Order ceasing reunification efforts, and those Findings, as we have already explained, recount how the trial court was concerned the parents had not been able to explain *all* of Ken's conditions when admitted because the Father's admission he dropped Ken only explained some of the injuries.

¶ 97 The trial court then expanded upon its previous Findings and noted additional testimony received at the termination hearing. As to Father's emailed explanation, the trial court specifically found Father was being "untruthful" and "his email ha[d] no weight and there [was]

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no credibility to it.” The trial court also noted how both medical experts who testified, including Mother’s expert, determined most or all of Ken’s injuries were non-accidental and Father’s email explanation of accidentally dropping Ken did not change their opinions because it could only explain one of the head injuries, not the full spectrum of injuries and conditions Ken presented with when admitted to the hospital. The trial court again noted Mother believed Father’s email about dropping Ken and came to believe Father intentionally hurt Ken, but the trial court explained Father’s explanation for how he hurt Ken, i.e. a single drop, whether intentional or not could not explain all Ken’s brain and head injuries based on testimony from Mother’s own expert. Further, as we explained above, Mother’s own testimony she was constantly present with the children contradicted Father’s email in which he said Mother was not home. Combined with the trial court’s rejection of Mother and Father’s prior explanations from its October 2020 Order, the trial court made clear in these unchallenged Findings of Fact why it did not credit any of the explanations proffered for Ken’s injuries. As a result, the trial court had still received no explanation for Ken’s injuries, thereby supporting that part of Finding 82.

¶ 98 As to the other part of Finding 82, the trial court’s Findings linked the injuries and conditions to a period of time when Mother and Father were the sole caretakers. Specifically as to Mother, the trial court noted she cared for Ken and Mark “continuously from the time [Ken] came home from the hospital on November 7, 2017 through December 3, 2017,” when Ken was admitted to the hospital again. The trial court also explained how the injuries most likely occurred during a period of time between 30 November and 3 December because Ken had an doctor’s appointment on 30 November where he did not have any of the injuries. As such, at least one of the parents must have been the cause of the injuries and conditions, leading to the safety risk of returning the children to the parents discussed in Finding 82. The trial court’s Findings on the continued lack of explanation of the injuries support its determination the safety risk has not changed since that time when Ken’s injuries and conditions were caused.

¶ 99 Mother makes several arguments against Finding 82. First, she argues the trial court had no evidence of neglect toward Mark specifically, which we address below when discussing whether the trial court’s overall Conclusion of Law was properly supported. Mother next contends “[t]here was a positive change in the safety risk based on the parenting evaluations and the completion of her case plan.” We address this argument below too because Finding 83—and Mother’s challenge to

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it—concerns Mother’s compliance with her case plan, or lack thereof, as evidence of neglect.

¶ 100 Mother’s only other argument against Finding 82 specifically is that Ken’s premature birth and “Father’s admitted guilt” explain Ken’s condition. The other unchallenged Findings of Fact reject Mother’s proffered explanations. As we already explained, medical experts, including Mother’s own expert, testified Father dropping Ken, as he admitted to, could not explain the full spectrum of Ken’s injuries and conditions. The trial court also made unchallenged Findings that implicitly ruled out premature birth as a cause. For example, the trial court found providers ruled out “other possible medical explanations” for Ken’s conditions, and experts from both sides explained Ken’s injuries were caused by “non-accidental trauma.”

¶ 101 Amicus North Carolina Coalition Against Domestic Violence (“the Coalition”) also argues the trial court was wrong in Finding 82 to “rel[y] heavily on a finding that [Mother] has no clear explanation for [Ken]’s injuries leading to the removal of the children.” Specifically, the Coalition contends Finding 82 “conflate[s] an explanation of the events leading to [Ken]’s injuries with a reduction in safety risk for the children” and “relies heavily on an inference that [Mother] either participated in or condoned any abuse leading to [Ken]’s injuries.” This argument is part of the Coalition’s broader argument “the trial court’s errors may retraumatize domestic violence survivor-parents and children in the child welfare system,” which comes after its more general point “effective responses to domestic violence in the child welfare system are necessary to ensure the health and safety of children.” (Capitalization altered.)

¶ 102 We agree with the Coalition’s first overarching point that “effective responses to domestic violence in the child welfare system are necessary to ensure the health and safety of children,” (capitalization altered), but we do not agree with its interpretation of the trial court’s repeated emphasis on the failure to explain Ken’s injuries. As to the connection between the lack of explanation for Ken’s injuries and conditions and the safety risk to the children, we have explained above how the trial court included numerous Findings about its concern with the lack of explanation of Ken’s injuries and condition. Caselaw also demonstrates why the lack of explanation can be so important. In a case the Coalition acknowledges is relevant to this consideration, our Supreme Court explained a parent’s “refus[al] to make a realistic attempt to understand how [her child] was injured” can help support a “trial court’s conclusion that the neglect is likely to reoccur.” *In re D.W.P.*, 373 N.C. at 340, 838 S.E.2d at 406. The *In re D.W.P.* Court inferred if a parent is not able

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to explain how their children were harmed before, there is a risk the children will be harmed the same way again if returned to the parent's custody, and that is a risk our courts are not required to take. *See id.*, 373 N.C. at 339–40, 838 S.E.2d at 406 (explaining the paramount importance of child safety before drawing the conclusion in the previous sentence). The trial court here permissibly drew the same inference explaining in Findings 87 and 88, which we have found support for above, the lack of explanation of Ken's injuries means there is a continued "risk to [both children's] health and safety."

¶ 103 As to the Coalition's other contention, the trial court was not inferring Mother participated in or condoned abuse and it need not have. The trial court made clear it understood Mother "believes the Father intentionally hurt" Ken. The Findings regarding a lack of explanation instead turned on Mother's lack of recognition of the medical impossibility of Father's proffered explanation causing all the conditions Ken presented with at the hospital. The trial court also did not need to draw such an inference because the definition of neglect includes "liv[ing] in an environment injurious to the juvenile's welfare," and neglect can include failing to prevent injuries like the ones here. N.C. Gen. Stat. § 7B-101(15) (eff. 1 Dec. 2019 to 30 Sept. 2021); *see In re Y.Y.E.T.*, 205 N.C. App. at 127–29, 695 S.E.2d at 522–23 (explaining, in a case where the trial court could not determine who caused a child's non-accidental injuries and terminated parental rights on the grounds of abuse and neglect, the trial court permissibly found both parents responsible because they either "directly caused the injury by inflicting the abuse or *indirectly caused the injury by failing to prevent it*" (emphasis added)). This reflects the broader recognition "[t]ermination of parental rights proceedings are not meant to be punitive against the parent,"— which might lead to an increased focus on individual culpability—"but to ensure the safety and wellbeing of the child." *In re D.W.P.*, 373 N.C. at 340, 838 S.E.2d at 406 (citing *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252). As a result, we reject the Coalition's challenge to Finding 82.

¶ 104 We also note the trial court made twelve unchallenged Findings of Fact in its adjudication order in the termination of parental rights proceeding that addressed domestic violence, and most notably made an unchallenged Finding there was "no evidence of domestic violence occurring between the parents before the filing of the petition" for abuse, neglect, and dependency. Mother testified to as much; in an unchallenged and therefore binding Finding, the court noted during the termination hearing, "[M]other testified that there was no domestic violence between her and the [F]ather prior to their DSS involvement." And the

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first mention of domestic violence between the parents in the record before us, namely the strangulation incident from Fall of 2018, does not appear until the 10 February 2020 hearing that led to the October 2020 Order, which is over two years after the incident that led to the children's removal from the home.<sup>7</sup>

¶ 105 We also reject Mother's argument the trial court erred "in refusing to allow testimony or reports from Dr. Parker and Attorney McCool as expert witnesses related to domestic violence." First, we note the trial court heard testimony from both witnesses as described in its unchallenged Findings of Fact. The trial court, in unchallenged Findings, explained it allowed Dr. Parker to testify as a "fact witness" rather than an expert because of her lack of full licensure and summarized her testimony. As to McCool, the trial court, again in an unchallenged Finding, explained it "accepted her as an expert in" the field of "victimology and domestic violence advocacy in the law." The trial court only excluded testimony from McCool because "intimate partner violence [was] not a fact in issue because it [was] not a reason or condition which caused the removal of the children." It also found Mother's therapy with Dr. Parker did not assist Mother "in alleviating the conditions or reasons for removal of the children" for the same reason.

¶ 106 This case is not one where there was a history, report, or even suspicion of domestic violence before DSS removed the children from the home, so, as the trial court found, domestic violence did not play a role in the removal of the children from the home. As a result, we reject both Mother's and Amicus Coalition's arguments about domestic violence as they relate to the specific facts in this specific case.

¶ 107 Turning to Finding 83, the trial court's unchallenged Findings of Fact provided ample support for its conclusion the parents, and Mother specifically, had failed to "address and alleviate" the conditions that brought Mark and Ken into DSS custody. The court again recounted Mother's case plan from the original abuse, neglect, and dependency proceeding, as we addressed in detail above in Mother's challenge to the October 2020 Order. The trial court then incorporated its Findings 58–62 from the October 2020 Order that recounted Mother's efforts up to the time

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7. In the June 2018 hearings that led to the August 2018 initial disposition order, the trial court received into evidence a text in which Father said when not high on marijuana he was "a very negative, abusive and ugly person." Aside from generically using the word "abusive," this does not give any insight into the nature, extent, or timeline of the abuse. Notably, the trial court did not make any additional Findings on domestic violence in the two subsequent permanency planning and review orders and only discussed the subject again in the October 2020 Order.

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of that order. Those Findings from the October 2020 Order explained how the trial court did not credit Mother's parental capacity evaluation because it did not address the lack of explanation for Ken's injuries and how the trial court did not find Mother's parenting class sufficient because it was "limited to childproofing the home and discussion of child health as in what to do if the child is sick or injured."

¶ 108 In the order terminating parental rights, the trial court made additional Findings updating Mother's efforts, or lack thereof, on those two fronts and further explained why it did not find her previous efforts sufficient. On the parenting capacity evaluation, the trial court noted "there is no change of circumstances" because the evaluator did not give an updated opinion and the "original evaluation failed to fully, objectively and adequately address the conditions that led to the removal of the children from the home." As to the parenting class, the trial court also found no change because the parenting class teacher offered no updated opinion and neither parent took additional parenting classes. The trial court then further explained its determination the previous parenting class was inadequate for the purpose of showing the parents were making progress towards addressing the conditions that led to DSS involvement:

At the time of the termination hearing, neither the Mother . . . or the Father . . . had engaged in any parenting class which fully and completely addressed the medical and safety reasons that the child [Ken] came into care, especially the facts that were of the most concern to this court to include [Ken]'s low blood sugar/hypoglycemia, low body temperature and cachectic (wasted away) appearance at the time of his admission in addition to [Ken]'s other brain injuries, fractures and retinal hemorrhages. The court's concern for the physical safety of [Ken], and [Mark] as a sibling in the home, was not alleviated by the testimony or the letter submitted by [the parenting class teacher] because this was not covered in her courses and there was not any other evidence of any other services which addressed this concern.

These Findings thus provide ample support for ultimate Finding 83 that parents had not addressed the issues that led to the juveniles' removal from the home, thereby constituting neglect.

¶ 109 Mother argues she completed her case plan and thereby showed the progress she needed to show. As we have explained when rejecting

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Mother's argument that the trial court erred in ceasing reunification efforts, the trial court took a different view of Mother's efforts than Mother takes. The trial court explained extensively—even more so in this termination order than in the October 2020 Order ceasing reunification—why Mother did not adequately address its concerns, and given we only review whether the Findings of Fact support ultimate Findings we treat as Conclusions of Law, we reject her arguments. *See In re M.K.*, ¶ 12 (explaining standard of review for Conclusions of Law). Mother's arguments about compliance with her case plan as of the date of the termination proceeding are also particularly poorly received because she already had the benefit of the trial court's order ceasing reunification efforts from October 2020 where it specifically told her why and how it did not think her parental capacity evaluation and parenting class sufficiently addressed the reasons for DSS involvement. Even if Mother had previously believed her parental capacity evaluation and parenting class were sufficient, she was on notice the trial court believed she needed to undertake additional efforts by the time of the termination proceeding.

¶ 110 Finally, based upon these ultimate Findings, the trial court also had a legally sufficient basis for its conclusion this amounted to a likelihood of future neglect, as it was required to find since Mother had been separated from Mark and Ken prior to the termination proceeding. *In re D.W.P.*, 373 N.C. at 339, 838 S.E.2d at 405. As we explained above when analogizing to termination of parental rights cases when discussing cessation of reunification efforts, our courts have repeatedly upheld trial court orders terminating parental rights on the grounds of the likelihood of future neglect when parents have been unable to explain children's past injuries. *E.g.*, *In re D.W.P.* 373 N.C. at 339–40, 838 S.E.2d at 405–06 (summarizing facts and then explaining, “Respondent-mother acknowledges her responsibility to keep David safe, but she refuses to make a realistic attempt to understand how he was injured or to acknowledge how her relationships affect her children's wellbeing. These facts support the trial court's conclusion that the neglect is likely to reoccur if the children are returned to respondent-mother's care.”). For example, in *In re Y.Y.E.T.*, this Court found the parents' “refusal to accept responsibility for the child's injury indicate[d] that the conditions which led to the child's initial removal from [their] home ha[d] not been corrected” and thus “repetition of abuse or neglect [was] probable.” *Id.*, 205 N.C. App. at 129, 695 S.E.2d at 523.

¶ 111 In the above section on cessation of reunification efforts, we explained how the trial court's Findings of Fact in that order aligned with the facts of *In re Y.Y.E.T.* and we find similar alignment here. First, the trial court incorporated its key Findings on the lack of explanation from

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its October 2020 Order ceasing reunification efforts in its order terminating parental rights. Second, the trial court made additional Findings on the continued lack of explanation and medical impossibility of Father's explanation for Ken's injuries and condition when Ken was admitted to the hospital. As such, the trial court had ample support for its Conclusion there was a likelihood of future neglect because of Mother's lack of explanation of Ken's injuries.

¶ 112 The trial court's Conclusion further properly determines both Ken and Mark can be considered neglected, via the likelihood of future neglect and abuse, based on Ken's injuries alone. The definition of neglected juvenile explains abuse or neglect of any juvenile in the home is relevant to determining whether any other juvenile in the home is neglected:

In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C. Gen. Stat. § 7B-101(15) (eff. 1 Dec. 2019 to 30 Sept. 2021). This link reflects "the trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home." *In re D.B.J.*, 197 N.C. App. 752, 755, 678 S.E.2d 778, 780–81 (2009) (quoting *In re T.S., III & S.M.*, 178 N.C. App. 110, 113, 631 S.E.2d 19, 22 (2006)). While the fact of prior abuse alone is not enough, this Court has recognized that a "parent's lack of acceptance of responsibility" can be a required additional factor "to suggest that the neglect or abuse will be repeated." See *In re J.C.B.*, 233 N.C. App. 641, 644, 757 S.E.2d 487, 489 (2014) (summarizing *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) as indicating a "parent's lack of acceptance of responsibility" is a sufficient additional factor). Similarly here, the trial court could rely on the prior abuse and neglect of Ken plus Mother's lack of explanation for Ken's injuries and condition when he arrived at the hospital to determine Mark was also a neglected juvenile because of the likelihood of future neglect or abuse.

¶ 113 As a result, we reject Mother's argument the adjudication as to Mark "is based on the circumstances relating to Ken's abuse or neglect in 2017" and "[t]here are no supported findings establishing the presence of other factors with a nexus to Mark or to the likelihood he would be neglected by Mother if his custody was returned to her." Mother's lack of explanation for Ken's injuries is the other factor with a nexus to Mark

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because he was—and would be if returned to Mother’s custody—in the same environment where Ken’s injuries occurred, as the trial court recognized in ultimate Finding 82.

¶ 114 Beyond the relevance of Ken’s injuries as to the neglect ground of termination for Mark, the trial court also recounted, throughout the proceedings in this case, various concerns about Mark, which the trial court took notice of when entering the adjudication order in the termination proceeding. Specifically, in both the abuse, neglect, and dependency adjudication order, to which Mother consented, and the initial disposition order, the trial court noted the parents did not agree to have a skeletal survey done on Mark, which DSS ordered as part of a child abuse evaluation, such that one was not done. A skeletal survey on Ken had revealed skull fractures and “rib fractures in various stages of healing” that led to the initial conclusion Ken’s injuries indicated “non-accidental or inflicted trauma.”

¶ 115 In addition to Mother refusing to allow a skeletal survey on Mark as part of a child abuse evaluation, the trial court also noted a series of concerns around immunizations in its initial disposition order. Initially, Mark’s foster parents signed him up for daycare, necessitating immunizations, but the parents contacted DSS “and requested they cancel” the immunization appointment.<sup>8</sup> Another time, shortly after Ken was born, the parents wanted Mark to be able to visit him and they lied to hospital staff that Mark had been immunized. In the same section of the initial disposition order, the trial court also found “the parents have a pattern of refusing medical treatment for both” Mark and Ken. While these Findings were not specifically repeated in the termination proceeding adjudication order, the court took judicial notice of them, and they demonstrate the trial court had additional concerns specific to Mark.

¶ 116 We also reject Mother’s arguments as to Ken’s adjudication. Mother argues “[t]he evidence and findings were insufficient to show a reasonable likelihood Mother would neglect or abuse Ken if he was returned to her custody” because she “fully complied with and completed her case plan” and because the trial court failed to “address any clear and convincing evidence of changed circumstances of a substantial risk of abuse or neglect by Mother at the time of the termination hearing.” We have repeatedly explained how Mother did not fully comply with and complete her case plan to the trial court’s satisfaction, most recently when addressing her challenge to ultimate Finding 83. We also note

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8. These immunizations were standard childhood immunizations normally required for children in school or daycare in North Carolina well before the COVID-19 pandemic.

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completing a case plan alone does not preclude terminating parental rights on the grounds of abuse or neglect. *See In re L.G.G.*, ¶ 34 (“[A] parent’s compliance with his or her case plan does not preclude a finding of neglect.” (quoting *In re J.J.H.*, 376 N.C. at 185, 851 S.E.2d 336)). As to changed circumstances, the trial court made unchallenged Findings indicating no circumstances changed with respect to Mother’s parental capacity evaluation and parenting classes, which it had previously found were insufficient. The trial court even directly used the language of changed circumstances at one point explaining: “As to the parenting capacity evaluation, *there is no change of circumstances* presented at the termination hearing . . . .”

¶ 117 Therefore, after de novo review, we determine the trial court’s Findings of Fact support its ultimate Findings and Conclusion Mother’s parental rights should be terminated on the grounds of neglect as to both Mark and Ken and on the grounds of abuse as to Ken pursuant to North Carolina General Statute § 7B-1111(a)(1).

#### **D. Termination on Willful Failure to Make Reasonable Progress Ground**

¶ 118 Mother also argues “[t]he trial court erred in terminating [her] parental rights on the ground she willfully failed to make reasonable progress” under North Carolina General Statute § 7B-1111(a)(2). Her previous challenges to Findings of Fact 85 and 86 also fit within this ground because they were in practice Conclusions of Law that mirror the language of § 7B-1111(a)(2). “Because the trial court properly terminated [her] parental rights based upon” abuse and neglect under North Carolina General Statute § 7B-1111(a)(1), “we need not address this argument.” *In re L.M.M.*, 379 N.C. 431, 2021-NCSC-153, ¶ 29 (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982) and summarizing the case as follows “holding that an appealed order should be affirmed when any one of the grounds found by the trial court is supported by findings of fact based on clear, cogent, and convincing evidence”); *see also* N.C. Gen. Stat. § 7B-1111(a) (“The court may terminate the parental rights upon a finding of one or more of the following” grounds for termination.).

