296 N.C. App.—No. 3 Pages 306-441

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JUNE 17, 2025

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

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OF
NORTH CAROLINA

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[1] Died 20 January 2025.

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David Alan Lagos

Assistant Director
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Ross D. Wilfley
Hannah R. Murphy
J. Eric James

ADMINISTRATIVE OFFICE OF THE COURTS

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Ryan S. Boyce

Assistant Director
Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Niccolle C. Hernandez
Jennifer C. Sikes

COURT OF APPEALS

CASES REPORTED

FILED 5 NOVEMBER 2024

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

Jurisdiction—contested case—termination from employment—applicability of North Carolina Human Resources Act—In a contested case filed by a former water quality director (petitioner) for Wake County, in which petitioner brought a wrongful termination claim under the North Carolina Human Resources Act (NCHRA), the Office of Administrative Hearings (OAH) properly dismissed the case for lack of subject matter jurisdiction on the basis that petitioner was not subject to the NCHRA, which applies only to State employees who were continuously employed by a covered local government entity for twelve months prior to being terminated. First, petitioner did not qualify as a "State employee" because he worked for a county agency rather than a State agency for nine months before his termination. Second, he worked specifically for a consolidated county human services

agency—which is not a covered entity under the NCHRA—whose county board had not elected to subject its employees to the NCHRA at the time of petitioner's employment. **Hawhee v. Wake Cnty., 347.**

APPEAL AND ERROR

Contested case—North Carolina Human Resources Act—applicability—wrong procedure for filing appeal—In a contested case claiming wrongful termination under the North Carolina Human Resources Act (NCHRA), which the Office of Administrative Hearings (OAH) dismissed after determining that petitioner was not a state employee subject to the NCHRA, petitioner missed the deadline to appeal to the superior court pursuant to Article 3 of Chapter 150B of the General Statutes (for a determination of whether he was in fact subject to the NCHRA) where the OAH mistakenly instructed him to appeal directly to the Court of Appeals under N.C.G.S. § 126-34.02(a) (outlining the procedure for employees that are subject to the NCHRA to appeal an OAH ruling). Although the Court of Appeals agreed to treat petitioner's brief as a petition for a writ of certiorari, the court declined to issue the writ because the petition lacked merit. **Hawhee v. Wake Cnty., 347.**

Domestic violence protective order hearing—exclusion of messages from victim's son—no offer of proof—In a domestic violence protective order proceeding, defendant failed to preserve for appeal his argument that the trial court erred by excluding evidence of messages sent to defendant by plaintiff's son, where defendant failed to make an offer of proof. **Simpson v. Silver, 410.**

Petition for certiorari—termination of parental rights—merit and extraordinary circumstances shown—In a father's appeal from an order terminating his parental rights in his children, where his notice of appeal did not comply with Appellate Rule 3, his petition for a writ of certiorari was allowed because: (1) his main argument—that the trial court failed to adhere to statutory mandates concerning the guardian ad litem assigned to the case—had merit, and (2) since the gravity of such error—where the fundamental rights of a parent are at stake—could have resulted in substantial harm to both the father and his children, extraordinary circumstances existed to justify issuing the writ. **In re S.D.H., 392.**

Preservation of issues—domestic violence proceeding—victim's testimony—no objection lodged—In a domestic violence protective order proceeding, defendant failed to preserve for appeal his argument that the plaintiff's testimony, in which she described having had panic attacks and an eating disorder, could not be the basis for the trial court's conclusion that defendant's actions had caused those conditions, where defendant did not object to plaintiff's testimony during trial. **Simpson v. Silver, 410.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Adjudication and disposition order—subject matter jurisdiction—home state of juveniles—In a neglect proceeding, the district court had jurisdiction over three of the mother's children, despite the existence of a previous child custody order concerning those juveniles entered by a court in Virginia, where the mother did not challenge the district court's finding of fact that North Carolina was the home state for the children and because, when the Virginia court entered its child custody order in 2023, the children had been residing in North Carolina since at least 2018—making North Carolina the juvenile's "home state" pursuant to the Uniform Child

respondent's comprehension of his son's needs as being unsupported by the evidence. With regard to respondent's arguments that testimony from the social worker and social worker supervisor (regarding sexual allegations made by another minor child in the home) was based on hearsay, the appellate court concluded that respondent waived those arguments because he failed either to object, lodge a continuing objection, or renew objections to the challenged testimony, and elicited similar testimony on cross-examination. **In re J.M.V., 374.**

Findings of fact—sufficiency of evidence—lack of progress—allegations of sexual abuse—failure to object to hearsay—In an appeal from an order terminating respondent-mother's parental rights to her two children, the appellate court concluded that sufficient evidence was presented to support all of the findings of fact challenged by respondent. Although respondent contended that she completed aspects of her case plan, evidence showed that the conditions which led to the removal of the children from the home continued to exist, respondent continued to suffer from serious mental and physical health issues, and respondent failed to demonstrate any improvement after completing a parenting class. With regard to respondent's challenge to several findings as being based on hearsay (regarding sexual abuse allegations made by her older child, as testified to by the social worker and social worker supervisor), the appellate court concluded that respondent waived her challenge because she failed to renew her initial objection to the challenged testimony and elicited some of the same evidence on cross-examination. **In re J.M.V., 374.**

Grounds for termination—failure to make reasonable progress—ongoing health issues—lack of stability—The trial court properly terminated respondent-mother's parental rights to her two children based on the ground of willful failure to make reasonable progress on correcting the conditions which led to the children's removal from the home where, although respondent made some progress on her case plan, she continued to deny sexual abuse allegations made by the older child that were substantiated by the department of social services, she failed to demonstrate any improvement in her parenting skills, and she continued to suffer from serious mental and physical health issues. **In re J.M.V., 374.**

Grounds for termination—failure to make reasonable progress—prolonged lack of engagement—The trial court properly terminated a father's parental rights to his daughter on the ground of willful failure to make reasonable progress to correct the conditions which led to the child's removal where: the child had been in foster care for 77 months, respondent did not engage with the department of social services (DSS) for nearly three years until DSS filed a petition to terminate his parental rights, respondent did not complete his case plan, and respondent did not seek visitation with his daughter or make any attempts to communicate with her. **In re A.K.H., 354.**

Grounds for termination—neglect—likelihood of repetition of neglect—failure to acknowledge impact of actions on child—The trial court properly terminated respondent-father's parental rights to his son on the ground of neglect where the court's findings supported its conclusions that the child was previously neglected—for being left unattended and falling down at least five stairs when he was three years old—and that there was a likelihood of future neglect if the child were returned to respondent's care. Although respondent completed most aspects of his case plan, he did not display any improvement or new skills after completing parenting classes, continued to challenge the adjudication of neglect as well as sexual abuse allegations made by another minor child in the home, and, despite being solely

reliant on outside services for his day-to-day maintenance, he expressed his intent to reduce those services if he resumed custody. **In re J.M.V., 374.**

Parental right to counsel—withdrawal of attorney—consent—failure to participate—In a juvenile matter in which respondent-father's daughter had been adjudicated neglected and dependent in 2016, after which respondent entered into a case plan, the trial court did not violate respondent's right to counsel by allowing his privately-retained counsel (who respondent had retained to replace his initial court-appointed counsel) to withdraw from the case in 2019, and by appointing a new attorney to represent respondent in 2022 only after the department of social services filed a petition to terminate respondent's parental rights. Respondent waived and forfeited his right to counsel by signing a consent order to allow his attorney to withdraw in 2019 and by failing to attend and participate in the proceedings or to disclose his location. **In re A.K.H., 354.**

TRESPASS

Real property—agent-principal liability—not applicable to landlord-tenant relationships—In a lawsuit brought by plaintiff property owners against their neighboring property owner (defendant)—a landlord whose tenants were predominantly college students—arising from tenants and their guests repeatedly blocking plaintiffs' access easement (a driveway) and crossing over plaintiffs' parking easement to exit defendant's property, the trial court properly rejected plaintiffs' trespass claim, which relied on the doctrine of agent-principal liability (a principal is liable for unauthorized acts by an agent if subsequent conduct tends to show ratification by the principal), because that doctrine did not apply to landlord-tenant relationships. Moreover, even assuming the doctrine had applied, plaintiffs had not presented evidence of ratification by defendant of the tenants' trespass. **Farrington v. WV Invs., LLC, 324.**

TRUSTS

Rule 60—subject matter jurisdiction—equitable distribution—revocable trust effectively revoked by stipulation—In an appeal from equitable distribution and alimony orders, in which the trial court distributed real property vested in a revocable trust, the Court of Appeals granted defendant's petition for writ of certiorari to review the trial court's indicative ruling denying defendant's Civil Procedure Rule 60 motion, in which he sought to set aside the trial court's orders for lack of subject matter jurisdiction due to failure to join the trust as a party. The trial court did not abuse its discretion in denying the Rule 60 motion because plaintiff and defendant—who were the trust's sole beneficiaries, trustees, and settlors—had stipulated in a pretrial order that there was no issue as to nonjoinder of parties in the proceeding and that the properties in the trust were part of a marital estate; therefore, the pretrial stipulations effectively revoked the trust and left the parties as beneficiaries, trustees, and settlors retaining control of the properties for distribution. **Face v. Face, 306.**

N.C. COURT OF APPEALS
2025 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	13 and 27
February	10 and 24
March	17
April	7 and 21
May	5 and 19
June	9
August	11 and 25
September	8 and 22
October	13 and 27
November	17
December	1

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

FACE v. FACE

[296 N.C. App. 306 (2024)]

KATHLEEN K. FACE, PLAINTIFF
v.
S. ALLEN FACE, DEFENDANT

No. COA23-1126

Filed 5 November 2024

1. Trusts—Rule 60—subject matter jurisdiction—equitable distribution—revocable trust effectively revoked by stipulation

In an appeal from equitable distribution and alimony orders, in which the trial court distributed real property vested in a revocable trust, the Court of Appeals granted defendant's petition for writ of certiorari to review the trial court's indicative ruling denying defendant's Civil Procedure Rule 60 motion, in which he sought to set aside the trial court's orders for lack of subject matter jurisdiction due to failure to join the trust as a party. The trial court did not abuse its discretion in denying the Rule 60 motion because plaintiff and defendant—who were the trust's sole beneficiaries, trustees, and settlors—had stipulated in a pretrial order that there was no issue as to nonjoinder of parties in the proceeding and that the properties in the trust were part of a marital estate; therefore, the pretrial stipulations effectively revoked the trust and left the parties as beneficiaries, trustees, and settlors retaining control of the properties for distribution.