¶ 119 We note in addition to Mother’s arguments, some Amici contend termination on this ground was not proper. Amicus The ACLU of North Carolina Legal Foundation argues “the trial court’s failure to properly weigh the Mother’s successful efforts to remedy the issues leading to the children’s removal . . . raised serious due process concerns.” (Capitalization altered.) The ACLU of North Carolina later clarified this

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fit with § 7B-1111(a)(2) by arguing applicable law only requires reasonable progress, which invokes the language of that sub-section. N.C. Gen. Stat. § 7B-1111(a)(2). Amici North Carolina Justice Center and North Carolina Community Bail Fund of Durham argue “[t]he trial court did not adequately consider the impact of wealth-based pre-trial incarceration when it evaluated this case for the termination of parental rights” and then specifically indicated their arguments are under § 7B-1111(a)(2). Amicus North Carolina Coalition Against Domestic Violence also challenges Finding of Fact 86, which we have already explained fits under this ground for termination.

¶ 120 Because we have already found the trial court properly terminated Mother’s parental rights based on § 7B-1111(a)(1), we do not respond to these arguments other than to make the following observations. First, while The ACLU of North Carolina uses constitutional rather than statutory language, the argument is essentially the same because our statutory procedures exist to protect parents’ constitutional due process rights as we explained at the outset of our analysis. *E.g.*, N.C. Gen. Stat. § 7B-100 (2021) (directing courts to interpret and construe abuse, neglect, and dependency and termination of parental rights statutes “[t]o provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents”) In addition, we cannot address constitutional arguments which were not raised before the trial court, *see In re J.N.S.*, 207 N.C. App. 670, 678, 704 S.E.2d 511, 517 (2010) (“[I]t is well settled that a constitutional issue not raised in the lower court will not be considered for the first time on appeal.” (quotations and citation omitted)), and neither Mother nor Father raised constitutional arguments as discussed by Amicus before the trial court.

¶ 121 Second, the “wealth-based pre-trial incarceration” argument advanced by Amici North Carolina Justice Center and Community Bail Fund of Durham were not raised by Mother in her briefing as reasons for the trial court’s errors. In fact, Amici’s argument directly contradicts Mother’s argument. Amici argue the trial court failed to (properly) consider Mother’s “incarceration and the subsequent impact it had on her ability to comply with the case plan and parent her children,” specifically around the issue of demonstrating what she learned in parenting class by applying it in visitation. But Mother argues under § 7B-1111(a)(2) she “complied with and fully completed the case plan established by the court to address the removal conditions,” which would necessarily include demonstrating what she learned from parenting class in

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visitation. Mother also does not argue on appeal that her incarceration impacted her ability to comply with the ordered services.

¶ 122 Even without that contradiction, we note the trial court recognized Mother and Father were incarcerated and could not post bond, which prevented them from being able to engage in services. In response, the trial court ordered DSS to “determine what, if any, services can be accessed in the jail and make referrals, if possible.” Finally, as to this argument, we note Mother had a period of time after she was released in which she had visitation with Mark regularly, and thus to demonstrate the skills she learned in parenting class. Beyond these notes, we need not respond to Amici’s arguments on the willful failure ground because we have already found the trial court properly terminated Mother’s parental rights based on § 7B-1111(a)(1).

**V. Termination of Mother’s Parental Rights- Disposition Phase  
Exclusion of Evidence as to Best Interests**

¶ 123 **[3]** Mother finally argues the trial court erred when it “exclude[ed] relevant evidence mandated for consideration” at the dispositional stage of the termination proceeding. Specifically, she argues the trial court erred in excluding testimony from one of her expert witnesses, Dr. Pryce, on the following topics:

1. Mother’s bond with and sacrifices for her children, placing their needs above her own.
2. Mother’s proactive parenting serving the best interests of her children.
3. The measured data indicating the potential harm, negative outcomes, and lack of benefit to children from separation from their biological parent and involvement in foster care systems; placement with kin provides better stability, fewer emotional and behavior problems, and lower reactive attachment disorders.
4. The measured importance of maintaining biological family relationships and connections, especially of African American families,
5. Data establishing that diminished bonds between juveniles and parents can be enhanced sufficiently to support reunification of the family.

We review the relevant legal background and standard of review before addressing Mother’s argument.

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**A. Legal Background and Standard of Review**

¶ 124 Our Supreme Court has described the trial court’s task at the dispositional stage of a termination proceeding as follows:

At the dispositional stage of a termination proceeding, the trial court must “determine whether terminating the parent’s rights is in the juvenile’s best interest.” N.C.G.S. § 7B-1110(a) (2019). In doing so, the trial court

may consider any evidence, including hearsay evidence as defined in [N.C.G.S. §] 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile. 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.

*Id.*

*In re G.G.M.*, 377 N.C. 29, 2021-NCSC-25, ¶ 22. On appeal, “[t]he trial court’s determination of a child’s best interests under N.C.G.S. § 7B-1110(a) is reviewed only for abuse of discretion.” *Id.*, ¶ 23 (quoting *In re J.S.*, 374 N.C. at 822, 845 S.E.2d 66). “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.” *Id.* (quoting *In re K.N.K.*, 374 N.C. 50, 57, 839 S.E.2d 735 (2020)).

¶ 125 When considering the specific question raised by Mother’s argument—the admissibility of evidence at the dispositional stage—the trial court operates within the bounds of § 7B-1110(a), which states: “The court may consider any evidence, including hearsay evidence as defined

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in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile.” N.C. Gen. Stat. § 7B-1110(a). Appellate courts review the trial court’s decision to admit or deny evidence at the dispositional phase of a termination of parental rights proceeding for abuse of discretion. *See In re M.Y.P.*, 378 N.C. 667, 2021-NCSC-113, ¶ 27 (“Given the wide discretion afforded the trial court in making evidentiary rulings during the dispositional hearing, even assuming that the issue had been preserved for appellate review, we would conclude the trial court did not abuse its discretion by excluding further testimony from respondent on this issue.”); *see also In re R.D.*, 376 N.C. 244, 250–51, 852 S.E.2d 117, 124 (2020) (“During the dispositional stage, conversely [to the adjudication stage], the trial court retains significantly more *discretion in its receipt of evidence* and may admit any evidence that it considers to be relevant, reliable, and necessary in its inquiry into the child’s best interests—even if such evidence would be inadmissible under the Rules of Evidence.” (emphasis from original removed and own emphasis added)).

¶ 126 In her opening brief, Mother argues the standard of review is de novo instead of abuse of discretion because the relevancy of evidence is a question of law. First, Mother relies on *Hill v. Boone*, 279 N.C. App. 335, 2021-NCCOA-490, which is a medical malpractice case not subject to the special evidentiary rule set out in § 7B-1110(a). *Hill*, ¶ 2 (noting case is a medical malpractice action). Thus, *In re M.Y.P.* and *In re R.D.* are controlling with their abuse of discretion standard. *In re M.Y.P.*, ¶ 27, *In re R.D.*, 376 N.C. at 251, 852 S.E.2d at 124. Further, we note by her reply briefing Mother argued excluding this evidence was an abuse of discretion, stating, “Excluding it because it was not based on North Carolina research was an abuse of discretion,” although at oral argument she again switched and argued the issue should be reviewed de novo. Because prior precedent dictates abuse of discretion as the standard of review in this context, we review the trial court’s exclusion of evidence from one of Mother’s experts for abuse of discretion.

**B. Analysis**

¶ 127 Reviewing for abuse of discretion, we must decide whether the trial court’s decision to exclude testimony from Mother’s expert was “manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.” *In re G.G.M.*, ¶ 23. After some foundational testimony, certifying the witness, Dr. Pryce, as an expert in “[c]hild welfare policy and practice,” extensive voir dire of Mother’s expert, and arguments from the parties on whether the expert should be

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allowed to testify, the trial court excluded the testimony from Mother's expert because it "deem[ed] that her testimony is irrelevant":

THE COURT: All right. Thank you. Well, the court has heard these questions, and this court follows the law. The court heard, as relates to Dr. Pryce, certainly Dr. Pryce is well-educated, and this court is not saying that she is not. However, the court finds it concerning that she was given not -- even from her own testimony, she did not think she had all the documentation on which she is premising an expert opinion. She did not ask for the court orders. She does not know about the DHHS practices in North Carolina where this incident involving the children took place. None of the research that she is relying on is from North Carolina. And so because of that, this court is going to deem that her testimony is irrelevant.

The trial court thus made a reasoned decision to exclude testimony from Mother's expert.

¶ 128 More specifically, we can break down the trial court's reasoning into two portions to respond to the five categories about which Mother complains. First, as to Mother's categories about her bond with her children and proactive parenting serving the children's best interests, the court explained it was concerned Dr. Pryce "even from her own testimony, she did not think she had all the documentation on which she [was] premising an expert opinion" and "did not ask for the court orders." The trial court thus explained it was not accepting the expert's testimony because it did not think her opinion could help it make the best interest determination before it.

¶ 129 In *In re K.G.W.*, this Court found a trial court did not abuse its discretion when it decided to exclude, from the dispositional phase of a termination proceeding, testimony from an expert witness who did not have sufficient information on the relevant case. *See* 250 N.C. App. 62, 63, 66–67, 791 S.E.2d 540, 541, 543 (2016) (excluding testimony by psychologist expert "who had not worked with the juvenile and who lacked experience in juvenile court matters" because it "was not helpful to" the trial judge as "trier of fact"). In so ruling, the *In re K.G.W.* Court explained this aspect of a trial court's discretion rests on the trial court's ability to weigh evidence and "as an appellate court, it is not our role to determine the weight to give to the evidence." *Id.*, 250 N.C. App. at 67, 791 S.E.2d at 543; *see also* N.C. Gen. Stat. § 7B-1110(a) (permitting trial

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court to consider evidence a trial court “finds to be relevant, *reliable*, and *necessary*” (emphasis added)). Here, similarly, we will not upset the trial court’s discretionary decision to determine the expert’s testimony would not be helpful because the expert did not have sufficient information regarding Mother or the specific facts of this case, including the trial court’s orders entered prior to Dr. Pryce’s review and testimony.

¶ 130 Mother’s other three categories all focus on the expert’s proffered testimony regarding data on the better outcomes from family placements over foster care, the importance of maintaining family bonds, “especially [in] African American families,” and the ability to “enhance[]” otherwise “diminished bonds” between children and parents to allow for reunification. Amicus The ACLU of North Carolina also argues data regarding enhancing bonds to allow for reunification was relevant. And within this broad category of data, Amicus North Carolina NAACP contends Mother’s expert would have provided relevant evidence of “racial disproportionality and racial bias in the child welfare system” in addition to the types of data Mother highlights in her brief.<sup>9</sup>

¶ 131 The broad and general points noted by Amici are certainly worthy of note, and in fact, these points are already addressed as factors in North Carolina General Statute § 7B-1110(a). *See* N.C. Gen. Stat. § 7B-1110(a) (listing factors relevant to best interest of the child at the termination disposition stage including “bond between the juvenile and the parent” and a catch-all provision for “[a]ny relevant consideration”); *see also In re N.C.E.*, 379 N.C. 283, 2021-NCSC-141, ¶ 19 (“[T]he trial court may treat the availability of a relative placement as a relevant consideration under N.C.G.S. § 7B-1110(a)(6).” (quotations and citation omitted)).

¶ 132 The General Assembly has also identified the “purposes and policies” for implementation of Chapter 7B, Subchapter I, N.C. Gen. Stat. § 7B-100 (2021), which includes termination of parental rights. *See* N.C. Gen. Stat. Chapter 7B, Subchapter I, Article 11 (on termination of parental rights). Each of the “purposes and policies” seeks to strike a balance, based on the facts of each case, between “the right to family autonomy” and the needs of the children for both protection and a “safe, permanent home.”

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9. Amicus NAACP also argues Mother was improperly “prevented from testifying about the role of race in the proceeding.” (Capitalization altered.) We first note Mother did not raise this issue on appeal. Second, Mother made no offer of proof when the trial court ultimately ruled she could not testify about the role “race has played” in her “interactions” with DSS. “[A] party is required to make an offer of proof” when seeking “to preserve an argument concerning the exclusion of evidence.” *In re M.Y.P.*, ¶ 25. Therefore, the argument has not been properly preserved for our review and we decline to address it.

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This Subchapter shall be interpreted and construed so as to implement the following purposes and policies:

- (1) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents;
- (2) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the juvenile, and the strengths and weaknesses of the family.
- (3) To provide for services for the protection of juveniles by means that respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence; and
- (4) To provide standards for the removal, when necessary, of juveniles from their homes and for the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents.
- (5) To provide standards, consistent with the Adoption and Safe Families Act of 1997, P.L. 105-89, for ensuring that the best interests of the juvenile are of paramount consideration by the court and that when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a safe, permanent home within a reasonable amount of time.

N.C. Gen. Stat. § 7B-100.

¶ 133

The law favors family placements over foster care—*if* a family placement is available and can be done safely. *See In re N.C.E.*, ¶ 19 (stating the “extent to which” the availability of a relative placement at termination dispositional stage is relevant depends “upon the extent to which the record contains evidence tending to show whether such a relative placement is, in fact, available” (quotations and citations omitted)); *see also* N.C. Gen. Stat. § 7B-903(a1) (2021) (stating, in context of abuse, neglect, and dependency dispositions trial courts “shall” order placement with a relative who is “willing and able to provide proper care and supervision [of the juvenile] in a safe home” unless contrary to the child’s best interests before discussing out of home placements). The law recognizes the importance of maintaining family bonds for the benefit of both

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parent and child, if possible. Parents have a constitutionally-protected right to the care, custody, and control of their children—if the parents are not unfit or have not acted inconsistently with their constitutionally protected rights as a parent. *See In re E.B.*, 375 N.C. at 315, 847 S.E.2d at 670–71 (“The government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody or where the parent’s conduct is inconsistent with his or her constitutionally protected status.” (quoting *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (alteration omitted))). But here, the trial court’s responsibility was to find the facts based upon the evidence presented as to these specific children and parents and to determine the best interests of these specific children based upon those facts and the law.

¶ 134 Relevant to these data grounds, the trial court explained it did not find the expert’s testimony relevant because she did “not know about the DHHS practices in North Carolina where this incident . . . took place” and “[n]one of the research” the expert relied upon “is from North Carolina.” Again, these explanations represent a reasoned decision, which is the standard the trial court’s exclusion must meet. *In re G.G.M.*, ¶ 23. Neither Mother nor Amici have demonstrated how research from another state and expert testimony which is not based upon in-state DHHS practices would be relevant to any determination made in this particular case. The trial judge here did not abuse her discretion by excluding the evidence on those same grounds. *In re K.G.W.*, 250 N.C. App. at 67, 791 S.E.2d at 543.

¶ 135 Both Mother and Amicus NAACP argue the excluded data—in Mother’s argument the data on outcomes in “non-kinship homes” and in NAACP’s argument the research on “[t]he disproportionate and negative impact of the child welfare system on marginalized racial groups”—can still apply to North Carolina because North Carolina is not different from other states. But even if we assume the proffered data about outcomes from “non-kinship homes” and regarding the “disproportionate and negative impact of the child welfare system on marginalized racial groups” are true, neither Mother nor Amicus have demonstrated this information has any direct relevance to this case. Ken suffered serious, life-threatening abuse while in the sole care of his parents, and we have already addressed the adjudications of abuse and neglect. Statistics or studies regarding outcomes for children in non-kinship homes or disproportionate impacts on “marginalized racial groups” may be of great assistance to the policy-making branches of government when establishing the laws and procedures in child welfare cases generally, but may have no direct relevance to a particular child or family. The trial

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court also considered whether these studies were useful in this case, as Mother’s trial counsel argued familiarity with North Carolina was not necessary because the expert’s knowledge covered the whole country.<sup>10</sup> We cannot say the trial court made an unreasoned decision or a “manifestly unsupported” one in determining otherwise, and thus we reject Mother and Amicus NAACP’s arguments. *In re G.G.M.*, ¶ 23.

¶ 136 The trial court did not abuse its discretion in excluding the testimony of Mother’s expert during the dispositional phase of the termination proceeding.

**VI. Conclusion**

¶ 137 We reject all Mother’s arguments on appeal and therefore affirm the trial court’s orders. After granting her PWC to review the issue, we conclude the trial court did not abuse its discretion in ceasing reunification efforts because it made the required Findings of Fact and a reasoned decision based on its Findings on Mother’s case plan progress and the still-unexplained nature of some of Ken’s injuries and ailments. We also conclude the trial court properly determined parental rights should be terminated on the grounds of neglect as to both Mark and Ken and on the grounds of abuse as to Ken pursuant to North Carolina General Statute § 7B-1111(a)(1) because competent evidence supports the trial court’s Findings of Fact and, based on our de novo review, those Findings of Fact support its ultimate Findings and Conclusions of Law. Because the trial court only requires one ground to terminate parental rights and we found that already, we do not address the trial court’s other ground of willful failure to make reasonable progress under North Carolina General Statute § 7B-1111(a)(2). Finally, the trial court did not abuse its discretion in excluding testimony from Mother’s expert.

AFFIRMED.

Judges ARWOOD and COLLINS concur.

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10. As part of this argument, Mother’s counsel said the expert had “seen research coming out of North Carolina,” but the expert’s testimony to that effect was struck following an objection.

## LOVETT v. UNIV. PLACE OWNER'S ASS'N

[285 N.C. App. 366, 2022-NCCOA-594]

MARY LOVETT, ADMINISTRATOR OF THE ESTATE OF  
GREGORY DWAYNE LOVETT, PLAINTIFF

v.

UNIVERSITY PLACE OWNER'S ASSOCIATION, INC. F/K/A UNIVERSITY PLACE  
PROPERTY OWNERS ASSOCIATION, TRICOR INTERNATIONAL, LLC, AND EBA  
CRYSTAL REAL ESTATE LLC, D/B/A SHOPPES AT UNIVERSITY PLACE, DEFENDANTS

No. COA22-28

Filed 6 September 2022

**Negligence—gross contributory negligence—voluntary intoxication**

The trial court properly dismissed—pursuant to Civil Procedure Rule 12(b)(6)—a wrongful death action against a retail, dining, and recreational complex where, one night, the decedent arrived at the complex already drunk, consumed more alcohol on the premises until his blood alcohol concentration was nearly five times the legal limit, and then drowned after jumping into a nearby lake. The decedent's voluntary intoxication amounted to gross contributory negligence barring his estate's recovery from any negligence by the complex.

Appeal by plaintiff from order entered 13 October 2021 by Judge Gregory Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 August 2022.

*Mauney PLLC, by Gary V. Mauney for plaintiff-appellant.*

*McAngus, Goudelock & Courie, PLLC, by Zachary D. Walton and Heather G. Connor for defendants-appellees Tricor International, LLC and University Place Owner's Association, Inc.*

*Raynor Law Firm, PLLC, by Kenneth R. Raynor for defendant-appellee Crystal Real Estate, LLC.*

TYSON, Judge.

¶ 1 Mary Lovett (“Plaintiff”), in her representative capacity as Administrator of the Estate of Gregory Dwayne Lovett (“Decedent”), appeals from the trial court’s order granting University Place Owner’s Association, Inc., Tricor International, LLC, and EBA Crystal Real Estate LLC’s (collectively “Defendants”) motions to dismiss with prejudice. We affirm.

**LOVETT v. UNIV. PLACE OWNER'S ASS'N**

[285 N.C. App. 366, 2022-NCCOA-594]

**I. Background**

¶ 2 On the evening of 14 September 2020, Decedent joined friends at the Shoppes at University Place, a retail, dining, and recreational complex located in Charlotte. Decedent was intoxicated upon arrival at the Shoppes. Decedent met his friends at Boardwalk Billy's Raw Bar & Ribs restaurant and bar and consumed more alcohol. Decedent allegedly suffered from alcoholism.

¶ 3 After leaving Boardwalk Billy's, Decedent and his friends walked around the lake adjoining the Shoppes. No fence, warning signs, or "no swimming" signs were posted around the lake, nor was any security personnel present to prohibit Decedent from jumping in the lake. Decedent walked to the edge of the lake and jumped in. Several by-standers rendered aid and pulled Decedent from out of the lake.

¶ 4 Shortly after being pulled out of the lake, Decedent jumped into the lake a second time. Decedent's friends became concerned when they could no longer see him above the surface of the water, but did not enter the lake and attempt to pull him again out of the water. Decedent's friends called the Charlotte-Mecklenburg Police Department for assistance. The police arrived and summoned divers to search for Decedent. Decedent could not be located. Police issued a "missing persons" report.

¶ 5 On 15 September 2020, the police returned with divers. Divers found and retrieved Decedent's body from under the surface of the water. The Mecklenburg County Medical Examiner's Office conducted an autopsy and concluded Decedent had drowned. The toxicological profile revealed Decedent's blood alcohol concentration ("BAC") level at the time of death was 0.37 grams per milliliter (0.37 g/100 mL).

¶ 6 Plaintiff qualified as administrator of Decedent's estate and filed a complaint alleging Decedent's death was wrongful and directly and proximately caused by Defendants' negligence and gross negligence. Defendants moved to dismiss Plaintiff's complaint with prejudice. The trial court heard arguments on Defendants' motions to dismiss on 14 September 2021 and entered an order dismissing Plaintiff's complaint with prejudice on 4 October 2021. Plaintiff appeals.

**II. Jurisdiction**

¶ 7 Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

## LOVETT v. UNIV. PLACE OWNER'S ASS'N

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**III. Issues**

¶ 8 Plaintiff asserts the trial court erred by allowing Defendants' motions to dismiss.

**IV. Motion to Dismiss****A. Standard of Review**

¶ 9 This Court's standard of review of a Rule 12(b)(6) motion and ruling is well established. "A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Kemp v. Spivey*, 166 N.C. App. 456, 461, 602 S.E.2d 686, 690 (2004) (citation and quotation marks omitted). "When considering a [Rule] 12(b)(6) motion to dismiss, the trial court need only look to the face of the complaint to determine whether it reveals an insurmountable bar to plaintiff's recovery." *Carlisle v. Keith*, 169 N.C. App. 674, 681, 614 S.E.2d 542, 547 (2005) (citation and quotation marks omitted).

¶ 10 "On appeal from a motion to dismiss under Rule 12(b)(6), this Court reviews *de novo* whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted[.]" *Christmas v. Cabarrus Cty.*, 192 N.C. App. 227, 231, 664 S.E.2d 649, 652 (2008) (citation and internal quotation marks omitted) (ellipses in original).

¶ 11 This Court "consider[s] the allegations in the complaint [as] true, construe[s] the complaint liberally, and only reverse[s] the trial court's denial of a motion to dismiss if [the] plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.* (citation omitted).

**B. Analysis**

¶ 12 In North Carolina, "a plaintiff's contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence." *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 648, 423 S.E.2d 72, 73-74 (1992) (citation omitted). Plaintiff correctly asserts Decedent's contributory negligence does not bar recovery from a defendant's gross negligence. "Only gross contributory negligence by a plaintiff precludes recovery by the plaintiff from a defendant who was grossly negligent." *McCauley v. Thomas*, 242 N.C. App. 82, 89, 774 S.E.2d 421, 426 (2015) (citations omitted). "Gross negligence is willful and wanton negligence." *Id.*

## LOVETT v. UNIV. PLACE OWNER'S ASS'N

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¶ 13 Our Court has held:

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 wilful (sic) 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.

*Boyd v. L.G. DeWitt Trucking Co.*, 103 N.C. App. 396, 402, 405 S.E.2d 914, 918 (1991) (internal citations and quotation marks omitted).

¶ 14 In *Sorrells*, our Supreme Court held the trial court properly granted defendant's motion to dismiss where decedent was voluntarily intoxicated, lost control of his vehicle, and struck a bridge. *Sorrells*, 332 N.C. at 649, 423 S.E.2d at 74. The Court found the facts established a similar degree of contributory negligence on part of the decedent, and plaintiff could not prevail. *Id.*

¶ 15 In *Davis v. Hulsing Enters., LLC*, 370 N.C. 455, 457, 810 S.E.2d 203, 205 (2018) our Supreme Court affirmed *Sorrells*' analysis. Our Supreme Court held the decedent's voluntary intoxication established contributory negligence, barring recovery from defendant's ordinary negligence. *Id.* at 458, 810 S.E.2d at 206. It held, regardless of defendant's negligence in continuing to serve decedent alcohol after she was visibly intoxicated, the decedent's contributory negligence prevented recovery. *Id.*

¶ 16 Here, Decedent was voluntarily intoxicated upon arrival and when he twice jumped into the lake. Decedent's BAC was nearly five times the legal intoxication threshold of 0.08 grams per milliliter (0.08 g/100 mL). We conclude, as did our Supreme Court in *Sorrells*, Decedent's voluntary intoxication level equaled, if not exceeded, any alleged negligence on Defendants' part. The trial court properly concluded these uncontested facts, reviewed in the light most favorable to Plaintiff, established such a degree of Decedent's contributory negligence to prevent Plaintiff from prevailing as a matter of law.

¶ 17 Plaintiff's argument fails because Decedent was grossly contributorily negligent, and his actions bar any negligence claim against Defendants. *Id.* Plaintiff's arguments are without merit.

## V. Conclusion

¶ 18 Our case law demonstrates voluntary intoxication is a circumstance which establishes gross contributory negligence. Decedent was

## RICHARDS v. HARRIS TEETER, INC.

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voluntarily intoxicated nearly five times the legal limit when he twice jumped into the lake. Decedent's gross contributorily negligence bars any recovery for negligence from Defendants.

¶ 19 Upon *de novo* review, taking Plaintiff's allegation as true and in the light most favorable to her, the trial court properly granted Defendants' motions to dismiss Plaintiff's complaint. The trial court's order dismissing Plaintiff's complaint is affirmed. *It is so ordered.*

AFFIRMED.

Judges INMAN and GORE concur.

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CLARENCE RICHARDS, EMPLOYEE, PLAINTIFF

v.

HARRIS TEETER, INC., EMPLOYER, SELF-INSURED (SEDGWICK CLAIMS  
MANAGEMENT SERVICES, THIRD-PARTY ADMINISTRATOR), DEFENDANTS

No. COA21-804

Filed 6 September 2022

**Workers' Compensation—termination of benefits—misconduct related to compensable injury—constructive refusal of suitable employment—inapplicable**

An opinion and award ordering an employer (defendant) to pay temporary total disability benefits to one of its truck drivers (plaintiff) was affirmed where, after plaintiff initially received benefits for a back injury he sustained on the job in a single-vehicle accident, defendant fired plaintiff for cause and then terminated his benefits on grounds that, because he was fired for misconduct (falling asleep at the wheel during the accident), plaintiff had made himself ineligible for rehire through defendant's return-to-work program and therefore had constructively refused suitable post-injury employment. The Industrial Commission properly declined to apply the test for constructive refusal of suitable employment articulated in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228 (1996), which only applies to employees who are fired for misconduct that is unrelated to their work-related injury, where applying the test to plaintiff would have created a fault-based bar to workers' compensation, which would cut against the underlying principles of the workers' compensation system.

**RICHARDS v. HARRIS TEETER, INC.**

[285 N.C. App. 370, 2022-NCCOA-595]

Appeal by defendants from opinion and award entered 26 August 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 August 2022.

*Hunter & Everage, by S. Camille Payton, for plaintiff-appellee.*

*Pope Aylward Sweeney & Santaniello, LLP, by Alexander J. Elmes and Edward A. Sweeney, for defendants-appellants.*

ZACHARY, Judge.

¶ 1 Defendants Harris Teeter, Inc., (“Defendant”) and Sedgwick Claims Management Services (collectively, “Defendants”) appeal from an Opinion and Award entered by the North Carolina Industrial Commission in which the Full Commission concluded that the *Seagraves* test did not apply in this case. After careful review, we affirm.

### **I. Background**

¶ 2 Plaintiff Clarence Richards began working as a truck driver for Defendant in 2016. On 3 August 2019, Plaintiff was injured in a single-vehicle accident on Interstate 85 when his truck “ran off the road returning from Virginia.” Vance County EMS transported Plaintiff to Maria Parham Health’s emergency department. The EMS record reports that Plaintiff “said he didn’t know he was listening to the radio and then the accident . . . says he may have just drifted thinking about something.” The hospital record states that Plaintiff “lost control of his vehicle this morning just after taking a sip of Gatorade and wound up wrecking into a grassy field.”

¶ 3 Plaintiff’s physician wrote Plaintiff out of work while he received medical treatment. On 13 August 2019, Plaintiff filed a Form 18 Notice of Accident to Employer and Claim of Employee, Representative, or Dependent with the Industrial Commission. On 30 August 2019, Defendants filed a Form 63 Notice of Payment of Compensation Without Prejudice, accepting Plaintiff’s claim for workers’ compensation benefits for a “low back” injury as a result of the 3 August accident. Defendants began paying indemnity benefits and medical compensation to Plaintiff, and did not contest the compensability of Plaintiff’s claim within the statutory deadline, thereby accepting the compensability of his “low back” injury. *See* N.C. Gen. Stat. § 97-18(d) (2021).

¶ 4 Shortly after the accident, Defendant terminated Plaintiff’s employment, effective 29 August 2019. Brian Barnhardt, a workers’

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compensation claims manager for Defendant, testified before the Deputy Commissioner that Defendant’s “review committee” determined that Plaintiff’s “accident was preventable.” Defendant’s personnel records indicate that Plaintiff was terminated for a “Violation of Established Safety Procedures”—namely, that Defendant’s camera in the cab of the truck showed that Plaintiff closed his eyes for approximately seven to ten seconds, which led to the single-vehicle accident—and that therefore Plaintiff was “Not Eligible for Rehire.”

¶ 5 Barnhardt also testified regarding Defendant’s “mandatory return-to-work program for a workers’ comp injury[,]” and the availability of “numerous temporary positions an associate can do if they have restrictions.” However, Barnhart testified that because Plaintiff was “not eligible for rehire[,]” Defendant would not offer Plaintiff any job, including positions “that [Defendant] claim[ed] [Plaintiff] could do.” Defendant also declined to provide “any vocational rehabilitative services to assist Plaintiff in locating suitable employment.”

¶ 6 Meanwhile, Plaintiff was released to return to “sedentary work only” on 15 August 2019, but he was prohibited from driving a truck professionally “due to functional limitations.” From 23 September 2019 through 3 February 2020, Plaintiff received treatment for his lower back and right knee from Dr. Ronald Gioffre, a board-certified orthopedic surgeon. Plaintiff also attended physical therapy, which Dr. Gioffre reported “seem[ed] to be helping greatly[,]” although Dr. Gioffre noted that Plaintiff “still cannot stand more than thirty minutes and sit about 1 hour, before he starts to have pain.”

¶ 7 Later, in his deposition, Dr. Gioffre elaborated on his decision regarding Plaintiff’s work restrictions:

So I basically didn’t feel in the few times that I saw him that even if he had a job that I would have let him go back to work with his back and hip, because I couldn’t see how he could possibly get up – step up into one of those trucks with the hip the way it was, and his back was an issue.

. . . .

I know what he had to do as a truck driver, and I said, No, you can’t go back to work. I didn’t know what else they wanted me to do with restrictions. If they would have had a sedentary type job, I’d have sent him back. There was no reason he couldn’t do sedentary work.

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When presented with Defendant's job descriptions for two positions—Cashier and Self-Checkout Cashier (also referred to as a “U-Scan Cashier”)—Dr. Gioffre testified that he thought Plaintiff would “have a hard time all day doing [the Cashier] work eight hours a day”; nonetheless, it was his opinion that Plaintiff would be able to perform the work of a U-Scan Cashier if he were permitted to sit periodically.

¶ 8 After being released from Dr. Gioffre's care on 3 February 2020, Plaintiff sought employment through various job search websites, across various industries. Plaintiff testified before the Deputy Commissioner that he looked for jobs that do not require constant sitting or standing, consistent with his restrictions, but that he had not received any replies from prospective employers. With regard to his resume, Plaintiff testified that he was 64 years old at the time of the hearing before the Deputy Commissioner, with three years of college education. He was employed for 12 years as a corrections officer, and for 27 years as a truck driver; he has never worked in an office and is “computer illiterate.”

¶ 9 On 30 April 2020, Plaintiff's counsel filed a Form 33 Request that Claim be Assigned for Hearing, alleging that “Defendants have failed and refused to pay past due [temporary total disability] benefit underpayment.” On 15 June 2020, Defendants filed a Form 33R Response to Request that Claim be Assigned for Hearing, replying, *inter alia*, that “Plaintiff has received all benefits to which he is entitled.” The matter came on for hearing before the Deputy Commissioner on 8 July 2020, and by Opinion and Award entered 12 January 2021, the Deputy Commissioner ordered that Defendants pay temporary total disability “until Plaintiff returns to work, until further order of the Industrial Commission, or until compensation is otherwise legally terminated.”

¶ 10 Defendants timely filed notice of appeal to the Full Commission of the North Carolina Industrial Commission, which heard this matter on 9 June 2021. By Opinion and Award entered 26 August 2021, the Full Commission awarded Plaintiff the same payment of temporary total disability and attorneys' fees, and added that “[s]ubject to the provisions of N.C. Gen. Stat. § 97-25.1, Defendant shall pay medical expenses incurred or to be incurred as a result of Plaintiff's admittedly compensable injury as may reasonably be required to effect a cure, provide relief, or lessen the period of disability.”

¶ 11 Defendants timely filed notice of appeal to this Court.

**II. Discussion**

¶ 12 On appeal, Defendants first argue that the Full Commission erred by failing to find that Plaintiff constructively refused suitable employment,

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and by failing to apply the test for constructive refusal of suitable employment first articulated by this Court in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 399 (1996), and subsequently adopted by our Supreme Court in *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 597 S.E.2d 695 (2004). Assuming application of the *Seagraves* test, Defendants also argue that the Full Commission erred by failing to find that Defendants had not shown that Plaintiff's termination was unrelated to his compensable injury, and by concluding that Plaintiff remains disabled or that he conducted a reasonable job search.

**A. Standard of Review**

¶ 13 “Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact.” *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006), *reh'g denied*, 361 N.C. 227, 641 S.E.2d 801 (2007). Because the Commission “is the sole judge of the weight and credibility of the evidence,” its “findings of fact are conclusive on appeal if supported by competent evidence[.]” *Blackwell v. N.C. Dep't of Pub. Instruction*, 2022-NCCOA-123, ¶ 5 (citations omitted).

¶ 14 “Findings not supported by competent evidence are not conclusive and will be set aside on appeal. But findings supported by competent evidence are conclusive, even when there is evidence to support contrary findings.” *Johnson v. Covil Corp.*, 212 N.C. App. 407, 408–09, 711 S.E.2d 500, 502 (2011) (citations and internal quotation marks omitted). “Unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal.” *Fields v. H&E Equip. Servs., LLC*, 240 N.C. App. 483, 485–86, 771 S.E.2d 791, 793–94 (2015) (citation omitted).

¶ 15 The Commission's conclusions of law are reviewed de novo. *Blackwell*, 2022-NCCOA-123, ¶ 5. Under de novo review, this Court “considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Fields*, 240 N.C. App. at 486, 771 S.E.2d at 793–94 (citation omitted).

**B. Constructive Refusal of Suitable Employment**

¶ 16 The parties stipulated that “Plaintiff was injured during the scope of his employment” with Defendant. The initial compensability of Plaintiff's lower back injury resulting from the accident is also undisputed. Rather, this appeal concerns whether Plaintiff constructively refused suitable employment where Defendant deemed him ineligible for participation in Defendant's “return-to-work” program.

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¶ 17 Before the Full Commission, Defendants argued that “Plaintiff constructively refused suitable employment because he was terminated for cause, and that but for the termination for cause, Plaintiff would have remained employed at his preinjury wages because Defendant would have accommodated Plaintiff’s post-injury restrictions.” On appeal, Defendants argue that the Full Commission erred by failing to extend the *Seagraves* test for constructive refusal of suitable employment. We disagree.

¶ 18 Under our Workers’ Compensation Act, “[i]f an injured employee refuses suitable employment as defined by G.S. 97-2(22), the employee shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.” N.C. Gen. Stat. § 97-32. “In *Seagraves*, the Court of Appeals examined the question of whether an employee can be deemed to have refused suitable employment, thereby precluding injury-related benefits, if she is terminated for misconduct that is unrelated to her workplace injuries.” *McRae*, 358 N.C. at 493, 597 S.E.2d at 698.

In lieu of an employee’s termination for misconduct serving as an automatic bar to benefits, the court in *Seagraves* adopted a test that measures whether the employee’s loss of earning capacity is attributable to the wrongful act that caused the employee’s termination from employment, in which case benefits would be barred, or whether such loss of earning capacity is due to the employee’s work-related disability, in which case the employee would be entitled to benefits intended for such disability.

*Id.* at 493, 597 S.E.2d at 699.

¶ 19 The *McRae* Court adopted the *Seagraves* test: “to bar payment of benefits, an employer must demonstrate initially that: (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee’s compensable injury.” *Id.* “An employer’s successful demonstration of such evidence is deemed to constitute a constructive refusal by the employee to perform suitable work . . . .” *Id.* at 493, 597 S.E.2d at 699 (citation and internal quotation marks omitted). The employee’s constructive refusal “would bar benefits for lost earnings, *unless* the employee is then able to show that his or her inability to find or hold other employment at a wage comparable

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to that earned prior to the injury is due to the work-related disability.” *Id.* at 493–94, 597 S.E.2d at 699 (citation and internal quotation marks omitted).

¶ 20 Further, our Supreme Court reiterated that, under the *Seagraves* test, the employer bears the burden “to show, by the greater weight of the evidence, that a plaintiff’s termination was unrelated to his or her work-related injuries; the burden is not on a plaintiff to show that the termination was so related.” *Id.* at 499, 597 S.E.2d at 702.

¶ 21 Importantly for the present case, the Full Commission noted in its Opinion and Award that the injured employee in *Seagraves* “had been provided light-duty, rehabilitative employment after contracting a compensable occupational disease[,]” see *Seagraves*, 123 N.C. App. at 229, 472 S.E.2d at 398, while the injured employee in *McRae* “was terminated for inadvertent errors she committed while performing a job to which she was reassigned subsequent to undergoing surgery for a compensable occupational disease[,]” see *McRae*, 358 N.C. at 491, 597 S.E.2d at 697–98. That the injured employees in *Seagraves* and *McRae* were terminated from rehabilitative employment was a significant factor to the Full Commission, which observed that Plaintiff “was not terminated from rehabilitative employment for misconduct unrelated to his admittedly compensable injury. Rather, Plaintiff in this case was terminated from his regular job for his role in the very accident that caused his admittedly compensable injury.” Accordingly, the Full Commission concluded that “[t]he operative facts in the case before us are substantially different than those in *Seagraves* and *McRae*” and therefore, “[g]iven these fundamental factual differences, the *Seagraves* test is not applicable in this case.”