2. Divorce—equitable distribution—classification of property—determination of distribution amounts—calculation of sum for distribution

In an equitable distribution proceeding, the trial court (1) erred in classifying certain property—which a prior interim distribution order had noted as defendant's sole and separate property for purposes of that distribution—as divisible; (2) as a result of that error, abused its discretion in determining the amounts to be distributed to each party; and (3) incorrectly distributed plaintiff's separate property after miscalculating the sum for distribution due to a clerical error. Accordingly, the equitable distribution order was reversed and remanded for corrections.

3. Divorce—alimony—any error in award to the benefit of appellant—order no longer in effect

An alimony order was affirmed where, although it featured the same erroneous calculation—regarding property to be distributed without accounting for a previous interim distribution ordered for

plaintiff—seen in a subsequent equitable distribution (ED) order, the calculation did not appear to have factored into the decretal portion of the ED order setting the monthly alimony payment, and where, had the calculations been correct, an even higher monthly alimony payment by defendant to plaintiff could have been ordered. Moreover, the alimony order had expired by the date on which defendant's appeal was heard.

Appeal by defendant from orders and judgments entered 28 December 2021 and 11 January 2022 by Judge J. Calvin Chandler in District Court, Brunswick County. Heard in the Court of Appeals 28 August 2024.

Ward & Smith, P.A., by John M. Martin, J. Albert Clyburn, and Christopher S. Edwards, for plaintiff-appellee.

Jonathan McGirt for defendant-appellant.

ARROWOOD, Judge.

S. Allen Face ("defendant") appeals from the trial court's alimony and equitable distribution orders. Defendant has additionally filed a petition for writ of certiorari ("PWC") seeking review of additional issues arising from alleged error in the trial court's indicative ruling on a Rule 60(b) motion. For the following reasons, we affirm in part, reverse in part, and remand the cause to the trial court for correction of clerical error.

I. Background

The parties were originally married on 11 May 2007, then separated on 17 July 2014 and divorced on 9 November 2015. During the marriage, defendant acquired a 4.5% ownership interest in Ductilcrete Holdings, LLC ("Ductilcrete"). Also during the marriage on 15 September 2011, the parties as settlors formed a revocable trust known as "The S. Allen Face, III and Kathleen K. Face Revocable Trust Dated September 15, 2011," ("the Trust"). The parties were the sole beneficiaries and trustees of the Trust. Three properties acquired early in the marriage, namely 316 Sea Star Circle, 1009 Lismore Way, and 311 Cottage Lane, were placed in the Trust. After the parties' separation, the Sea Star Circle and Cottage Lane properties were sold out of the Trust. The Sea Star Circle sale netted proceeds of $183,935.00 disbursed equally between the parties, and the Cottage Lane sale netted proceeds of $91,050.00 disbursed to plaintiff after crediting defendant for his payment of $16,498.00 in mortgage debt.

On 19 July 2016, Judge Jason C. Disbrow entered a consent order which was signed by both parties. The order provided for an interim distribution under N.C.G.S. § 50-20, distributing to plaintiff one-half of defendant's RBC Centura Individual Retirement Account, one-half of defendant's shares in Ductilcrete, and the proceeds from the sale of 311 Cottage Lane, and distributing to defendant two cars and a thirty-six-foot boat.

On 22 September 2016, plaintiff filed a motion seeking a further interim distribution order, stating that the 1009 Lismore Way property was encumbered by a note[1] for which defendant was liable, and plaintiff sought to refinance the note. On 14 November 2016, the trial court entered an order concluding that plaintiff was the dependent spouse, and defendant was the supporting spouse, and ordering defendant to pay a sum of $5,687.50 per month as post-separation support.

On 31 October 2017, after the parties' divorce, Ductilcrete was sold, and between 2 November 2017 and 6 November 2020, defendant received seven checks totaling $1,263,704.06 for the 4.5% ownership interest in his name.

On 4 June 2018, Judge William F. Fairley entered an order on interim distribution which addressed and clarified Judge Disbrow's prior order. Judge Fairley made the following findings in relevant part:

> 3. That the parties entered into a stipulation of interim distribution on July 19, 2016 which was signed by the Honorable Jason Disbrow and entered into this file, which distributed to the plaintiff herein one-half of the defendant's membership in the Ductilcrete LLC using the following language "Plaintiff shall have as her sole and separate property one half (1/2) of defendant's shares (sic) in Ductilecrete (sic)" and pursuant to which the parties contemplated that the plaintiff would be conveyed one half of the defendant's interest in Ductilcrete and that as a result thereof the plaintiff would own said interest as her sole and separate property one half of the defendant would retain as his sole and separate property one half of Ductilcrete plus other certain other marital assets set forth in said order;
>
> 4. That the stipulation of July 19, 2016 does not value the interest of either party in said asset but does intend

1. The encumbrance was related to defendant's boat.

that the parties, from that date forward, own their interest therein as separate property;

5. That subsequent to the entry of the stipulation hereinabove referenced, the plaintiff discovered that defendant's interest in this LLC was not transferable as a result of the organizational documents of the LLC;

. . . .