¶ 22 Defendants argue that the Full Commission erred by distinguishing the case at bar from *Seagraves* and *McRae* on the basis of those injured employees’ termination from rehabilitative employment, asserting that “[i]t is unclear why the Commission believes the temporal factor is required in the analysis of earning capacity and disability.” Instead, Defendants contend that “[t]he fact that . . . Plaintiff’s misconduct resulted in his termination for cause deprived . . . Defendant the opportunity to return him to suitable employment[.]” According to Defendant, it “has a job for . . . Plaintiff but for the fact he was terminated for unsafe driving when he fell asleep and drove his truck off the road[,]” an undisputed violation of Defendant’s established safety protocols. Because it “has a job approved by the authorized treating physician which would have been available to . . . Plaintiff, but for his termination, the fact that termination did not occur during rehabilitative employment appears irrelevant.” We cannot agree.

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¶ 23 In seeking to apply the *Seagraves* test to cases such as this—in which the injured employee was terminated for causing the accident that resulted in his injury and so, pursuant to the employer’s policies, has not and avowedly will not be offered suitable employment—Defendants essentially ask this Court to impose a for-cause bar to recovery of workers’ compensation benefits when the employee is unable to find suitable employment elsewhere. Defendants’ position is fundamentally incompatible with the well-established principles and purposes of the workers’ compensation system, which deliberately eliminates negligence from its calculus in all but certain narrowly defined instances.

¶ 24 The Workers’ Compensation Act has been carefully calibrated to balance the needs of compensably injured employees with the potential risks posed to employers. “The social policy behind the Workers’ Compensation Act is twofold. First, the Act provides employees swift and certain compensation for the loss of earning capacity from accident or occupational disease arising in the course of employment. Second, the Act insures limited liability for employers.” *Frost v. Salter Path Fire & Rescue*, 361 N.C. 181, 184, 639 S.E.2d 429, 432 (2007) (citation omitted).

¶ 25 As part of this mutually beneficial exchange, our Supreme Court has long recognized that under the Workers’ Compensation Act “not even gross negligence is a defense to a compensation claim. Only intoxication or injury intentionally inflicted will defeat a claim.” *Hartley v. N.C. Prison Dep’t*, 258 N.C. 287, 289, 128 S.E.2d 598, 600 (1962). Since *Hartley* was decided, only the unauthorized use of controlled substances has been added to this limited list of exceptions. See N.C. Gen. Stat. § 97-12 (providing that an employee forfeits compensation in the event of “intoxication,” “being under the influence of any controlled substance” not properly prescribed, or “willful intention to injure or kill himself or another”). Therefore, an “employee’s violation of a safety rule does not of itself constitute a bar to recovery of compensation where it may be determined that his injury arose in the course of the employment.” *Spratt v. Duke Power Co.*, 65 N.C. App. 457, 466, 310 S.E.2d 38, 44 (1983).

¶ 26 In the instant case, Defendants clarify that they do not argue on appeal that fault has any place in the compensability determination, and they do not dispute that Plaintiff’s injury was compensable. Nevertheless, Defendants argue that fault *does* have a place—or at least, it *should*—in the workers’ compensation system, when it comes to determining when an employer may subsequently terminate workers’ compensation benefits.

¶ 27 Our Supreme Court considered similar concerns when it first adopted the *Seagraves* test in *McRae*: “We . . . recognize that the current benefit

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scheme faces the potential for abuse by employees. If injury-related benefits continued without regard to an employee's misconduct, injured employees conceivably could commit misconduct in order to be terminated without suffering the appropriate financial consequences." 358 N.C. at 495, 597 S.E.2d at 700. Yet the *McRae* Court contrasted that concern with its opposite: "[A]ny rule that would allow employers to evade benefit payments simply because the recipient-employee was terminated for misconduct could be open to abuse. Such a rule could give employers an incentive to find circumstances that would constitute misconduct by employees who were previously injured on the job." *Id.* In the end, our Supreme Court concluded that the *Seagraves* test "is an appropriate means to decide cases of this nature" because it "is intended to weigh the actions and interests of employer and employee alike. Ultimately, the *Seagraves* rule aims to provide a means by which the Industrial Commission can determine if the circumstances surrounding a termination warrant preclusion or discontinuation of injury-related benefits." *Id.*

¶ 28 We thus are bound to reject Defendants' argument, and hold that the Full Commission did not err by concluding that the *Seagraves* test does not apply in the instant case.

¶ 29 Each of Defendants' remaining arguments assumes the applicability of the *Seagraves* test in this case. Accordingly, we need not address those arguments in light of our decision.

### III. Conclusion

¶ 30 For the foregoing reasons, the Full Commission's Opinion and Award is affirmed.

AFFIRMED.

Judges WOOD and GRIFFIN concur.

**STATE v. ADAMS**

[285 N.C. App. 379, 2022-NCCOA-596]

STATE OF NORTH CAROLINA

v.

MICHAEL LEONARD ADAMS, JR., AND VANESSA PENA, DEFENDANTS

No. COA21-459

Filed 6 September 2022

**1. Child Abuse, Dependency, and Neglect—misdemeanor child abuse—parents fighting over physical possession of child—pulling opposite ends of child—sufficiency of evidence**

The State presented sufficient evidence to convict defendants of committing misdemeanor child abuse (N.C.G.S. § 14-318.2) against their four-year-old son where, during a custody exchange, defendant-father and defendant-mother engaged in a “tug of war” over the child, in which the parents violently pulled opposite ends of the child, placing him at substantial risk of being injured—even if they did not intend to hurt him. Although defendant-mother argued that she was trying to protect the child because the father was in an irate and dangerous state of mind, the State was not required to rule out every hypothesis of innocence to survive the motion to dismiss.

**2. Jury—criminal trial—voir dire—reopening—trial court’s discretion**

In a prosecution for misdemeanor child abuse, the trial court did not abuse its discretion by denying defendant-parents’ motions to reopen voir dire of a juror who, after he had been passed upon by counsel but before the jury was impaneled, stated that he believed defendants should be required to testify. The trial court carefully instructed the juror on defendants’ right not to testify, heard arguments from counsel, considered the matter overnight, considered the negative impact that reopening voir dire could have on the orderly disposition of defendants’ charges, and was satisfied that the juror would follow the law as the court instructed him.

**3. Probation and Parole—during pendency of appeal—requirement to complete conditions of probation—stayed**

In its judgments entered upon jury verdicts finding defendant guilty of misdemeanor child abuse, the trial court erred by ordering defendant to fulfill conditions of his probation during the pendency of his appeal. Defendant’s probation was stayed by N.C.G.S. § 15A-1451 upon his notice of appeal.

## STATE v. ADAMS

[285 N.C. App. 379, 2022-NCCOA-596]

Appeal by defendants from judgments entered on or about 18 March 2021 by Judge Michael D. Duncan in Superior Court, Yadkin County. Heard in the Court of Appeals 22 February 2022.

*Attorney General Joshua H. Stein, by Assistant Attorneys General Ryan C. Zellar and Deborah M. Greene, for the State.*

*Michael E. Casterline, for defendant Michael Leonard Adams, Jr.*

*Gilda C. Rodriguez, for defendant Vanessa Pena.*

STROUD, Chief Judge.

¶ 1 Defendants appeal from judgments entered upon jury verdicts finding them each guilty of misdemeanor child abuse. Defendant Adams argues the trial court erred (1) by denying his motion to dismiss at the close of all evidence; (2) by denying his motion to reopen *voir dire* of a juror after that juror expressed a potential bias toward defendants who do not testify on their own behalf; and (3) by ordering him to complete conditions of his probation while this appeal was pending. Defendant Pena presents arguments for (1) and (2) above, but does not challenge the portion of the trial court's judgment ordering her to complete conditions of her probation while this appeal was pending. We find the trial court committed no error as to Defendants' motions to dismiss or motions to reopen *voir dire* but did err by ordering Defendant Adams to complete the special conditions of his probation while his appeal was pending. The case is remanded for resentencing as to Defendant Adams only.

### I. Background

¶ 2 Defendants were tried on 1 May 2019 in Yadkin County District Court. Both Defendants were found guilty of misdemeanor child abuse. Both appealed to the Superior Court and were tried 15 March 2021.

¶ 3 During the unrecorded jury selection at the Superior Court trial, and after he had been passed upon by the State and by defense counsel for both Defendants, but before the jury was impaneled, one of the jurors, Juror Clark,<sup>1</sup> raised his hand and "indicated that he wanted to say something." The rest of the jurors were dismissed for the evening and Juror Clark was held back to speak to the trial court. Juror Clark told the trial court he could not hear one of the questions, and Defendant Adams's counsel repeated the question:

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1. A pseudonym.

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The one about if they choose not to testify? Yes, sir. If -- the defendants have a choice not to testify in the trial. If they exercise that right and choose not to testify, do you believe that you can give the defendants a fair trial based on their choosing not to testify?

Juror Clark then indicated he thought both Defendants should be required to “answer the questions themselves.” The trial court did not reopen *voir dire*, but examined Juror Clark regarding his opinion on the Defendants’ rights not to testify, and told Juror Clark he “cannot hold that against them if they choose not to testify.” After the trial court’s questions and instructions, Juror Clark affirmed he understood the Defendants have a right not to testify and that he could follow the law as instructed by the trial court. Counsel for both Defendants made motions to reopen *voir dire* to question Juror Clark; the trial court heard arguments and then elected to “give it some thought overnight.”

¶ 4 The following morning, the trial court heard additional arguments by all parties and brought Juror Clark back into the courtroom for additional examination. After a lengthy instruction, and after Juror Clark again affirmatively responded that he could follow the law as instructed by the trial court, the trial court denied Defendants’ motions to reopen *voir dire*.

¶ 5 The trial proceeded, and only the State presented evidence. The State’s evidence tended to show at approximately 6 p.m. on 21 September 2018 Detective Ryan Preslar with the Yadkinville Police Department was “walking out of the police department to go home” when he heard “screaming and hollering.” He “walked out to the parking lot to look, and . . . [saw] a man in the back driver’s side door” of a vehicle across the street, “behind the driver’s seat, half his body [was] in the car and he [was] coming in and out.” Detective Preslar testified “[i]t was hard to tell . . . if he was hitting somebody or jerking on something.” The vehicle was in the Sheriff’s Office parking lot, across the street from the Yadkinville Police Department parking lot.

¶ 6 Detective Preslar radioed for help and ran toward the vehicle. As he approached, he noticed “[Defendant] Adams had the child out of the vehicle. He had [his arm] wrapped kind of around [the child’s] upper torso and arm and he’s pulling in one direction and [Defendant] Pena had [the child] by the bottom half of his body, his legs area and she’s pulling in the opposite direction.” Detective Preslar testified the Defendants were “violent[ly]” pulling the child in opposite directions, because “[t]hey were both wanting that child.” The child was “hollering, crying

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out[,]” and appeared to be in pain. The “tug of war” continued for approximately 20 to 30 seconds while Detective Preslar approached the vehicle, and “[w]hen [he] [got] within feet of [the Defendants] they let go” of the child. Defendants did not drop the child, but quickly put him down on his feet. At about this time Deputy Nathaniel Hodges from the Yadkin County Sheriff’s Office arrived and the Defendants were separated. Detective Preslar did not notice injuries on either Defendant or on the child, and the child calmed down significantly after Detective Preslar separated the Defendants. Detective Preslar noticed that the car seat in the car “was actually pulled from its strapped-in position, and it was kind of set to the side.”

¶ 7 Deputy Hodges interviewed the Defendants. Defendant Adams stated “he just wanted his child, that he was there to pick up their child . . . for a child custody exchange.” Defendant Adams also told Deputy Hodges he was supposed to have someone with him to supervise the child custody exchange, but he still attended the custody exchange after his mother, the usual supervisor, could not attend. Defendant Pena stated she was putting shoes on the child when “[Defendant] Adams approached the vehicle and began trying to, in her words, rip the child out of the vehicle.” Defendant Pena held on to the child and the “tug of war” ensued “due to the fact she did not want [Defendant] Adams to take the child” because he was “irate.” Deputy Hodges charged both Defendants with child abuse under North Carolina General Statute § 14A-318.2 and arrested both Defendants. After Defendants were arrested, DSS was contacted and took temporary custody of the child.

¶ 8 At the close of State’s evidence, both Defendants made motions to dismiss. These motions were renewed at the close of all evidence. The motions were denied, and the charges were submitted to the jury. The jury returned a guilty verdict for each Defendant, and the trial court proceeded to sentencing. Both Defendants were sentenced to serve 75 days of imprisonment, suspended for 18 months of supervised probation. As one of the special conditions of probation, each Defendant was ordered to “enroll and complete any coparenting classes.” In the written judgments, the trial court noted each Defendant had entered notice of appeal in open court but ordered as to each Defendant that “probation is to commence once the appeal decision is reached but the Defendant is to enroll [and] complete the co-parenting classes while the appeal is pending.” (Capitalization altered.) Both Defendants appeal.

## II. Analysis

¶ 9 Defendant Adams contends (1) the State presented insufficient evidence to convict him because the child suffered no injury and no

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substantial risk of injury was created by his conduct; (2) “the trial court abused its discretion when it denied [his] motion to reopen *voir dire* of Juror [Clark],” (capitalization altered), because good reason existed to reopen *voir dire*; and (3) the trial court violated North Carolina General Statute § 15A-1451(a)(4) when it ordered him to serve conditions of his probation while his appeal was pending. Defendant Pena presents substantially the same arguments for the first two issues. Defendant Adams alone asserts the trial court erred by ordering him to complete the conditions of his probation during the pendency of his appeal. Defendant Pena proposed this issue for review but did not address this error in her brief and it has been abandoned. *See* N.C. R. App. P. 28(a) (“Issues not presented and discussed in a party’s brief are deemed abandoned.”). We will address each Defendant’s argument regarding denial of the motions to dismiss separately. We will address their arguments regarding denial of the motion to re-open *voir dire* together, and we will address Defendant Adams’s argument regarding the special condition of his probation last.

**A. Sufficiency of the Evidence****1. Standard of Review**

¶ 10 This Court’s standard of review of a trial court’s ruling on a motion to dismiss is well-settled:

A trial court’s denial of a defendant’s motion to dismiss is reviewed *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). On appeal, this Court must determine “whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator[.]” *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (citation omitted), *cert. denied*, 531 U.S. 890, 121 S. Ct. 213, 148 L.Ed.2d 150 (2000).

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). Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State’s favor. *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 115 S. Ct. 2565, 132 L.Ed.2d 818 (1995). “Contradictions and discrepancies are for

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the jury to resolve and do not warrant dismissal.”  
*Smith*, 300 N.C. at 78, 265 S.E.2d at 169.

*State v. Watkins*, 247 N.C. App. 391, 394, 785 S.E.2d 175, 177 (2016). “[T]he only question before us . . . is whether a reasonable juror *could* have concluded that the defendant was guilty based on the evidence presented by the State. If so, even if the case is a close one, it must be resolved by the jury.” *Id.* at 396, 785 S.E.2d at 178 (emphasis in original).

## 2. Analysis

¶ 11 [1] Both Defendants were convicted under North Carolina General Statute § 14-318.2. Section 14-318.2 provides in relevant part:

(a) Any parent of a child less than 16 year of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the Class A1 misdemeanor of child abuse.

N.C. Gen. Stat. § 14-318.2 (2018). “[T]he State must introduce substantial evidence that the parent, by other than accidental means, either (1) inflicted physical injury upon the child; (2) allowed physical injury to be inflicted upon the child; or (3) created or allowed to be created a substantial risk of physical injury.” *Watkins*, 247 N.C. App. at 395, 785 S.E.2d at 177. There is no dispute that Defendants are the parents of the child or that the child is less than 16 years old, and the State only sought a conviction on the substantial risk theory of misdemeanor child abuse. Therefore, the sole element of misdemeanor child abuse in dispute is whether each Defendant “creat[ed] or allow[ed] to be created a substantial risk of physical injury, upon or to such child by other than accidental means . . . .” N.C. Gen. Stat. § 14-318.2; *id.*

### a. Defendant Adams’s Motion to Dismiss

¶ 12 This Court has recognized a “paucity of cases applying” the substantial risk prong of § 14-318.2. *See Watkins*, 247 N.C. App. at 395, 785 S.E.2d at 177-78. Because “substantial risk of physical injury” is not defined by § 14-318.2, this Court engages in a fact-specific inquiry to determine if such risk exists. *See id.* at 395-96, 785 S.E.2d 177-78. Defendant Adams argues “*State v. Watkins* . . . appears to [be] the only precedential case where a parent was convicted of child abuse without proof of some injury, but instead for merely creating a substantial risk of injury.” He also

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argues *Watkins* is distinguishable from this case and the State has not put forth substantial evidence Defendant Adams created a substantial risk of physical injury to the child by other than accidental means. He argues that the short duration of the incident cuts against any finding of a substantial risk. We hold there was sufficient evidence to submit the case to the jury, and the trial court did not err in denying Defendant Adams's motion.

¶ 13 Defendant Adams appears to be correct that *Watkins* is the sole reported case applying the “substantial risk” prong of § 14-318.2. In *Watkins*, the defendant parked her car outside the Madison County Sheriff's Office and left her 19-month-old son buckled in his car seat while she went inside the Sheriff's Office to leave money for an inmate in the jail. *Id.* at 392, 785 S.E.2d at 176. The State's evidence showed when she was in the lobby, she could not see her car, which was parked about 46 feet away from the front door. *Id.* A detective escorted the defendant out after she argued with employees in the lobby and saw the child in the car. *Id.* at 392-393, 785 S.E.2d at 176.

¶ 14 The defendant in *Watkins* testified in her own defense. *Id.* at 393, 785 S.E.2d at 176. She testified the child was very warmly dressed in a “snowsuit . . . mittens, boots, a toboggan, pants, and a sweater.” *Id.* She said the car had been running before she arrived at the Sheriff's Office with the heater on, and the car was “hotter than blazes” when she got out. *Id.* She claimed she left the windows closed when she went inside the Sheriff's Office, where she believed, based on past experience, it would only take “‘three or four minutes’ to purchase [a] calling card.” *Id.* at 393, 785 S.E.2d at 177. She also claimed she could see the car from where she was standing in the lobby. *Id.*

¶ 15 The *Watkins* Court, viewing the evidence in the light most favorable to the State, analyzed the evidence as to substantial risk of physical injury in these circumstances:

Here, viewing the evidence, as we must, in the light most favorable to the State with every inference drawn in the State's favor, James, who was under two years old, was left alone and helpless—outside of Defendant's line of sight—for over six minutes inside a vehicle with one of its windows rolled more than halfway down in 18-degree weather with accompanying sleet, snow, and wind. Given the harsh weather conditions, James' young age, and the danger of him being abducted (or of physical harm being inflicted

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upon him) due to the window being open more than halfway, we believe a reasonable juror could have found that Defendant “created a substantial risk of physical injury” to him by other than accidental means. *See* N.C. Gen. Stat. § 14-318.2(a).

*Id.* at 395-96, 785 S.E.2d at 178.