7. That [plaintiff's counsel]'s letter of May 12, 2017 references the attached letter from [counsel for Ductilcrete] and indicates that his client, the plaintiff, would accept $100,800 "to resolve her interest in" the LLC and inquires of [defendant's counsel] as to whether the defendant would be agreeable to liquidating the plaintiff's interest in said LLC;

8. That because the defendant's interest in the LLC was nontransferable, the sale of the plaintiff's portion of the defendant's interest in the LLC had to be approved by the defendant and that no sale to other members of the LLC of the plaintiff's interest in the LLC could take place without the approval and cooperation of the defendant;

. . . .

15. That on October 31, 2017 the entirety of Ductilcrete LLC and was sold to GCP Applied Technologies, Inc. and that the value of the parties' interest therein was in the amount of $1,012,500 and that the same was forwarded to the defendant in the form of a check on November 2, 2017 and that the defendant deposited said amount into his bank account and has paid from those funds the amounts set forth in defendant's response to interrogatory number three introduced as plaintiffs Exhibit 2 in today's hearing;

16. That the defendant contends that his efforts on behalf of the LLC subsequent to the date of separation of the parties and the date of interim distribution contributed to an increase in the value of the parties' interest in the LLC;

17. That the defendant retains $326,783 of the $1,012,500 proceeds from the sale of Ductilcrete LLC;

18. That no offer to sell plaintiff's interest in this LLC was conveyed to the defendant by [plaintiff's counsel]'s letter

of May 12, 2017 and, if any such offer was made, the defendant communicated no acceptance thereof to the plaintiff within a reasonable period of time and that the parties, either individually or through their agents, never arrived at an agreement to sell and purchase said interest;

19. That the proposed stipulation purporting to modify a prior interim distribution order of the court was not signed by the plaintiff or counsel and did not constitute a valid and binding stipulation of the parties;

20. That the plaintiff is the equitable owner of one half of the defendant's interest in Ductilcrete LLC and she was the owner thereof as of the date of the interim distribution order dated July 19, 2016;

21. That the values of the parties' interest in Ductilcrete LLC as of the date of separation and the date of distribution remain for determination at the trial of equitable distribution;

22. That the estate of the parties is more than sufficient to accommodate an interim distribution as set forth hereinafter without concern that the same may deliver to either party assets that cannot be appropriately accounted for in the final equitable distribution order;

23. That there is no good reason that the court should decline to distribute at this time a portion of the remaining $326,783 currently retained by the defendant from the sale of the parties' interest in Ductilcrete LLC and that the plaintiff is entitled to possession of at least $100,800 thereof and that the remainder thereof, $225,983, should be deposited by the defendant into the office of the Clerk of Superior Court for preservation pending the equitable distribution.

Based on these findings, Judge Fairley concluded that the parties' interest in Ductilcrete was a marital asset subject to Judge Disbrow's order, "and that as a result of said order the plaintiff became the owner of one-half of the 4.5% interest in Ductilcrete LLC" as her sole and separate property, with defendant retaining the other one-half interest as his sole and separate property. Judge Fairley further concluded that plaintiff had not offered to sell her interest in Ductilcrete to defendant, that the proposed stipulation was not signed and accordingly not a valid and

binding stipulation, and that Judge Disbrow's interim distribution order remained effective.

On 17 December 2018, plaintiff filed a motion to show cause, alleging that defendant had failed to comply with an order to compel with respect to defendant's income tax returns and response to plaintiff's request for production. The trial court entered an order to show cause the same day, and on 12 March 2019 entered a further order finding that the subject responses from defendant were "again, incomplete and do not conform to the court's order to compel[.]" As sanctions, the trial court ordered defendant to disclose the names and contact information for all individuals involved in preparing the parties' 2017 tax return, produce copies of any documents used in the same, and pay reasonable attorney's fees incurred in the prosecution of the order to show cause. On 20 November 2019, the trial court entered an order on attorney's fees, ordering defendant to make payments of $12,910.00 and $6,650.00 to plaintiff for reasonable attorney's fees.

On 2 December 2019, defendant filed a motion to set aside and for a new trial, citing "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Plaintiff responded on 11 December 2019 with a motion for show cause order alleging that defendant had failed to comply with the terms of the 20 November order. That same day, the trial court entered a show cause order requiring defendant to appear at a 21 January 2020 hearing.