¶ 16 In addition to *Watkins*, Defendant Adams argues several unreported cases from this Court are persuasive, even if they are not binding precedent, and they illustrate what constitutes a “substantial risk of physical injury” in violation of § 14-318.2. *See, e.g., State v. Parker*, 278 N.C. App. 606, 2021-NCCOA-389, ¶ 24 (unpublished) (“[D]riving at sixty (60) miles per hour with a car door open creates a ‘substantial risk of injury’ for any passengers, including children, in the vehicle.”); *State v. Miller*, 276 N.C. App. 276, 2021-NCCOA-84, ¶ 16 (unpublished) (Where defendant “‘exceeded the speed limit for approximately one minute’ before ‘sometimes crossing the center line to pass pulled-over vehicles’ with Deputy Rae in pursuit with his blue lights flashing”); *State v. Thomas*, 217 N.C. App. 198, 719 S.E.2d 254 (2011) (unpublished) (exposure to 41 grams of cocaine and a loaded firearm); *In re I.H.*, No. COA09-244, 2009 WL 2139096 (N.C. App. July 7, 2009) (unpublished) (high speed police chase resulting in accident where children were injured).

¶ 17 But the factual circumstances here Defendant Adams seeks to distinguish from *Watkins* and the unreported cases are instead similar in relevant ways. In all the cases, the potentially dangerous incidents were quite brief, just minutes, and in all but one case the children involved were fortunately unharmed. The question is whether the actions “created a substantial risk of physical injury” to the child by “other than accidental means.” Based upon these cases, a “substantial risk of physical injury” may arise in an incident lasting only moments, where the defendant has intentionally engaged in the activity presenting a risk of physical harm to the child and has exposed the child to the risk of injury—whether the child was exposed to illicit substances, or exposed to severe weather conditions, or risk of abduction, or in a speeding car driven in a manner creating a substantial risk of a crash. The circumstances in which a “substantial risk of physical injury” vary from case to case, based on the severity and length of the risky conduct, but presented a jury question sufficient to survive a motion to dismiss.

¶ 18 Thus, while illustrative, these cases “do not resolve the issue presently before us—that is, whether the State’s evidence here was sufficient to raise a jury question regarding a violation of N.C. Gen. Stat.

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§ 14-318.2(a) by Defendant.” *Watkins*, 247 N.C. App. at 396, 785 S.E.2d at 178. Close questions are questions that must be resolved by the jury, and the question before us is “whether a reasonable juror *could* have concluded that [both] defendant[s] [were] guilty based on the evidence presented by the State.” *Id.* (emphasis in original). Here, the State’s evidence tended to show Defendant Adams attended the custody exchange of the parties’ four-year-old son without a court-ordered supervisor. Defendant Adams then became incensed, for reasons undisclosed by the record, and attempted to forcibly remove the child from the vehicle. He grabbed the child around the child’s upper torso and began to violently pull the child out of the vehicle, which appears to have caused the child to “holler” or “cry out” in pain. Given the fact the car seat also appeared to have been “pulled from its strapped-in position[,]” a reasonable inference to be drawn from the evidence is that Defendant Adams pulled hard enough to move the car seat out while attempting to take the child. Then, for 20 to 30 seconds, Defendant Adams ignored police instructions and engaged in a “tug of war” with Defendant Pena, with the child serving as the “rope,” placing the child at risk of physical injury from the fight between Defendants.

¶ 19

It is not difficult to conclude the child was at a substantial risk of being injured in many ways during the “tug of war.” The evidence, viewed in the light most favorable to the State, shows that Defendant Adams “created a substantial risk of physical injury” to his child. *Watkins*, 247 N.C. App. at 395, 785 S.E.2d at 177. Many of these injuries may occur very quickly, and Defendant Adams’s argument that the short duration of the incident cuts against a finding of “substantial risk of physical injury” is not persuasive. The evidence simply creates a question for the jury to resolve as to whether the duration of the incident was long enough to create a “substantial risk of physical injury.” During the struggle, the child could have been dropped and suffered injury. The child could have been harmed by the mere act of pulling the child in two directions. Defendant Adams had wrapped his arm around the child’s upper torso, and the child’s neck or head could have been compressed or contorted as a result of the struggle. If either parent lost their grip on the child, the child could have been thrown to the ground by the force exerted by the other parent and injured. And the record reflects that none of Defendant Adams’s conduct was accidental. His attempts to wrest the child away from Defendant Pena were quite intentional, even though he did not intend to harm the child. There was no indication in *Watkins* or any of the unreported cases cited by Defendant Adams that the defendants had any intention or desire of harming the children in those situations; they intentionally engaged in risky activities in a time and manner that

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also placed a child at risk of injury. The State presented substantial evidence Defendant “create[d] or allow[ed] to be created a substantial risk of physical injury, upon or to [his] child by other than accidental means” in violation of North Carolina General Statute § 14-318.2. The trial court did not err by denying his motion to dismiss.

*b. Defendant Pena’s Motion to Dismiss*

¶ 20 Much of the evidence presented by the State as to Defendant Adams’s culpability under § 14-318.2 is equally applicable to the prosecution of Defendant Pena. Upon a *de novo* review of the evidence presented by the State, viewed “in the light most favorable to the State[,]” *Watkins*, 247 N.C. App. at 394, 785 S.E.2d at 177 (quotation omitted), the State’s evidence was sufficient to show Defendant Pena “created or allowed to be created a substantial risk of physical injury” to the child and thus must be resolved by the jury. *See id.* at 395, 785 S.E.2d at 177.

¶ 21 The State’s evidence tended to show Defendant Pena was an equal participant in the “tug of war” over the Defendants’ child. When Detective Preslar was approaching the vehicle in the Sheriff’s Office parking lot, he observed Defendant Pena with her arms around the “[m]iddle of the [child’s] legs.” As Detective Preslar approached, Defendant Pena also ignored his instructions to “put the child down” and continued to pull the child in the direction opposite Defendant Adams for approximately 20 to 30 seconds. Additionally, although Defendant Adams was not seriously injured, Defendant Adams told Detective Preslar that Defendant Pena became violent in close proximity to the child during the physical struggle and “bit [Defendant Adams] on the forearm and punched him in the face several times.” Detective Preslar characterized Defendant Pena as pulling on the child “hard” or “violent[ly].” Even though Defendant Adams “was supposed to be getting custody of the child that day[,]” Defendant Pena resisted a cooperative custody exchange and instead engaged in a violent physical struggle over possession of the child, starting in the confines of a vehicle.

¶ 22 Defendant Pena cites *State v. Noffsinger*, 137 N.C. App. 418, 426, 528 S.E.2d 605, 611 (2000), and argues “ ‘a parent owes a special duty to her child which has long been recognized by statute and by common law’ and that ‘a parent has a duty to take affirmative action to protect her child and may be held criminally liable if she is present when someone harms her child and she does not take reasonable steps to prevent it.’ ” She frames the struggle over the child as “taking affirmative action to protect her son from [Defendant] Adams, who arrived without the court ordered custody [supervisor] and forcibly removed [the child] from her

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car, and [to] keep [Defendant] Adams from driving away with [the child] in the erratic and dangerous state in which he was in.” But Defendant Pena does not address another possible interpretation of the evidence: that even though they met in the parking lot of the Sheriff’s Office (and across the street from the Police Department), where she could have quickly summoned an officer to assist if Defendant Adams was in an “erratic and dangerous” state, she instead participated in an unreasonable struggle over physical possession of the child with the child’s father. Instead of seeking help, she took affirmative action that placed the child in danger by engaging in the “tug of war” over him. Regardless, even though Defendant Pena “offered an innocent explanation for [her] conduct,” the State’s evidence need not “‘rule out every hypothesis of innocence.’” *State v. Winkler*, 368 N.C. 572, 582, 780 S.E.2d 824, 830 (2015) (quoting *State v. Thomas*, 350 N.C. 315, 343, 514 S.E.2d 486, 503 (1999)). “[A] reasonable juror *could* have concluded that the defendant was guilty based on the evidence presented by the State.” *Watkins*, 247 N.C. App. at 396, 785 S.E.2d at 178 (emphasis in original).

¶ 23 The State presented substantial evidence to submit to the jury the question of whether Defendant Pena “create[d] or allow[ed] to be created a substantial risk of physical injury, upon or to [her] child by other than accidental means” in violation of North Carolina General Statute § 14-318.2. The trial court did not err by denying Defendant Pena’s motion to dismiss.

*c. Conclusion*

¶ 24 Because the State presented substantial evidence of each element of misdemeanor child abuse, *see Watkins*, 247 N.C. App. at 394, 785 S.E.2d at 177, “a reasonable juror *could* have concluded that [both] defendant[s] [were] guilty based on the evidence presented by the State.” *Id.* at 396, 785 S.E.2d at 178 (emphasis in original). The trial court did not err by denying Defendants’ motions to dismiss.

## B. Defendants’ Motions to Reopen *Voir Dire*

### 1. Standard of Review

¶ 25 “In order for a defendant to show reversible error in the trial court’s regulation of jury selection, a defendant must show that the court abused its discretion and that he was prejudiced thereby.” *State v. Rodriguez*, 371 N.C. 295, 312, 814 S.E.2d 11, 23-24 (2018) (quotation 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.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523,

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527 (1988); *see also White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (“A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court’s decision] was so arbitrary that it could not have been the result of a reasoned decision.”).

## 2. Analysis

¶ 26 **[2]** All parties agree North Carolina General Statute § 15A-1214 governs jury selection. Section 15A-1214(g) provides:

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

(1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.

(2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.

(3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.

N.C. Gen. Stat. § 15A-1214(g) (2018). Section 15A-1214(g) gives the court “leeway to make an initial inquiry when allegations are received before a jury has been impaneled that would, if true, establish grounds for reopening *voir dire* . . .” *State v. Boggess*, 358 N.C. 676, 683, 600 S.E.2d 453, 457 (2004). “As part of this initial investigation, the judge may question any involved juror and may consult with counsel out of the juror’s presence. Based on information thus developed, the judge has discretion to reopen *voir dire* or take other steps suggested by the circumstances.” *Id.*

¶ 27 Defendants argue there was “good reason . . . to challenge [Juror Clark] for cause or, alternatively, to exercise a peremptory challenge[.]” (Capitalization altered.) The State argues that even with good cause, “the trial court is permitted, but is not required to reopen *voir dire*.” The trial court did not abuse its discretion, and Defendants’ arguments are overruled.

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¶ 28 Here, the trial court questioned Juror Clark after he offered his opinion that he thought Defendants should “answer the questions themselves.” The trial court sought to clarify Juror Clark’s opinion, then carefully instructed him “that [the Defendants] have a right to testify if they wish and they have a right not to testify if they wish, and you cannot hold that against them if they choose not to testify.” The trial court stretched this examination over two days, allowing Juror Clark to think on his opinion overnight before reexamining him the next morning. The trial court also heard arguments from counsel on both days. The trial court “ha[d] discretion to reopen *voir dire* or take other steps suggested by the circumstances[]” after its initial inquiry, *Bogges*, 358 N.C. at 683, 600 S.E.2d at 457, and ultimately chose to question Juror Clark without reopening *voir dire*.

¶ 29 Both Defendants cite our decision in *Bond*. See *State v. Bond*, 345 N.C. 1, 478 S.E.2d 163 (1996). They argue a juror’s equivocal statements as to the death penalty qualify as “good reason” to reopen *voir dire*, as were the juror’s statements in *Bond*, see *id.* at 20, 478 S.E.2d at 172, and Juror Clark’s statement here is a similarly “good reason” to reopen *voir dire*. But *Bond* is distinguishable. In *Bond*, the trial court reopened the prosecution’s *voir dire* after the juror appeared to have changed his mind regarding the death penalty between the State’s and the defense’s *voir dire*. *Id.* at 18-19, 478 S.E.2d at 171-72. *Voir dire* was still ongoing at the time of the trial court’s ruling, and the juror had not yet been passed upon by both the prosecution and the defense. *Id.* Here, as far as the record reflects, Juror Clark did not make equivocal statements until after jury selection was completed.<sup>2</sup> Juror Clark made a single statement after both parties had passed on him and he had been seated in seat 2. *Bond* is not controlling. But, more importantly, even if equivocal statements like those by the juror in *Bond* or Juror Clark’s statements volunteering an opinion can constitute “good cause” to reopen *voir dire*, the decision to reopen *voir dire* is still squarely within the discretion of the trial court. See N.C. Gen. Stat. § 15A-1214(g); *Rodriguez*, 371 N.C. at 312, 814 S.E.2d at 23-24; see also *Bond*, 345 N.C. at 19-20, 478 S.E.2d at 172 (“This Court has previously interpreted the language of N.C.G.S. § 15A-1214(g) and found that the decision to reopen *voir dire* rests in the trial court’s discretion. . . . [A]bsent a showing of abuse of discretion, the trial court’s decision to reopen the examination of prospective juror Robbins will not be disturbed.”). We must still review the trial court’s decision not to reopen *voir dire* for an abuse of discretion.

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2. Because jury selection was unrecorded, our record is limited to statements made after *voir dire*, but there is no contention the issue arose earlier.

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¶ 30 After examination of Juror Clark on the first day, the court expressed concerns about reopening *voir dire*:

We've already passed on jurors. If you didn't ask them that question, you know that -- it concerns me obviously that you're going to have other jurors stepping up saying the same thing. That's the attorneys' responsibility from both sides to ask what questions they feel are necessary to get a picture of whether or not, in their own mindset a juror can be fair and impartial to both sides.

I have great concerns about just starting back again with number two, and then even greater concerns if we were to do that in front of all the other jurors. It just opens a Pandora's box, and I'm not going to allow that to happen. I'll hear any further arguments in the morning if you want to go get me some case law or if you want to do a little research and you feel like you need to do a brief, any of those things are acceptable to the court.

The trial court reasoned that reopening *voir dire* would have a negative impact on the orderly disposition of Defendants' charges, possibly resulting in a lengthy delay, and instead opted to perform the extensive examination of Juror Clark, giving him overnight to continue to consider the trial court's instructions, to determine if his opinion would prevent him from serving as a fair and impartial juror. The trial court also allowed parties an additional opportunity to develop their arguments and be heard the next day. At the end of the first day, the trial court did not doubt Juror Clark's ability to remain fair and impartial:

The Court was satisfied when [Juror Clark] left yesterday that regardless of how he felt about the law, whether he liked it or disliked it, that he indicated that he would follow and obey the law as the Court instructed him.

And, after hearing additional arguments from counsel the next day, the trial court was still "satisfied with the answer of [Juror Clark]" and denied both Defendants' motions.

¶ 31 "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it

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could not have been the result of a reasoned decision.” *White*, 312 N.C. at 777, 324 S.E.2d at 833. The trial court in this case denied Defendants’ motions after inquiring into Juror Clark’s opinion and only after determining Juror Clark would be able to follow the law. Defendants’ motions were denied because the trial court was concerned that reopening *voir dire* would “open[] a Pandora’s box” and cause delays during Defendants’ trial, Defense counsel for both parties had already passed on Juror Clark, and Juror Clark gave repeated affirmations that he understood and could apply the law. The trial court came to “a reasoned decision” when it denied Defendants’ motions. *Id.*

¶ 32 We do not need to reach Defendants’ alternative argument that, “if *voir dire* of [Juror Clark] had been reopened and the trial court did not dismiss him for cause, [Defendants] could have used a peremptory challenge to remove him[,]” because the trial court did not abuse its discretion by refusing to reopen *voir dire*. See N.C. Gen. Stat. § 15A-1214(c)-(f) (2021) (establishing that peremptory challenges may only be exercised while *voir dire* is open). Because the trial court did not abuse its discretion by denying Defendants’ motions after examining Juror Clark without reopening *voir dire*, the trial court committed no error and did not violate § 15A-1214(g).

**C. Defendant Adams’s Conditions of Probation**

¶ 33 **[3]** “An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*.” *State v. Skipper*, 214 N.C. App. 556, 557, 715 S.E.2d 271, 272 (2011) (quoting *Armstrong v. N.C. State Bd. of Dental Examiners*, 129 N.C. App. 153, 156, 499 S.E.2d 462, 466 (1998)).

¶ 34 Defendant Adams asserts the trial judge violated North Carolina General Statute § 15A-1451(a)(4) by “order[ing] him to enroll in co-parenting classes and serve the active portion of his split sentence before the appeal was decided.” The State concedes that this was an error. After a review of the judgment, we agree the trial court did err by ordering Defendant Adams to fulfill conditions of his probation while his appeal was pending. Although the trial court’s judgment is identical as to Defendant Pena, she failed to argue this issue on appeal and it has been abandoned. See N.C. R. App. P. 28(a).

¶ 35 North Carolina General Statute § 15A-1451(a)(4) provides: “(a) When a defendant has given notice of appeal: . . . (4) Probation or special probation is stayed.” N.C. Gen. Stat. § 15A-1451(a)(4) (2018). Defendant Adams gave notice of appeal in open court after the trial court suspended his sentence and ordered the co-parenting classes as conditions

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of probation. Then, the trial court included the following in its written judgment: “Probation is to commence once the appeal decision is reached *but the Defendant is to enroll [and] complete the co-parenting classes while the appeal is pending . . .*” (Capitalization altered and emphasis added.) Because Defendant Adams’s probation was stayed by North Carolina General Statute § 15A-1451 upon his notice of appeal, the trial court erred when it ordered Defendant Adams to complete conditions of his probation while his appeal was pending. We remand for resentencing.

### III. Conclusion

¶ 36 We conclude the trial court did not err by denying Defendants’ motions to dismiss and motions to reopen *voir dire* of Juror Clark. We also conclude the trial court erred by ordering Defendant Adams to complete his probation while his appeal was pending. The case is remanded for resentencing as to Defendant Adams only.

NO ERROR IN PART; REMANDED IN PART.

Judges ARROWOOD and WOOD concur.

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STATE OF NORTH CAROLINA  
v.  
RONALD DALE CHEERS, DEFENDANT

No. COA21-498

Filed 6 September 2022

### Satellite-Based Monitoring—jurisdiction—recidivist status—sufficiency of findings

Where, in light of *State v. Grady*, 327 N.C. 509 (2019), the trial court vacated a previous order imposing lifetime satellite-based monitoring (SBM) on defendant and issued a new order requiring him to enroll in SBM for a period of 30 years, the appellate court rejected defendant’s argument that the trial court lacked subject matter jurisdiction to do so, as the trial court continued jurisdiction over the original order and could modify it pursuant to defendant’s motion for appropriate relief. Further, the trial court had statutory authority to impose SBM because defendant’s offense was committed against a minor; and finally, the trial court made sufficient

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findings to support its determination that defendant required the “highest possible level of supervision and monitoring” for a term of 30 years.

Appeal by Defendant from order entered 20 January 2021 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 7 June 2022.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.*

*Dylan J.C. Buffum Attorney at Law, PLLC, by Dylan J.C. Buffum, for Defendant-Appellant.*

INMAN, Judge.

¶ 1 Defendant-Appellant Ronald Dale Cheers (“Defendant”) appeals from an order of the trial court vacating a previous order imposing lifetime satellite-based monitoring (“SBM”) and ordering him to enroll for a period of 30 years. He argues: (1) the trial court lacked subject matter jurisdiction to conduct an evidentiary hearing and impose SBM upon him; (2) the trial court did not have statutory authority at the time of his hearing to impose a term of years based on his classification as a “recidivist;” and (3) the trial court erred in concluding Defendant required the “highest level of supervision.” After careful consideration of our SBM statutes, precedent, and the record, we affirm the order of the trial court.

### I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 On 30 June 2008, Defendant pled guilty to two counts of indecent liberties with a child after sexually abusing the minor daughter of his then-girlfriend. Pursuant to the plea agreement, the trial court consolidated his convictions and sentenced him to 25 to 30 months in prison, with credit for 342 days of pre-trial confinement. The trial court also ordered Defendant to enroll in SBM for his natural life (“2008 SBM order”). The form order included the finding:

The defendant was convicted of a reportable conviction as defined by [N.C. Gen. Stat. §] 14-208.6(4) and is required to register under Part 3 of Article 27A of Chapter 14 of the General Statutes because the defendant is classified as a sexually violent predator, is a recidivist, or was convicted of an aggravated

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offense as those terms are defined in [N.C. Gen. Stat. §] 14-208.6.

However, the order did not specify which statutory ground—sexually violent predator, recidivist, or aggravated offender—required Defendant’s lifetime enrollment.

¶ 3 After two years in prison, in May 2010, Defendant was unconditionally discharged and his rights to citizenship were restored. Nearly ten years later, in light of our Supreme Court’s holding in *State v. Grady*, 327 N.C. 509, 831 S.E.2d 542 (2019) (“*Grady III*”), that our SBM statutes were unconstitutional as applied to unsupervised recidivists, the State served Defendant with two notices of hearing to review Defendant’s lifetime SBM enrollment. Then, the State advised Defendant’s counsel via e-mail that Defendant’s “previous compulsory lifetime SBM [was] unconstitutional” and Defendant was “entitled to a SBM hearing if and when he want[ed] to petition the court for removal based upon the ruling in *Grady*.”

¶ 4 Upon the State’s recommendation, on 24 August 2020, Defendant filed a motion for appropriate relief (“MAR”), seeking to terminate his mandatory lifetime enrollment in SBM. The State then moved to deny Defendant’s motion, requesting instead that the trial court convert Defendant’s motion to a “Petition to Terminate Defendant’s Satellite-Based Monitoring” and conduct a hearing to determine whether Defendant should be enrolled in the SBM program for a term of years pursuant to N.C. Gen. Stat. § 14-208.40A (2019). In its motion, the State conceded that, at the time Defendant was convicted of two counts of indecent liberties in 2008, the trial court had enrolled Defendant in SBM based on his statutory classification as a recidivist.

¶ 5 Defendant’s motion came on for hearing on 8 January and 13 January 2021. On 20 January 2021, the trial court vacated the 2008 lifetime SBM order, concluded Defendant “require[d] the highest level of supervision and monitoring,” and ordered Defendant enroll in SBM for a term of 30 years, retroactive to his initial monitoring on 26 May 2010 (“2021 SBM order”). In its order, the trial court found the 2008 lifetime enrollment order “was unclear as to why the Defendant was ordered to enroll in lifetime [SBM].” Defendant appeals.

## II. ANALYSIS

### A. Trial Court’s Jurisdiction

¶ 6 Defendant argues the trial court lacked subject matter jurisdiction to conduct an evidentiary hearing in January 2021 and enter an

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order imposing SBM. We hold the trial court appropriately exercised its jurisdiction.

¶ 7 Whether a trial court has subject matter jurisdiction is a question of law, which we review *de novo*. *State v. Billings*, 278 N.C. App. 267, 2021-NCCOA-306, ¶ 14. Under *de novo* review, we consider the matter anew and freely substitute our own judgment for that of the lower tribunal. *Id.*

¶ 8 Defendant relies on *Billings*, a recent decision from this Court about the trial court’s jurisdiction to conduct an SBM hearing, but he overlooks a key distinction between that case and the one before us and ignores more recent precedent from our Supreme Court on the issue. In *Billings*, we considered whether the trial court had jurisdiction to conduct an SBM hearing ten years after the offender was enrolled in SBM, two years after he was convicted and sentenced on his most recent offense, based solely on a scheduled hearing in the absence of any motion for SBM review. *Id.* ¶¶ 17, 21-23. We interpreted our SBM statutes to permit the trial court to conduct an SBM hearing either “during the sentencing phase” or “[w]hen an offender is convicted of a reportable conviction . . . and *there has been no determination by a court on whether the offender shall be required to enroll in satellite-based monitoring[.]*” *Id.* ¶¶ 23, 24 (emphasis in original) (quoting N.C. Gen. Stat. §§ 14-208A(a), 14-208.40B(a) (2019)). Neither of those scenarios existed, *id.* ¶ 25, so we considered whether the trial court’s jurisdiction had otherwise properly been invoked by “valid motion, complaint, petition, or other valid pleading[.]” *Id.* ¶ 28 (quotation marks and citation omitted). Because no motion was filed, we held the trial court was without jurisdiction to conduct an SBM hearing where the offender had already been enrolled and vacated the trial court’s order without prejudice to the State’s filing “an application for satellite-based monitoring.” *Id.* ¶¶ 31-33.

¶ 9 In this case, Defendant filed an MAR with the trial court after the State advised him that he was entitled to relief under *Grady III*. Unlike in *Billings*, Defendant’s own motion properly brought the matter before the trial court. In fact, at the hearing, the trial court opened: “We are back on the record . . . on the motion for appropriate relief.” Defendant’s counsel began his argument, “I filed this motion for appropriate relief on August 4, 2020, on behalf of [Defendant], pursuant to the recent case law in . . . *Grady*.”

¶ 10 Further, though Defendant filed a criminal MAR, recent precedent from our Supreme Court has clarified that SBM orders are “civil in nature[.]” *State v. Hilton*, 378 N.C. 692, 2021-NCSC-115, ¶ 34 (“Since

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the SBM program is civil in nature, the North Carolina Rules of Civil Procedure govern. As such, a defendant may also seek removal of SBM through Rule 60(b).” (citation omitted)); *see also State v. Strudwick*, 379 N.C. 94, 2021-NCSC-127, ¶¶ 17-18 (“The trial courts of this state are endowed with ‘ample power to vacate judgments whenever such action is appropriate to accomplish justice’ through the operation of Rule 60(b)(6) and are invited to wield that power in a judicious manner.” (quoting *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971))).

¶ 11 Rule 60(b)(6) provides that “upon such terms as are just, the court may relieve a party . . . from a final . . . order . . . [for] [a]ny . . . reason justifying relief from the operation of the judgment.” N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2021). “The test for whether a[n] . . . order . . . should be modified or set aside under Rule 60(b)(6) is two-pronged: (1) extraordinary circumstances must exist, and (2) there must be a showing that justice demands that relief be granted.” *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987).

¶ 12 Following our Supreme Court’s recent precedent in *Hilton* and *Strudwick*, we hold the trial court had continued jurisdiction over the original 2008 SBM order and could modify it pursuant to Defendant’s motion. Defendant has not shown the trial court abused its discretion otherwise. *See Bank of Hampton Rds. v. Wilkins*, 266 N.C. App. 404, 406, 831 S.E.2d 635, 639 (2019) (“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.”).

¶ 13 Assuming *arguendo* the trial court lacked jurisdiction, Defendant cannot ask this Court to invalidate the very relief he requested. *See* N.C. Gen. Stat. § 15A-1443(c) (2021) (“[A] defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.”); *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (“A defendant who invites error has waived his right to all appellate review concerning the invited error.”).

## B. Recidivist Status

¶ 14 Defendant contends the trial court lacked statutory authority to impose SBM because, as a recidivist convicted of an offense involving the physical, mental, or sexual abuse of a minor, he was not eligible for SBM under our statutes as they existed at the time of the hearing. We hold Defendant’s reading of our statutes conflicts with precedent defining the Legislature’s intent.

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¶ 15 “[A]lleged statutory errors are questions of law and as such, are reviewed *de novo*.” *State v. Harding*, 258 N.C. App. 306, 321, 813 S.E.2d 254, 265 (2018).

¶ 16 Defendant’s prior convictions/record level worksheet is not included in the record on appeal, but the trial court’s findings in the 2021 SBM order reveal Defendant was also convicted of four counts of indecent liberties with a child in 1994. Defendant has not challenged that finding, so it is binding on this Court. *See Strudwick*, ¶ 24 (“[U]nchallenged findings of fact are binding on appeal.” (quotation marks and citation omitted)).

¶ 17 In its order imposing SBM for 30 years, the trial court also found Defendant’s offense “involv[ed] the physical, mental or sexual abuse of a minor pursuant to N.C. Gen. Stat. § 14-208.40A” and “Defendant is a recidivist[.]” Because the trial court found Defendant fit into both statutory categories, Defendant does not fall into the unsupervised, recidivist-only class exempted from lifetime monitoring under *Grady III*. *See Grady III*, 372 N.C. at 545, 831 S.E.2d at 569 (“The category to which this holding applies includes only those individuals who are not on probation, parole, or post-release supervision; who are *subject to lifetime SBM solely by virtue of being recidivists* as defined by the statute.” (emphasis added)); *Strudwick*, ¶ 20 (“[T]he holding of *Grady III* concerning the unconstitutionality of North Carolina’s lifetime SBM scheme as it applies to recidivists . . . is wholly inapplicable.” (citation omitted)). Thus, not unlike the defendants in *Strudwick* and *Hilton* who, as aggravated offenders, fell outside *Grady III*’s holding, Defendant, even as a recidivist, *also* committed an offense involving the physical, mental, or sexual abuse of a minor and is beyond *Grady III*’s reach. *See Hilton*, ¶ 20 (explaining *Grady III* “left unanswered the question of whether the SBM program is constitutional as applied to sex offenders who are in categories other than that of recidivists who are no longer under State supervision.”).

¶ 18 The version of our statutes in effect at the time of the 2021 SBM order from which Defendant appeals provided:

(d) If the court finds that the *offender committed an offense that involved the physical, mental, or sexual abuse of a minor*, that the offense is not an aggravated offense or a violation of G.S. 14-27.23 or G.S. 14-27.28 and the offender is not a recidivist, the court shall order that the Division of Adult Correction do a risk assessment of the offender. . . .

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(e) Upon receipt of a risk assessment from the Division of Adult Correction and Juvenile Justice pursuant to subsection (d) of this section, the court shall determine whether, based on the Division of Adult Correction and Juvenile Justice's risk assessment, the offender requires the highest possible level of supervision and monitoring. If the court determines that the offender does require the highest possible level of supervision and monitoring, the court shall order the offender to enroll in a satellite-based monitoring program for a period of time to be specified by the court.

§ 14-208.40A(d)-(e) (2019) (emphasis added). Since the trial court entered the 2021 SBM order, Subsections 14-208.40A(d) and (e) have been amended so that recidivists, now referred to as "reoffenders," are subject to the same procedures outlined above. *See* 2021 N.C. Sess. Laws 138, § 18(d); § 14-208.40A(c)-(c1) (2022).

¶ 19 Defendant's own summary of our caselaw acknowledges that the trial court's finding that his offense involved the physical, mental, or sexual abuse of a minor makes him eligible for enrollment in the SBM program. *See Harding*, 258 N.C. App. at 322, 813 S.E.2d at 266. In addition, his reading of the previous iteration of the statute would lead to absurd results, contrary to the intent of the General Assembly in identifying specific categories of sex offenders subject to monitoring, including those convicted of an offense involving the physical, mental, or sexual abuse of a minor. *See State v. Jones*, 367 N.C. 299, 306, 758 S.E.2d 345, 350 (2014) ("Where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." (cleaned up)).

¶ 20 We must construe Subsections 14-208.40A(d) and (e) together and *in pari materia* with other provisions of the SBM statutes in effect at the time of the 2021 SBM order. *See State v. Rankin*, 371 N.C. 885, 889, 821 S.E.2d 787, 792 (2018) ("Parts of the same statute dealing with the same subject matter must be considered and interpreted as a whole." (citations omitted)); *State v. Jones*, 359 N.C. 832, 836, 616 S.E.2d 496, 498 (2005) ("In discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible."). Subsection 14-208.40(a)(2), in particular, provided the SBM program "shall be designed to monitor three categories of offenders[,] including any offender that

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(i) is convicted of a reportable conviction as defined by [N.C. Gen. Stat. §] 14-208.6(4), (ii) is required to register under Part 2 of Article 27A of Chapter 14 of the General Statutes, (iii) *has committed an offense involving the physical, mental, or sexual abuse of a minor*, and (iv) based on the Division of Adult Correction and Juvenile Justice’s risk assessment program requires the highest possible level of supervision and monitoring.

§ 14-208.40(a)(2) (2019) (emphasis added).

¶ 21 In holding our SBM statutes were unconstitutional as applied to unsupervised, recidivist offenders in *Grady III*, our Supreme Court created a loophole for individuals in Defendant’s position, as an unsupervised recidivist convicted of an offense involving the physical, mental, or sexual abuse of a minor. Recent legislative amendments resolved this discrepancy and bolstered the Legislature’s original intent for the SBM regime—that sexually violent predators, recidivists, aggravated offenders, offenders convicted of an offense violating N.C. Gen. Stat. §§ 14-27.2A or 14-27.4A, and offenders convicted of an offense involving the physical, mental, or sexual abuse of a minor, be subject to SBM. *See* 2021 N.C. Sess. Laws 138, § 18(d); § 14-208.40A(c)-(c1) (2022). And, as noted above, in *Hilton* and *Strudwick*, our Supreme Court held that the imposition of lifetime SBM to offenders like Defendant, who meet statutory criteria other than as a recidivist, does not violate the Fourth Amendment. *Hilton*, ¶ 36 (holding “the SBM statute as applied to aggravated offenders is not unconstitutional” because the “search effected by the imposition of lifetime SBM on the category of aggravated offenders is reasonable under the Fourth Amendment”); *Strudwick*, ¶ 28 (holding lifetime SBM was constitutional for another aggravated offender).

¶ 22 Based on our canons of statutory construction and binding precedent, we hold the trial court did not err in imposing SBM upon Defendant for a period of 30 years.

¶ 23 Further, we note the Legislature amended our SBM regime just several months after the trial court entered its order from which Defendant now appeals. *See* 2021 N.C. Sess. Laws 138, § 18(d). Those legislative amendments provide in part that Defendant may petition the trial court to modify or terminate his SBM enrollment, and the trial court must cap the term at ten years. *See* N.C. Gen. Stat. § 14-208.46(a) (2022) (“An offender who was ordered prior to December 1, 2021, to enroll in satellite-based monitoring for a period longer than 10 years may file a

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petition for termination or modification of the monitoring requirement with the superior court in the county where the conviction occurred.”); *State v. Anthony*, 2022-NCCOA-414, ¶ 19 (“[I]f the offender has been enrolled for at least 10 years already, ‘the court shall order the petitioner’s requirement to enroll in the satellite-based monitoring program be terminated.’ Combined with a change setting a ten-year maximum on new SBM enrollments, the statutory system now limits SBM to ten years for all offenders.” (quoting N.C. Gen. Stat. § 14-208.46(d)-(e)) (citations omitted)). In other words, since Defendant has been enrolled in SBM for more than ten years, he can obtain a court order terminating that enrollment today.

**C. Sufficient Findings to Support “Highest Level of Supervision”**

¶ 24 Lastly, Defendant asserts the trial court erred in determining he required the “highest level of supervision” based on a mistaken understanding of his risk assessment and because it failed to enter sufficient “additional findings” derived from competent evidence to justify the monitoring for a period of 30 years.

¶ 25 We review the trial court’s findings of fact in an SBM order to determine whether they are supported by competent evidence, and we review the trial court’s conclusions of law “for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found.” *Harding*, 258 N.C. App. at 321, 813 S.E.2d at 265 (citations omitted). For Defendant’s challenge, in particular, we review the trial court’s order “to ensure that the determination that ‘defendant requires the highest possible level of supervision and monitoring’ ‘reflect[s] a correct application of law to the facts found.’” *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (citation omitted).

¶ 26 Defendant concedes “as a matter of historical fact” that he scored a “4” on the Static-99R evaluation conducted on 6 January 2021. But Defendant argues Findings of Fact 7 and 8: (1) are unsupported by competent evidence; (2) demonstrate the trial court misunderstood the application of Defendant’s Static-99R score because the assessment measures the estimated likelihood of recidivism at the time an offender is released up to two years post-release where Defendant had not re-offended for ten years in the community; and (3) indicate the trial court misconstrued Defendant’s recidivism risk percentage. The trial court’s findings provide:

7. Defendant scored a “4” on the Static-99R evaluation conducted January 6, 2021, indicating Defendant is at an “above average risk” of recidivism;

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8. Pursuant to the Static 99R result, Defendant's sexual recidivism rate is in the moderate high-risk category of 6.1-12.2%[.]

The Static-99R Coding Rules provide:

The longer an offender has been free of detected sexual offending since his release to the community from their index sex offence, the lower their risk of recidivism. Our research has found that, in general, for every five years the offender is in the community without a new sex offence, their risk for recidivism roughly halves. Consequently, we recommend that for offenders with two years or more sex offence free in the community since release from the index offence, the time they have been sex offence free in the community should be considered in the overall evaluation of risk. Static risk assessments estimate the likelihood of recidivism at the time of release and we expect they would be valid for approximately two years.

Soc'y for the Advancement of Actuarial Risk Need Assessment, *Static-99R Coding Rules* 13 (Rev. 2016).<sup>1</sup>

¶ 27 Based on the Static-99R guidance, Defendant argues the trial court should have considered that he had not committed a sex offense for a decade since his release in its risk assessment and that his risk should have been 3.0 to 6.1 percent, in the "low" to "moderate-low" risk range.

¶ 28 Even if, as Defendant argues, the trial court misunderstood or misapplied Defendant's Static-99R rating, the trial court made sufficient additional findings based in competent evidence to support the "highest level of supervision:" (1) Defendant scored a "4" on his recent Static-99R; (2) Defendant authored a letter prior to his 2008 conviction saying he would "do it again when [he] g[o]t out;" (3) Defendant's prior record level was IV; (4) Defendant had been convicted of six counts of taking indecent liberties and had disclosed to his therapist that he had impregnated a fourteen-year-old when he was in college, forcing the child to have an abortion; (5) Defendant had not completed sex offender treatment either while in prison or since his release; (6) he abused a position of trust and authority in perpetrating the sex offenses; (7) Defendant

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1. Available at: <https://saarna.org/download/static-99r-coding-rules-revised-2016/>.

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had several non-compliance issues with his monitoring device since his release; and (8) based on a psycho-evaluation of Defendant, Defendant had minimized his criminal conduct which “could be a sign of dishonesty.” The trial court made sufficient findings to support its determination that Defendant required the “highest possible level of supervision and monitoring” for a term of 30 years. *See Kilby*, 198 N.C. App. at 366, 679 S.E.2d at 432. *Cf. State v. Dye*, 254 N.C. App. 161, 170-71, 802 S.E.2d 737, 743 (2017) (“[T]he trial court found that Defendant required the highest possible level of supervision and monitoring ‘based on the risk assessment of the Division of Adult Correction,’ and did not make any further findings of fact as to why SBM was appropriate. This finding was in error, and requires us to vacate the SBM order.”).

## III. CONCLUSION

¶ 29 Based on the foregoing, we affirm the order of the trial court vacating Defendant’s lifetime SBM enrollment and ordering Defendant to enroll in SBM for a term of 30 years.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

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STATE OF NORTH CAROLINA  
v.  
RAY MARSHALL LAWSON, SR.