Plaintiff filed another motion for civil contempt on 1 July 2020 regarding equitable distribution. The motion stated that a court-appointed expert had "formed the opinion that from the date of separation until December 31, 2016," the business Allen Face and Company, LLC, one of the assets subject to equitable distribution, had "increased in value by $221,000.00." The motion referenced a scheduling order entered by Judge Fairley requiring defendant to "comply with the court-appointed expert's request for production of documents . . . on or before the close of business on February 28, 2020." Plaintiff contended that defendant had produced exhibits "numbers 1 and 2," but had made no other document production as requested by the expert. Furthermore, plaintiff stated that "upon information and belief that Defendant has failed to pay the retainer to engage the expert for said services." The trial court entered a show cause order on 18 September 2020 ordering defendant to appear at a 29 September hearing.

On 6 January 2021, the trial court entered a pre-trial order with several stipulations agreed to by the parties. The contested issues remaining included:

> A. The classification of the property as shown on Schedule A as either marital, divisible or separate;
>
> B. The value of the marital and divisible property shown on Schedule A that have not been agreed upon;
>
> C. Whether an equal or unequal division of property is equitable after considering the factors contained in 50-20;
>
> D. The distribution of all property owned by the parties as of the date of separation and as of the date of distribution that is listed on Schedule A.

After hearings on 7 June and 2 August 2021, Judge J. Calvin Chandler entered an equitable distribution order on 20 December 2021. The order included findings that the parties "stipulated that the date of separation fair market value of the 4.5% interest in Ductilcrete was $201,600.00[,]" and "[n]either party introduced any competent evidence as to the value of the interest in Ductilcrete on July 19, 2016 (interim distribution date) or as of the date of trial." Judge Chandler accepted Judge Fairley's order as conclusively resolving that "[d]efendant's 4.5% interest in Ductilcrete was marital property[,]" and "[t]hat pursuant to the July 2016 Consent Order, Plaintiff obtained a 2.25% interest in Ductilcrete as her sole and separate property effective as of July 19, 2016." Judge Chandler further found:

> 76. Between November 2, 2017 and November 6, 2020, Defendant received seven checks made payable to him personally for the total amount of $1,263,704.06. These funds were proceeds that Ductilcrete received from the GCP sale and from retained earnings of Ductilcrete. These amounts were distributed to Defendant based on his record ownership of 4.5% in Ductilcrete.
>
> 77. Because Plaintiff's ownership interest in Ductilcrete was not transferred to her after the entry of the July 2016 Consent Order, Plaintiff never had control of her interest in Ductilcrete and the portion of the sales proceeds and retained earnings that should have been distributed to her due to her 2.25% ownership in Ductilcrete ($631,852.03) were, in fact, distributed to Defendant.
>
> . . . .

> 80. Defendant has converted Plaintiff's separate property in the amount of $305,069.03. The Court makes this finding by clear, strong, and convincing evidence as required by *Upchurch v. Upchurch*, 122 N.C. App. 172.
>
> 81. Defendant would be unjustly enriched if he were allowed to retain Plaintiff's separate property. . . .
>
> 82. Defendant paid long-term capital gains taxes on the post-date-of-separation distributions . . . . The court will consider this as a distributional factor.
>
> 83. The Court finds that the remaining $631,852.03 . . . is divisible property subject to distribution by this Court.

Regarding distributional factors under N.C.G.S. § 50-20(c), the trial court found that plaintiff's income was "limited to her Social Security benefits and period distributions from her individual retirement account" with a balance of $300,000.00, and that after separation plaintiff "had to receive distributions from her IRA in order to meet the payment of her counsel fees, and other living expenses." The court found that defendant "earns substantial income[,]" estimated at approximately $500,000.00 for 2021, as well as an individual retirement account with an approximate value of $670,000.00 and personal bank accounts with balances totaling approximately $155,000.00. The parties did not have "significant debt obligations" apart from the mortgage on the marital residence. The duration of the marriage was approximately 86 months prior to separation; plaintiff was "70 years old and has suffered serious health issues in the past but is currently in reasonably good health. [Defendant] is 73 years old and is in good physical health." For non-marital expectation of pension/retirement, "Defendant has been able to contribute to his individual retirement account in the maximum amount allowed by law[,]" while "Plaintiff has been financially unable to make any contribution to her individual retirement account since the date of separation." Based on the above, the court found that an in-kind division was not equitable.

Based on these findings, the trial court concluded that "[a]s a result of the Ductilcrete distributions following the GCP sale, Plaintiff was entitled to receive the sum of $631,852.03 as her separate property." Pursuant to N.C.G.S. § 50-20(i):

> Plaintiff is entitled to recover from Defendant as her separate property the sum of $631,852.03 less the $100,800.00 distribution previously ordered by the Court and less the funds in the amount of $225,983.00 deposited with

> the Clerk . . . After those credits are applied, Plaintiff is entitled to a judgment against Defendant in the amount of $305,069.03 plus post-judgment interest. Additionally, Plaintiff is entitled to recover reasonable attorney's fees from Defendant for fees incurred by her in order to recover her separate property.

The trial court further ordered that defendant pay plaintiff a sum of $400,850.01 plus eight percent interest annually, representing plaintiff's portion of the Ductilcrete distributions. Plaintiff was awarded sole ownership of the Lismore Way property and the full proceeds from the Cottage Lane sale; the proceeds from the Sea Star Circle sale were split evenly between the parties. Defendant filed notice of appeal from Judge Chandler's equitable distribution order on 28 December 2021.