No. COA21-698

Filed 6 September 2022

**1. Indictment and Information—felony animal cruelty—name of horse—surplusage**

In an indictment charging defendant with felony animal cruelty, the trial court properly allowed the State to amend the indictment by removing the name of the horse, which was not an essential element of the offense and therefore was not required to render the indictment facially valid. Further, the remaining description of the animal as a “chestnut mare horse” was sufficiently clear to allow defendant the ability to prepare an adequate defense and to protect himself from being twice put in jeopardy for the same offense.

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**2. Criminal Law—prosecutor’s closing argument—felony animal cruelty—reading of case law—not grossly improper**

The prosecutor’s closing argument in a trial for felony animal cruelty—during which the prosecutor read to the jury, without objection, the facts of a prior animal cruelty case and opined that since the facts were similar to the instant case, the element of intent was established beyond a reasonable doubt—was not so grossly improper as to require a new trial, given the overwhelming evidence presented by the State.

Appeal by Defendant from Order entered 27 January 2021 by Judge Josephine K. Davis in Durham County Superior Court. Heard in the Court of Appeals 7 June 2022.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt B. Orsbon, for defendant-appellant.*

HAMPSON, Judge.

**Factual and Procedural Background**

¶ 1 Raymond Marshall Lawson Sr. (Defendant) appeals from Judgment entered upon his conviction by a jury for felony animal cruelty. The Record, including evidence introduced at trial, tends to reflect the following:

¶ 2 Two brothers, William and Coleman Cameron, both of whom are now deceased, owned adjacent parcels of land in Durham County. Prior to their death, Defendant paid Coleman \$6,000 for “lifetime rights” to keep his horses on Coleman’s property. Coleman also allegedly gave Defendant two of his horses in the same transaction. In total, Defendant kept seven horses on Coleman’s property. In 2016 William died, and his nephew, Greg Lee (Mr. Lee), moved onto the land William formerly owned and “kept an eye on” Coleman’s property.

¶ 3 After moving onto the property in 2016, Mr. Lee disputed Defendant’s ownership of the two horses Coleman allegedly gave to Defendant, claiming they still belonged to the deceased Coleman. On 25 February 2016, Defendant discovered that Mr. Lee shot and killed one of the horses Coleman had given him after it allegedly “went lame.” Mr. Lee attempted to cremate the body in lieu of burying it as the ground was too cold and hard at the time.

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¶ 4 That day Defendant called the Durham County Sheriff's Office in an attempt to press charges against Mr. Lee for killing his horse. However, Sheriff's Deputies told Defendant the horse's ownership was a probate question, and they were powerless to help until a court resolved the issue. The Deputies directed Defendant to bury the dead horse and departed the scene. The next day, on 26 February 2016, Deputies returned for a "compliance follow-up." The Deputies confirmed that Defendant had buried the horse and saw him feeding the remaining horses.

¶ 5 On 4 June 2016, Mr. Lee called animal control to report several deceased horses on the property. Officers with the Durham County Animal Services division (Animal Services) responded to the call. Once on the scene, Animal Services discovered the skeletal remains of three horses. Additionally, one emaciated "chestnut mare" horse was found in Defendant's paddock, still alive. The horse's ribs, spine, hips, and tail bone were visible through its skin. The paddock had no food or water, and the ground lacked any forageable vegetation. The horse also had a severe bacterial skin infection known as "rain rot," wherein the horse develops painful lesions on its skin.

¶ 6 Deputies obtained a warrant to seize the emaciated horse. The horse was taken to the Durham Animal Protection Society (APS). Durham APS subsequently transferred the horse to a rescue in Orange County for more intensive medical care.

¶ 7 Two days later, on 6 June 2016, a Deputy went to Defendant's house to speak with him. During the conversation, Defendant announced that he could no longer care for his horses and wished to surrender them.

¶ 8 Defendant filled out the paperwork and surrendered a total of five horses.

¶ 9 On 19 August 2019, Defendant was charged with felony animal cruelty, misdemeanor animal cruelty, and misdemeanor animal abandonment. Defendant's indictment for the felony animal cruelty charge originally read:

And the jurors for the State upon their oath present that on or about the date of offense shown and in the county named above, the defendant named above unlawfully, willfully, and feloniously did maliciously torture by deprivation of necessary sustenance of an animal, a chestnut mare horse named "Diamond," owned by the Defendant and/or Raykell Jeanee Smith.

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¶ 10 Subsequently, the State dismissed the two misdemeanor charges leaving only the felony animal cruelty charge under N.C. Gen. Stat. § 14-360(b) (2021). The State also moved to strike surplus language in the indictment seeking to remove the words “named Diamond” from each count.

¶ 11 On 20 January 2021, the trial court conducted a hearing on the motion. At this hearing, defense counsel argued that the change would force Defendant to defend against broader charges. Prior to the change, Defendant argued he had planned his defense around the theory that the horse the State seized was not Diamond and did not belong to Defendant. Defense counsel argued Defendant would be prejudiced by the amendment because he would now be unable to argue the horse at issue was not Diamond and thus not his. The State countered by arguing that only one horse was seized, and the modification would not change the alleged identity of the horse and would not prejudice Defendant’s planned argument. The State further argued that the name was surplusage, and Defendant was still free to argue that the horse was named Diamond and did not belong to Defendant. Ultimately the trial court granted the motion over the defense counsel’s objections.

¶ 12 Trial began on 20 January 2021. During the State’s case in chief, four witnesses testified that it was Defendant who owned the horse in question and the paddock in which it was found. Additionally, Defendant’s expert witness testified that the emaciated horse “could very well be Diamond.” Defendant himself was unable to explain where his horse was now if, in fact, the State had incorrectly identified the horse seized by Animal Services as belonging to him.

¶ 13 During the State’s closing arguments, the prosecutor argued that the intent element of animal cruelty was proven beyond a reasonable doubt by reading to the jury facts from a similar case, *State v. Coble*, 163 N.C. App. 335, 593 S.E.2d 109 (2004), in which this Court upheld an animal cruelty judgment. The prosecutor told the jury that the facts should “sound familiar” because they were “the same things we have here for intent.” The State’s closing argument drew no objections from defense counsel.

¶ 14 After trial, on 27 January 2021, the jury found Defendant guilty of felony animal cruelty. The trial court sentenced Defendant to 11 to 23 months in prison but elected to suspend the sentence for 36 months of supervised probation. Defendant gave Notice of Appeal in open court on the same day.

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**Issues**

¶ 15 The issues on appeal are whether: (I) the removal of the name of the horse from the indictment rendered it facially invalid; and (II) the prosecutor's recitation of case law during her closing argument constituted gross impropriety necessitating a new trial.

**Analysis****I. Removal of Horse's Name from Indictment**

¶ 16 **[1]** Defendant contends that the horse's name was an essential element of the charged crime and that deleting it deprived him of the opportunity to prepare an adequate defense and now exposes him to double jeopardy. Thus, Defendant argues that the State's amendment to remove the name of the horse from the indictment rendered it facially invalid and, therefore, deprived the trial court of jurisdiction.

¶ 17 "When a criminal defendant challenges the sufficiency of an indictment lodged against him, that challenge presents this Court with a question of law which we review *de novo*." *State v. Oldroyd*, 380 N.C. 613, 2022-NCSC-27, ¶ 8. Indictments are not required to conform to any "technical rules of pleading." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). However, indictments must conform to certain threshold requirements and the strictures of N.C. Gen. Stat. § 15A-924 (2021). Generally, indictments must (1) be sufficiently clear as to "allow the defendant to identify the event or transaction against which [they have] been called to answer so that [they] may prepare a defense," (2) be sufficiently specific to "protect the defendant against being twice put in jeopardy for the same crime," *Oldroyd*, 2022-NCSC-27, ¶ 8, and (3) "allege all of the essential elements of the offense charged." *State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985).

¶ 18 The requirements are satisfied with "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C. Gen. Stat. § 15A-924(a)(5) (2021). *See also Oldroyd*, 2022-NCSC-27, ¶¶ 7–8 ("[A]n indictment is sufficient if it asserts facts plainly, concisely, and in a non-evidentiary manner which supports each of the elements of the charged crime with the exactitude necessary to allow the defendant to prepare a defense and to protect the defendant from double jeopardy.").

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¶ 19 Additionally,

[e]very criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment.

N.C. Gen. Stat. § 15-153 (2021).

¶ 20 Pursuant to N.C. Gen. Stat. § 15A-923(e) (2021), indictments may not be amended, meaning there must be no change “which would substantially alter the charge set forth in the indictment.” *State v. Price*, 310 N.C. 596, 598, 313 S.E.2d 556, 558 (1984). However, “if an indictment contains an averment unnecessary to charge the offense, such averment may be disregarded as inconsequential surplusage.” *State v. Grady*, 136 N.C. App. 394, 396–97, 524 S.E.2d 75, 77 (2000). Accordingly, surplus language which “in no way change[s] the nature or the degree of the offense charged” may be stricken from an indictment. *State v. Peele*, 16 N.C. App. 227, 233, 192 S.E.2d 67, 71, *cert. denied*, 282 N.C. 429, 192 S.E.2d 838 (1972).

¶ 21 In the case at bar, Defendant was indicted for felony animal cruelty under N.C. Gen. Stat. § 14-360(b) (2021). The elements of felony animal cruelty under N.C. Gen. Stat. § 14-360(b) (2021) are (1) intentional and malicious (2) torture, mutilation, maiming, cruelly beating, disfiguring, poisoning, or killing of (3) any animal.<sup>1</sup> Thus, the indictment must allege all of these elements in a non-evidentiary fashion and in a manner sufficiently clear and specific so as to “allow the defendant to identify the event or transaction against which he had been called to answer so that he may prepare a defense” and “protect the defendant against being twice put in jeopardy for the same crime.” *Oldroyd*, 2022-NCSC-27, ¶ 8.

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1. “As used in this section, the words ‘torture’, ‘torment’, and ‘cruelly’ include or refer to any act, omission, or neglect causing or permitting unjustifiable pain, suffering, or death. As used in this section, the word ‘intentionally’ refers to an act committed knowingly and without justifiable excuse, while the word ‘maliciously’ means an act committed intentionally and with malice or bad motive. As used in this section, the term ‘animal’ includes every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia except human beings.” N.C. Gen. Stat. § 14-360(c) (2021).

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¶ 22 Here, the trial court’s Order granting the motion to strike surplus language removed only the words “named ‘Diamond’ ” from the indictment, leaving the animal described as only a “chestnut mare horse.” However, on 4 June 2016, there was only one living horse, a chestnut mare, that Animal Services seized from the property. Thus, the indictment, with or without the horse’s name, was sufficiently clear as to “allow the defendant to identify the event or transaction against which he had been called to answer so that he may prepare a defense.” *See Oldroyd*, 2022-NCSC-27, ¶ 8. Indeed, the identity of the chestnut mare horse at issue was known to all parties at all times, both before and after the motion to strike surplus language. Additionally, only one horse was ultimately discussed at trial, and, despite the change in the indictment, the State continued to allege that the horse’s name was “Diamond.”

¶ 23 Following the modification and through trial, Defendant and all other parties continued to understand precisely what horse and what event the indictment referred to, and the same remains clear to any potential future court. Thus, the indictment remained sufficiently clear to “allow the defendant to identify the event or transaction against which he had been called to answer so that he may prepare a defense,” and sufficiently specific to “protect the defendant against being twice put in jeopardy for the same crime.” *Id.*

¶ 24 Moreover, under N.C. Gen. Stat. § 14-360(b) (2021), the name of the horse is not an essential element of the crime of felony animal cruelty. Indeed, it has long been held that it is acceptable to identify subject animals by general description in indictments. *See State v. Credle*, 91 N.C. 640, 643–46 (1884) (the words “cattle beast” in an indictment were sufficient in a case where the defendant was charged with killing the ox of another). In this case, ultimately, the name of the horse was immaterial to the offense charged because there was no confusion as to the horse—the chestnut mare—at issue. As such, here, striking the name of the horse “in no way change[s] the nature or the degree of the offense charged[.]”<sup>2</sup> *Peele*, 16 N.C. App. at 233, 192 S.E.2d at 71.

¶ 25 Therefore, inclusion of the horse’s name was not necessary in this case to charge the offense by way of a facially valid indictment and did

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2. There may well be instances where the name of the animal at issue may be necessary—or at least helpful—to avoid confusion, to distinguish between animals, avoid double jeopardy concerns and, in turn, amending an indictment to reference a potentially different animal could be problematic. We need not and do not decide that issue today as, in this case, the Record reflects no confusion as to the horse the State alleged to be at issue.

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not change the nature or degree of offense charged. Thus, it was permissible to strike the name of the horse from the indictment as surplusage. Consequently, the trial court did not err in allowing the State's motion to amend the indictment.

II. The State's Closing Argument

¶ 26 **[2]** Defendant contends that the prosecutor's reading of case law in closing argument constituted gross impropriety making it an error for the trial court to fail to intervene *ex mero motu*, necessitating a new trial.

¶ 27 In this case, because the statement at issue did not draw an objection from defense counsel, 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 . . . .

*State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002). 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). Both elements are essential for this Court to find that "the error merits appropriate relief." *Id.*

¶ 28 When reviewing for gross impropriety, "[o]ur standard of review dictates that '[o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.'" *Id.* (quoting *State v. Anthony*, 354 N.C. 372, 427, 555 S.E.2d 557, 592 (2001)). "[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L.Ed.2d 144, 157 (quoting *Darden v. Wainwright*, 699 F.2d 1031, 1036 (11th Cir. 1983)). A prosecutor's statements are not reviewed

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in a vacuum; rather, we take them “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).

¶ 29 Further, even when an argument is deemed so improper, and the trial court should have intervened *ex mero motu*, this Court is not permitted to presume prejudice; rather, Defendant has the burden of demonstrating prejudice. *See Huey*, 370 N.C. at 186, 804 S.E.2d at 474. In order for a new trial to be ordered, the prosecutor’s statements must have been so improper that they “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Wainwright*, 477 U.S. at 169, 91 L. Ed. 2d at 145. There must be “a showing that the argument is so grossly improper that a defendant’s 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. 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 184.

¶ 30 “In jury trials, the whole case as well of law as of fact may be argued to the jury.” N.C. Gen. Stat. § 7A-97 (2021). This statute “grants counsel the right to argue the law to the jury, which includes the authority to read and comment on reported cases and statutes.” *State v. Gardner*, 316 N.C. 605, 611, 342 S.E.2d 872, 876 (1986). However, “counsel may not read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client.” *Id.*

¶ 31 Here, the prosecutor read the jury the facts of *State v. Coble*, 163 N.C. App. 335, 593 S.E.2d 109 (2004), and told them that the facts should “sound familiar” because “that is the same things we have here for intent.” Presuming, without deciding, the prosecutor’s reading from *Coble* and argument thereon in this case was improper, Defendant cannot show the argument was so grossly improper, in light of the full context and the evidence presented against Defendant, that Defendant’s “right to a fair trial was prejudiced by the trial court’s failure to intervene.” *Huey*, 370 N.C. at 174, 804 S.E.2d at 469–70.

¶ 32 The evidence presented included the testimony of four witnesses who all testified that the horse at issue belonged to Defendant and could only have belonged to Defendant. Additionally, the four witnesses all testified that the paddock in which the horse was found belonged to Defendant. Defendant’s own expert witness also testified that the horse at issue “could very well be Diamond.” Multiple witnesses, including one

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who was admitted as an expert on equine care, testified about the emaciated and infected condition in which the horse was found. Moreover, for his own part, Defendant testified that he visited the paddock every day. He could not explain where his horse was now if the horse in the State's possession was not his.

¶ 33 Therefore, in light of the evidence presented at trial, we cannot conclude Defendant was deprived of a fair trial or his right to due process. Thus, Defendant has not established the prosecutor's closing argument was so grossly improper the trial court was required to intervene *ex mero motu*. Consequently, the trial court did not err by failing to intervene in the closing argument *ex mero motu*.

**Conclusion**

¶ 34 Accordingly, for the foregoing reasons, we conclude there was no error at trial and affirm the Judgment against Defendant.

NO ERROR.

Judges INMAN and GRIFFIN concur.

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STATE OF NORTH CAROLINA

v.

YON HWAR SEE

No. COA22-9

Filed 6 September 2022

**1. Discovery—voluntary discovery—criminal case—laboratory records—procedures for blood alcohol analysis**

In a prosecution for felony death by vehicle and driving while impaired, where a chemical analysis of defendant's blood by the City-County Bureau of Identification laboratory indicated that defendant was drunk when she fatally struck a pedestrian with her car, the trial court did not abuse its discretion in denying defendant's request for voluntary discovery of the laboratory's audit, non-conformity, and corrective-action records, which defendant argued might contain information demonstrating possible user error in the operation of the machine used to analyze her blood. The State provided sufficient information to familiarize defendant with the laboratory's testing procedures, which she used to effectively cross-examine the

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doctor who analyzed her blood sample. Further, on appeal from her convictions, defendant failed to cite any authority or assert any legal basis for her claim that the denial of her discovery request violated her due process rights under the state constitution.

**2. Appeal and Error—preservation of issues—constitutional argument—admission of blood test in criminal case**

In a prosecution for felony death by vehicle and driving while impaired, defendant failed to preserve for appellate review her argument that the trial court erred by admitting her blood alcohol test results into evidence—based on her contention that her consent to the blood draw was not knowing, voluntary, or intelligent, in violation of the federal and state constitutions—where defense counsel did not raise the constitutional argument at trial. Further, the Court of Appeals declined to invoke Appellate Rule 2 to review this argument in defendant’s appeal from her convictions.

Appeal by defendant from judgment entered 7 May 2021 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 10 August 2022.

*Attorney General Joshua H. Stein, by Assistant Attorney General Jonathan J. Evans, for the State.*

*Daniel M. Blau for defendant-appellant.*

ZACHARY, Judge.

¶ 1 Defendant Yon Hwar See appeals from a judgment entered upon a jury’s verdicts finding her guilty of driving while impaired and felony death by vehicle. On appeal, Defendant challenges the trial court’s denial of her request for discovery of the City-County Bureau of Identification laboratory’s audit, non-conformity, and corrective-action records, as well as the admission of her blood test results into evidence. After careful review, we conclude that Defendant received a fair trial, free from error.

***Background***

¶ 2 While driving to work at approximately 6:00 a.m. on 23 June 2020, Defendant fatally struck a pedestrian, Patrick Simmons, with her vehicle. Mr. Simmons had been “walking on or near the fog line in the right lane” of the road when Defendant’s car struck him from behind. The front windshield of Defendant’s car was “smashed[,]” and the front

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bumper was dented. The portion of the road at which the collision occurred was “perfectly straight[,]” and driving conditions that morning were clear.

¶ 3 Shortly after the collision, Lindsey Childs noticed “what [she] initially assumed to be just some discarded clothes on the side of the road[,]” but which she determined upon closer examination to be the body of Mr. Simmons. Ms. Childs pulled over and approached Defendant’s car “to make sure she was okay.” Defendant “didn’t make eye contact” with Ms. Childs and “didn’t say anything” to her; she was “[j]ust sitting, staring straight forward” in her car. Ms. Childs then called 9-1-1.

¶ 4 At approximately 7:00 a.m., Raleigh Police Department Officer Lee Granger arrived at the scene of the collision to serve as the lead investigator. Several other law enforcement officers were already present. Officer Granger did not administer any standardized field sobriety tests to Defendant at any point during his investigation, because other officers informed him that “someone had already checked her out for alcohol, and there was no alcohol in this case.”