The trial court entered an alimony order on 11 January 2022. The findings reiterated much of the preceding history of the case and previous findings discussed above. The trial court found that plaintiff's net monthly income was $708.42, and had "a shortfall each month of income to expenses of $7,475.02." Based on the findings, the trial court ordered defendant to pay plaintiff $6,000.00 per month as alimony from 1 February 2022 until 31 July 2024.

Defendant filed notice of appeal from the alimony order on 8 February 2022.

On 21 November 2022, defendant filed a Rule 60(b) motion to set aside the orders on appeal. The motion stated that "[d]uring the process of preparing materials for use in the pending appeals," defendant's counsel became aware "for the first time, of the existence of [the] Trust. If anyone involved in this matter was previously aware of this Trust, the existence of this Trust or its legal effect do not appear to have been brought to the attention of the Court . . . ." Defendant contended that the trial court failed to join the Trust, preventing its exercise of subject matter jurisdiction over a claim for equitable distribution concerning real property owned by the Trust, in addition to mathematical and other errors relating to the distribution of Ductilcrete.

Defendant also filed with this Court a motion to hold appellate proceedings in abeyance in order to permit the use of the procedure described in *Bell v. Martin*, 43 N.C. App. 134, 142 (1979), *rev'd on other grounds*, 299 N.C. 715 (1980), for the trial court to enter an "indicative ruling."

On 6 September 2023, the trial court entered an indicative ruling denying defendant's Rule 60(b) motion. Regarding subject matter jurisdiction, the trial court concluded:

> 3. The Trust was not a necessary party to the equitable distribution action, and the Court had subject matter jurisdiction to distribute the Trust's assets, ...
>
> 4. While "[p]roperty is not part of the marital estate unless it is owned by the parties on the date of separation," *Lawrence v. Lawrence*, 100 N.C. App. 1, 16 (1990), the Court concludes that the settlors of a revocable trust, like the Trust, retain ownership of the trust res. "[T]he power of revocation is tantamount to ownership of the trust property and of such a nature that it is subject to order of the [C]ourt." . . . .
>
> 5. In addition to the provisions of the Trust in which the parties maintained individual control over any real property placed in the Trust, North Carolina's trust code reinforces the Court's view that property in a revocable trust remains property of the settlor. Pursuant to N.C.G.S. § 36C-6-602(c), settlors of a revocable trust, like Plaintiff and Defendant, have the power to revoke the trust at any time. . . .
>
> 6. The Court rejects Defendant's attempts to blur the distinction between revocable trusts, on the one hand, and irrevocable trusts, on the other. In the case of an *irrevocable* trust, the trust is a necessary party. . . . [*R*]*evocable* trusts are "will substitutes" and the "rules applicable to wills should, and in fact often do, apply to such trusts." . . . By entering into the stipulations concerning the distribution of real property which had been placed in the Trust, the parties were exercising their rights to transfer real property as allowed by the terms of the Trust, and, in essence, with the distribution of Lismore Way, revoked the Trust as allowed by N.C. Gen. Stat. § 36C-6-602(2)(c).

The trial court further concluded that Rule 60(b) did not authorize the court to correct any alleged mathematical error, and that "correction of any mathematical error would be tantamount to a substitute for appeal, which our Supreme Court has concluded is improper."

On 8 January 2024, defendant filed a petition for writ of certiorari requesting review of additional issues relating to the appeals arising from the indicative ruling.

II. Discussion

Defendant contends the trial court erred in its classification and distribution of the Ductilcrete interest, in exercising subject matter jurisdiction without joining a necessary third-party, and by relying upon a defective equitable distribution order. We first address defendant's PWC and the trial court's indicative ruling on defendant's Rule 60(b) motion.

A. Rule 60(b) Motion

[1] Defendant's Rule 60 motion asserts that the trial court lacked subject matter jurisdiction to distribute real property vested in a trust that was not joined as a party to the litigation, and that the distribution order contained underlying mathematical errors. This Court has previously granted writ of certiorari to review an advisory opinion denying a Rule 60(b) motion in *Morgan v. Nash Cnty.*, 224 N.C. App. 60, 74–75 (2012). In the interest of judicial economy, we grant defendant's petition for writ to review the trial court's indicative ruling.

"The issue of jurisdiction over the subject matter of an action may be raised at any time during the proceedings, including on appeal." *McClure v. Cnty. of Jackson*, 185 N.C. App. 462, 469 (2007); s*ee also* N.C. R. App. P. 10(a)(1) (objection to subject matter jurisdiction automatically deemed preserved).

In questions of subject matter jurisdiction, the "standard of review is *de novo*." *In re K.A.D.*, 187 N.C. App. 502, 503 (2007). Additionally, denial of a Rule 60(b) motion is reviewed under an abuse of discretion standard. *Kingston v. Lyon Const., Inc.*, 207 N.C. App. 703, 709 (2010) (citing *Davis v. Davis*, 360 N.C. 518, 523 (2006)). Accordingly, the trial court's decision "is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777 (1985).