¶ 5 Officer Daniel Egan, a member of the Raleigh Police Department’s Crash Reconstruction Unit, responded to the scene at approximately 7:15 a.m. Other law enforcement officers told Officer Egan that Defendant had performed the standardized field sobriety tests, and that alcohol was not a factor. Consequently, Officer Egan did not administer any standardized field sobriety tests or otherwise inquire into Defendant’s level of impairment during his investigation.

¶ 6 Officer Granger cited Defendant with misdemeanor death by vehicle. While he spoke with Defendant, Officer Granger was wearing a mask due to the COVID-19 pandemic; Defendant was also wearing a mask. Officer Granger informed Defendant of her implied consent rights and requested a sample of her blood for chemical analysis. Defendant consented, and at 8:43 a.m., a paramedic collected two vials of Defendant’s blood at the scene.

¶ 7 Officer Granger then transported the “blood kit” containing Defendant’s blood sample to the City-County Bureau of Identification (“CCBI”) laboratory for testing. Dr. Richard Waggoner, employed in the CCBI’s DWI Blood Chemistry Department, received Defendant’s blood kit on 26 June 2020 and conducted the chemical analysis on 6 July 2020. His analysis revealed that on the morning of 23 June 2020, Defendant had a blood-alcohol concentration of 0.18 grams per 100 milliliters. Later, at trial, both Officers Granger and Egan admitted that they were surprised by the results of Defendant’s blood analysis, and stated that they would

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have investigated the scene differently if they had known at the time that Defendant was impaired.

¶ 8 On 12 October 2020, a Wake County grand jury indicted Defendant for felony death by vehicle, driving while impaired, and failure to reduce speed. The next day, the State dismissed the charge of misdemeanor death by vehicle.

¶ 9 On 12 March 2021, Defendant filed a motion for voluntary discovery. On 22 March 2021, after consultation with her toxicology expert, Defendant filed a request for additional voluntary discovery and a motion to continue, seeking documents and records of the CCBI laboratory “relating to testing protocols, operating procedures and maintenance records.” Specifically, Defendant sought, *inter alia*:

10. Findings of any and all *internal* laboratory audits from 6/26/2019 (year prior to sample submission to laboratory) to [22 March 2021].

11. Findings of any and all *external* laboratory audits from 6/26/2019 (year prior to sample submission to laboratory) to [22 March 2021].

12. Records of all corrective actions, non-conformities, and/or non-conforming events received at any time for all laboratory employees that were in custody of the blood sample.

¶ 10 Defendant’s request for additional voluntary discovery came on for hearing on 12 April 2021 in Wake County Superior Court. Regarding requests 10, 11, and 12, Defendant contended that these materials were necessary to enable her expert to conduct a peer review of Dr. Waggoner’s analysis of her blood sample, in that “[i]nternal and external audits are tools for peer review that are recognized as an accepted practice in the field of forensic toxicology.” The State argued that the requests were “overbroad and irrelevant[,] . . . amounting to nothing more than a fishing expedition.” When the trial court asked Defendant’s counsel whether he had “some reason to believe there may be [exculpatory] information” contained in the laboratory’s audit, non-conformity, and corrective-action records, Defendant’s counsel conceded that he was “not able to make a plausible showing” as to why he thought that the materials contained exculpatory evidence.

¶ 11 Dr. Waggoner testified at the hearing. He explained the auditing processes conducted at the CCBI laboratory:

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Every year our accrediting body requires us to perform an internal audit of the entire laboratory process, including management and technical aspects of the entire process.

And then every two years an accrediting body will send auditors externally that will inspect the entire process of our laboratory and perform a total and complete audit.

Dr. Waggoner further explained that there are six separate sections of the CCBI, but that the auditors perform “one comprehensive audit of the entire laboratory.” He opined that neither the audits nor any corrective-action records would be necessary to perform a peer review of the chemical analysis process, and that he would only consider such materials necessary “if [he] saw issues in the quality control documents.”

¶ 12 On 14 April 2021, the trial court entered an order denying without prejudice Defendant’s requests for the items described in numbers 10, 11, and 12, finding that these requests were “overly broad[.]” The court granted Defendant’s requests for the remaining items that the State had not yet provided.

¶ 13 Defendant’s case came on for trial on 3 May 2021 in Wake County Superior Court. At trial, Defendant’s expert did not testify.

¶ 14 Dr. Waggoner testified at length as the State’s expert, describing the processes and protocols he followed while conducting the blood analysis. Dr. Waggoner explained that he arrived at the 0.18 blood-alcohol concentration figure by averaging the results gathered from the two smaller samples he tested, which were derived from one of the vials of Defendant’s blood in the blood kit that Officer Granger provided to the CCBI. He further explained that he purposefully spaced out the testing of Defendant’s smaller samples in order to reduce the likelihood of any repeated error, and that he had the results reviewed by another analyst to ensure their accuracy. Dr. Waggoner also stated that “[i]f alcohol is contaminated with a yeast and it’s not preserved and it’s exposed to elevated temperatures, there is a possibility that some fermentation could occur. But if it’s preserved, collected under aseptic conditions, and refrigerated, there’s virtually no possibility of that occurring.” He detailed the process by which he ensures proper calibration of the machines used for the blood analysis, and explained that there was a 99.73% probability that his calculations were within 0.012 grams per milliliter of the 0.18 figure he ultimately calculated.

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¶ 15 At the close of the State’s evidence, the trial court granted Defendant’s motion to dismiss the charge of failure to reduce speed. On 7 May 2021, the jury returned verdicts finding Defendant guilty of the remaining charges. The trial court arrested judgment on the driving while impaired conviction, and sentenced Defendant to a mitigated sentence of 50 to 72 months in the custody of the North Carolina Division of Adult Correction for the felony death by vehicle conviction.

¶ 16 Defendant timely appealed.

**Discussion**

¶ 17 On appeal, Defendant argues that the trial court “erred by denying [her] discovery request[s] for audit, non-conformity, and corrective-action records from the CCBI laboratory, in violation of N.C. Gen. Stat. § 15A-903 and Article I, Sections 19 and 23 of the North Carolina Constitution.” Defendant also contends that the trial court plainly erred by admitting her blood test results into evidence because her consent to the blood draw was not knowing, voluntary, or intelligent.

*I. Standard of Review*

¶ 18 “We review a [trial court’s] ruling on discovery matters for an abuse of discretion.” *State v. Pender*, 218 N.C. App. 233, 240, 720 S.E.2d 836, 841, *appeal dismissed and disc. review denied*, 366 N.C. 233, 731 S.E.2d 414 (2012). “An abuse of discretion will be found where the ruling was so arbitrary that it cannot be said to be the result of a reasoned decision.” *Id.* (citation omitted).

*II. Requests for Voluntary Discovery*

¶ 19 [1] Defendant first contends that the trial court “should have allowed discovery” of the CCBI laboratory’s audit, non-conformity, and corrective-action records pursuant to N.C. Gen. Stat. § 15A-903 because these items may have contained information demonstrating “an increased possibility of user error in the operation of th[e] machine” used to analyze her blood sample. We disagree.

¶ 20 This Court broadly construes a defendant’s right to discovery pursuant to N.C. Gen. Stat. § 15A-903, which governs discovery matters in criminal cases. *State v. Dunn*, 154 N.C. App. 1, 9, 571 S.E.2d 650, 655 (2002), *supersedeas and disc. review denied*, 356 N.C. 685, 578 S.E.2d 314 (2003).

¶ 21 The parties cite no cases that directly address whether a defendant has a right to discover a laboratory’s audit, corrective-action, or non-conformity records pursuant to N.C. Gen. Stat. § 15A-903(a)(1)a.

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Nevertheless, we find instructive opinions in which the defendant's right to discovery was evaluated under the prior version of the statute, N.C. Gen. Stat. § 15A-903(e),<sup>1</sup> in that the right to discovery that was articulated in subsection (e) is similar to a defendant's right to discovery pursuant to § 15A-903(a)(1)a. *Compare* N.C. Gen. Stat. § 15A-903(e) (2003), *with id.* § 15A-903(a)(1)a (2021).

¶ 22 Section 15A-903(a)(1) now provides that “[u]pon motion of the defendant, the court must order . . . [t]he State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors’ offices involved in the investigation of the crimes committed or the prosecution of the defendant.” N.C. Gen. Stat. § 15A-903(a)(1) (2021). For the purpose of § 15A-903, such “files” include any “matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant.” *Id.* § 15A-903(a)(1)a.

¶ 23 Furthermore, “[w]hen any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes.” *Id.*; *see State v. Cunningham*, 108 N.C. App. 185, 195, 423 S.E.2d 802, 808 (1992) (concluding that N.C. Gen. Stat. § 15A-903(e) (1988) “must be construed as entitling a criminal defendant to pretrial discovery of not only conclusory laboratory reports, but also of any tests performed or procedures utilized by chemists to reach such conclusions”).

¶ 24 Nonetheless, a defendant's right to voluntary discovery is not unlimited. When an examination or test is conducted in a defendant's case, the State need not provide “information concerning peer review of the testing procedure, whether the procedure has been submitted to the scrutiny of the scientific community, or is generally accepted in the scientific community.” *State v. Fair*, 164 N.C. App. 770, 774–75, 596 S.E.2d 871, 874 (2004). Such information “is beyond the scope of N.C. Gen. Stat. § 15A-903's discovery provisions” because access to this type of information is not “necessary for the defendant to understand the testing

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1. N.C. Gen. Stat. § 15A-903(e) granted defendants the right “to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor.” N.C. Gen. Stat. § 15A-903(e) (2003). However, this provision was removed in 2004 upon the General Assembly's amendment to N.C. Gen. Stat. § 15A-903. *See An Act to . . . Provide for Open Discovery in All Felony Cases . . .*, S.L. 2004-154, § 4, 2004 N.C. Sess. Laws 515, 517–20.

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procedure and to conduct an effective cross-examination of the State's expert witness." *Id.* at 774, 596 S.E.2d at 873–74; *see also Cunningham*, 108 N.C. App. at 196, 423 S.E.2d at 809 (concluding that the defendant was entitled to additional discovery because the chemist's report—which contained “only the ultimate result” of the tests performed—“d[id] not enable [the] defendant's counsel to determine what tests were performed and whether the testing was appropriate, or to become familiar with the test procedures”).

¶ 25 In the instant case, Defendant contends that she “cannot cross-examine a machine, so it [wa]s vitally important that she have access to information in the State's possession that may show an increased possibility of user error in the operation of th[e] machine” that Dr. Waggoner used to analyze her blood samples and determine her blood-alcohol concentration.

¶ 26 After careful review of the record, we conclude that the trial court did not abuse its discretion in denying in part Defendant's request for additional voluntary discovery, as Defendant was provided with sufficient information to become familiar with the testing procedure and to adequately cross-examine Dr. Waggoner. Apart from the documents requested in numbers 10, 11, and 12, the State provided—either voluntarily or by court order—substantial laboratory information. Such discovery included the CCBI laboratory's standard operating procedure and quality control logs; the laboratory's maintenance records from 6 July 2019 through 6 July 2020 for both machines that were used to analyze the blood samples; the maintenance records from the same period for “any analytical balances used”; the records of temperature in the refrigerators containing the blood samples and the analytical controls; the laboratory's internal chain of custody records; the chromatography data for the calibrators and controls relevant to the blood samples; and the certificate of laboratory accreditation.

¶ 27 At the 12 April 2021 hearing, Dr. Waggoner explained the significance of these materials. The quality control logs contain a variety of testing information, such as data concerning the quality control samples, which are used “to check the entire process to see if there's anything that could be amiss with it.” The maintenance records indicate whether the laboratory followed the CCBI maintenance schedule. The records of temperature in the refrigerators could potentially reveal “noncompliance” with protocols, which could affect the laboratory's testing accuracy and accreditation. And the chromatography data for the calibrators and controls indicate whether the machines were properly operating at the time of the analysis.

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¶ 28 Defendant was then able to use this information during her cross-examination of Dr. Waggoner to challenge the validity of the blood analysis. Her counsel extensively questioned Dr. Waggoner—who performed the analysis—regarding the testing processes and protocols, as well as his compliance with the protocols. Defense counsel also inquired as to whether the samples were refrigerated prior to Dr. Waggoner’s testing, which Dr. Waggoner did not know, and which he admitted could affect the blood-alcohol concentration test results. Furthermore, Dr. Waggoner confirmed during cross-examination that the CCBI laboratory does not “quality control test” the blood kits; he acknowledged that he did not know “whether the iodine was used correctly in sterilizing the injection point on [Defendant] when her blood was taken,” which could affect the results; and he conceded that carryover of alcohol content from one blood sample to another during testing “is always a concern” because it could affect the accuracy of the tests.

¶ 29 The trial court provided Defendant with pretrial discovery of not only the “conclusory laboratory report[ ],” but also “any tests performed or procedures utilized by” Dr. Waggoner to reach his conclusions, thereby sufficiently “enabl[ing D]efendant’s counsel to determine what tests were performed and whether the testing was appropriate, [and] to become familiar with the test procedures.” *Cunningham*, 108 N.C. App. at 195–96, 423 S.E.2d at 808–09. Because Defendant was able “to understand the testing procedure and to conduct an effective cross-examination of the State’s expert witness” with the discovery provided to her, *Fair*, 164 N.C. App. at 774, 596 S.E.2d at 873, we conclude that the trial court did not abuse its discretion in denying her request for the laboratory’s audit, non-conformity, and corrective-action records, *see Pender*, 218 N.C. App. at 240, 720 S.E.2d at 841.

¶ 30 Defendant next contends that the trial court’s denial of her requests concerning the laboratory’s audit, non-conformity, and corrective-action records “violated [her] state constitutional rights to due process, a fair trial, confrontation, and compulsory process.” Again, we disagree.

¶ 31 A defendant’s right to discovery of exculpatory information stems from the United States Constitution. *See Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963). In *Brady*, the United States Supreme Court held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* “Favorable evidence is material if there is a reasonable probability that its disclosure to the defense would result in a different outcome in the jury’s deliberation.” *State v. Strickland*,

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346 N.C. 443, 456, 488 S.E.2d 194, 202 (1997) (citation and internal quotation marks omitted), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). The North Carolina Constitution provides similar protections. *See Cunningham*, 108 N.C. App. at 196, 423 S.E.2d at 809. However, “[t]he defendant has the burden of showing that the undisclosed evidence was material and affected the outcome of the trial.” *State v. Tirado*, 358 N.C. 551, 589–90, 599 S.E.2d 515, 541 (2004), *cert. denied*, 544 U.S. 909, 161 L. Ed. 2d 285 (2005).

¶ 32 In the present case, Defendant advances no argument that the trial court’s denial, in part, of her additional discovery requests violated her federal constitutional rights, only asserting that the court “should have allowed the discovery under Article I, Sections 19 and 23 of the state constitution.” Defendant fails to explain how the court’s actions violated her constitutional rights. She cites no authority to support her propositions beyond the mention of “Article I, Sections 19 and 23 of the state constitution” and a recital of what she asserts are the “unique facts of this case[.]” As such, we have no legal basis upon which to review this alleged error. *See* N.C. R. App. P. 28(b)(6). Furthermore, “[i]t is not the role of this Court to craft [D]efendant’s arguments for h[er].” *State v. Earls*, 234 N.C. App. 186, 192, 758 S.E.2d 654, 658, *disc. review denied*, 367 N.C. 791, 766 S.E.2d 643 (2014).

¶ 33 Regardless, Defendant is unable to demonstrate “that the undisclosed evidence was material and affected the outcome of the trial.” *Tirado*, 358 N.C. at 590, 599 S.E.2d at 541. Her argument fails accordingly.

### III. Admission of Blood Test Results

¶ 34 **[2]** Finally, Defendant argues that the trial court plainly erred by admitting the blood test results into evidence, in that her “consent for the blood draw was not knowing, voluntary, or intelligent, in violation of the” federal and state constitutions.

¶ 35 Defendant concedes that her counsel did not argue such constitutional violations below, so that this issue has not been preserved for appellate review. Thus, Defendant requests that we invoke Appellate Rule 2 to review this purported constitutional error. We decline to do so. *See State v. Dean*, 196 N.C. App. 180, 188, 674 S.E.2d 453, 459 (“Defendant never presented any constitutional arguments to the trial court, and we will not address such arguments for the first time on appeal.”), *appeal dismissed and disc. review denied*, 363 N.C. 376, 679 S.E.2d 139 (2009); *see also State v. Register*, 206 N.C. App. 629, 634, 698 S.E.2d 464, 469 (2010).

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***Conclusion***

¶ 36 For the foregoing reasons, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges INMAN and GRIFFIN concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 SEPTEMBER 2022)

BLAYLOCK v. YORK 2022-NCCOA-601 No. 22-173	Alamance (18CVS2459)	Dismissed
GOODE v. LEISURE ENT. CORP. 2022-NCCOA-602 Nos. 22-77, 22-370	Mecklenburg (21CVS6227)	Affirmed
GRAY v. WELLS FARGO BANK, N.A. 2022-NCCOA-603 No. 21-609	Dare (16CVS489)	Affirmed
HALL v. BRUNSWICK PLANTATION PROP. OWNERS ASS'N 2022-NCCOA-604 No. 21-748	Wake (21CVD5636)	Affirmed
IN RE J.M. 2022-NCCOA-605 No. 21-775	Forsyth (19JB111)	Vacated and Remanded
IN RE Z.M. 2022-NCCOA-606 No. 22-167	Mecklenburg (19JT172) (19JT173) (19JT174) (19JT175)	Affirmed
STATE v. ABERNATHY 2022-NCCOA-607 No. 21-765	Cleveland (19CRS2165) (19CRS54910)	Affirmed
STATE v. BOSWELF 2022-NCCOA-608 No. 21-789	Onslow (16CRS51743) (17CRS56861) (19CRS114)	No Error
STATE v. BURBAGE 2022-NCCOA-609 No. 22-35	Beaufort (16CRS50482)	Affirmed In Part; Remanded For Correction Of Clerical Error.
STATE v. GONCALVES 2022-NCCOA-610 No. 21-801	Pender (19CRS51910-12) (20CRS131)	NO PLAIN ERROR
STATE v. KIRK 2022-NCCOA-611 No. 21-531	Mecklenburg (07CRS231089) (08CRS34203)	Affirmed

STATE v. LARKIN 2022-NCCOA-612 No. 22-10	Mecklenburg (16CRS223316) (16CRS223318)	Affirmed in part; vacated and remanded in part.
STATE v. LASSITER 2022-NCCOA-613 No. 21-461	Durham (15CRS58280) (15CRS58364)	No Error
STATE v. MINTZ 2022-NCCOA-614 No. 21-437	Cleveland (16CRS51838)	No Error
STATE v. NICHOLSON 2022-NCCOA-615 No. 21-465	New Hanover (17CRS53234) (17CRS53329) (17CRS5688)	No Error
STATE v. NICKELSON 2022-NCCOA-616 No. 21-699	Columbus (20CRS51455) (21CRS157)	No Error
STATE v. OUTLAW 2022-NCCOA-617 No. 21-669	Wayne (19CRS50705)	No Error
STATE v. WILLIAMS 2022-NCCOA-618 No. 21-647	Wake (18CRS215086)	No Error
STROHM v. MORGAN 2022-NCCOA-619 No. 22-91	Moore (21CVS82)	Affirmed
SUOZZO v. SUOZZO 2022-NCCOA-620 No. 22-62	Pitt (19CVS313)	Affirmed
ZHANG v. ZHANG 2022-NCCOA-621 No. 22-245	Wake (21CVS6076)	Affirmed



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