Pursuant to N.C.G.S. § 36C-6-602, a revocable trust "may be revoked by either spouse acting alone but may be amended only by joint action of both spouses[.]"

> (c) The settlor may revoke or amend a revocable trust:
>
> (1) By substantial compliance with a method provided in the terms of the trust; or
>
> (2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

> a. A later will or codicil . . . or
>
> b. By oral statement to the trustee if the trust was created orally; or
>
> c. Any other written method delivered to the trustee manifesting clear and convincing evidence of the settlor's intent.

The indicative ruling primarily concerns the Trust and its effect on subject matter jurisdiction. Defendant cites *Wenninger v. Wenninger*, 901 S.E.2d 677, 678 (N.C. Ct. App. May 7, 2024) to support his contention that the Trust was a necessary party. In *Wenninger*, this Court vacated an order pursuant to Rule 19, "[b]ecause the parties stipulated that the Trust held title to the Trust Property, the Trust was 'a necessary party to the equitable distribution proceeding,' and the trial court correctly concluded that it would not have jurisdiction to distribute the Trust Property without the Trust being made a party . . . ." *Id.* at 681. The *Wenninger* Court was guided by *Nicks v. Nicks*, 241 N.C. App. 487 (2015), which "repeatedly indicated that the proper procedure on remand would be to join the trust as a necessary party and resolve the equitable distribution accordingly." *Id.* Notably, the trust at issue in *Nicks* was irrevocable. *Nicks*, 241 N.C. App. at 491.

Defendant also relies on *Upchurch v. Upchurch*, 122 N.C. App. 172 (1996), specifically the rule that "when a third party holds legal title to property which is claimed to be marital property, that third party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of the ownership of that property." *Id.* at 176. "Otherwise the trial court would not have jurisdiction to enter an order affecting the title to that property." *Id.* (citing *Lucas v. Felder*, 261 N.C. 169, 171 (1964)). In *Upchurch*, this Court determined that a trust was not established by clear and convincing evidence. *Id.*

The issues of subject matter jurisdiction and joinder in an equitable distribution case were also addressed in *Quesinberry v. Quesinberry*, 210 N.C. App. 578 (2011). There, the appellant asserted that several items of property distributed pursuant to equitable distribution belonged to Quesinberry's Garage, which had not been joined. *Id.* at 581. However, the parties had stipulated in a pre-trial order that those property items were marital assets. *Id.* Accordingly, the *Quesinberry* Court held that the appellant's argument was without merit and overruled the issue on appeal. *Id.* at 582–83.

Additionally, our Business Court denied a motion to dismiss for failure to join a necessary party, reasoning that the trust was unnecessary

because the trust was "by [its] nature subject to the control and whim of" the controlling shareholder, who could revoke the trust "at any time[,]" making its contents "subject to the claims of the settlor's creditors." *Window World of Baton Rouge, LLC v. Window World, Inc.*, 2017 WL 2979142, at *10 (N.C. Super. July 12, 2017).

In this case, the Trust's beneficiaries, trustees, and settlors were plaintiff and defendant. In the pre-trial order signed by both parties, the parties stipulated that "all parties have been correctly designated and there is no question as to misjoinder or nonjoinder of parties[,]" and that the properties in the Trust were part of the marital estate. At oral argument, defendant's counsel contended that nobody was aware of the existence or legal significance of the Trust, and that a stipulation alone was insufficient to maintain subject matter jurisdiction.

We find this case to be distinguishable from *Wenninger* and *Upchurch* and are persuaded by the reasoning set forth in *Quesinberry*. Here, the Trust was revocable by either party, and all of the property and proceeds in the Trust were stipulated as marital assets. The parties agreed that the property was titled to them individually and retained complete control over the properties in the Trust. Defendant's assent to the pre-trial order manifested "clear and convincing evidence of the settlor's intent" for the property in the Trust to be distributed between the parties as marital property.

Accordingly, the pre-trial order effectively revoked the Trust; the parties as settlors, trustees, and beneficiaries retained control of the properties subject to distribution. This is unlike *Wenninger*, where the parties "stipulated that the Trust held title to the Trust Property," making the Trust " 'a necessary party to the equitable distribution proceeding,' " *Wenninger*, 901 S.E.2d at 681. We also find this to be distinguishable from *Upchurch* because the "third party" here, the Trust, did not effectively hold legal title to the property subsequent to the pre-trial order, and was not a necessary party to the equitable distribution proceeding.

Because the Trust was revoked by the pre-trial order and the subject properties were stipulated as marital assets, we affirm the trial court's indicative ruling on defendant's Rule 60 motion.

B. Equitable Distribution

[2] "Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between

the parties in accordance with the provisions of this section." N.C.G.S. § 50-20(a). This Court reviews "a trial court's equitable distribution order to determine 'whether there was competent evidence to support the trial court's findings of fact and whether those findings of fact supported its conclusions of law.' " *Crago v. Crago*, 268 N.C. App. 154, 157 (2019) (quoting *Casella v. Alden*, 200 N.C. App. 859, 861 (2004)). "The division of property in an equitable distribution 'is a matter within the sound discretion of the trial court.' " *Id.* (quoting *Cunningham v. Cunningham*, 171 N.C. App. 550, 555 (2005)). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777 (1985).

"There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable." N.C.G.S. § 50-20(c). If a trial court determines that equal distribution is not equitable, the court shall consider the following factors:

> (1) The income, property, and liabilities of each party at the time the division of property is to become effective.
>
> (2) Any obligation for support arising out of a prior marriage.
>
> (3) The duration of the marriage and the age and physical and mental health of both parties.
>
> (4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects.
>
> (5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.
>
> (6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.
>
> (7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.
>
> (8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.
>
> (9) The liquid or nonliquid character of all marital property and divisible property.

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.

(11) The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.

(11b) In the event of the death of either party prior to the entry of any order for the distribution of property made pursuant to this subsection:

a. Property passing to the surviving spouse by will or through intestacy due to the death of a spouse.

b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of a spouse.

c. Property passing to the surviving spouse from life insurance, individual retirement accounts, pension or profit-sharing plans, any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary (excluding any benefits under the federal social security system), or any other retirement accounts or contracts, due to the death of a spouse.

d. The surviving spouse's right to claim an "elective share" pursuant to G.S. 30-3.1 through G.S. 30-33, unless otherwise waived.

(12) Any other factor which the court finds to be just and proper.

N.C.G.S. § 50-20(c).

Defendant contends the trial court incorrectly valued, classified, and distributed marital property, specifically in allocating $201,600.00 as marital property for the interest in Ductilcrete, $631,852.03 as plaintiff's separate property pursuant to interim distribution including $100,800.00 as "separate property," and another alleged $531,052.03 as separate property pursuant to "interim distribution." Defendant argues that the distribution adds up to more than the available total gross proceeds.

The first consent order on interim distribution from 19 July 2016, signed by both parties, ordered that plaintiff receive one-half of defendant's shares in Ductilcrete as sole and separate property. Judge Fairley's order filed 4 June 2018 clarified that order, finding that "plaintiff would own said interest as her sole and separate property and that the defendant would retain as his sole and separate property one half of Ductilcrete . . . ." Judge Fairley found that Ducilcrete was sold in 2017, netting $1,012,500.00 in proceeds, of which defendant retained $326,783.00. Judge Fairley concluded there was "no good reason" that the remainder should not be distributed, with plaintiff entitled to possession of $100,800.00 thereof and the remaining $225,983.00 to be deposited with the Clerk of Superior Court for preservation.

The trial court's order on equitable distribution acknowledged and "accepted" Judge Fairley's order in its findings, also noting that Judge Fairley "specifically left unresolved the issue of valuing the parties' interests in Ductilcrete leaving that issue to be resolved at the trial on equitable distribution." The trial court found that defendant "received seven checks made payable to him personally for the total amount of $1,263,704.06[,]" and that because plaintiff's interest in Ductilcrete was not transferred to her after the entry of the consent order, her ownership interest was equal to half of the funds defendant received after the sale, totaling $631,852.03. However, the trial court also found that defendant had paid plaintiff $100,800.00 as interim distribution and deposited $225,983.00 with the Clerk of Court, reducing the converted property to the amount of $305,069.03. The trial court then found that the remaining $631,852.03 was divisible property subject to distribution.

The prior orders clearly found and concluded that the interest in Ductilcrete was to be distributed in equal one-half shares as separate property; instead, the trial court distributed one-half to plaintiff as her sole and separate property, and the other half as divisible property, rather than to defendant as his sole and separate property. Although the trial court referenced and "accepted" the prior orders as the law of the case, the court failed to acknowledge "that the defendant would retain as his sole and separate property one half of Ductilcrete[.]"

The trial court's distributive award required defendant to pay plaintiff the sum of $400,850.01, representing the "[divisible] portion of the Ductilcrete distributions[,]" and leaving defendant with $231,002.02 as his divisible distribution. This "divisible" portion was in fact defendant's sole and separate property, and the trial court's distribution amounts to an abuse of discretion.

Furthermore, it appears the trial court incorrectly calculated the sum for distribution. The trial court based its findings on the total amount of $1,263,704.06 received by defendant via check, but failed to properly account for the prior distribution of the marital portion at the date of separation, $201,600.00. The distributions reflect one-half portions totaling $631,852.03 while also including two $100,800.00 distributions from the marital portion of the interest. To ensure compliance with the previous orders and stipulations that each party would receive one-half of the interest as sole and separate property, the trial court should have subtracted the previously distributed portion from the proceeds before further dividing and distributing the funds. The correct distribution would be for plaintiff to receive $531,052.03, less the deposit with the Clerk of $225,983.00, for a remaining entitlement of $305,069.03, and for defendant to receive $531,052.03, rather than have that portion distributed unequally as divisible property.

Although the distribution of defendant's one-half interest as divisible property was an abuse of discretion, the distribution of plaintiff's separate property amounts to a clerical error. Clerical mistakes are "mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission . . . ." N.C. R. Civ. P. 60. A clerical error is defined as "[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Jarman*, 140 N.C. App. 198, 202 (2000) (citation and quotation marks omitted). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *Zurosky v. Shaffer*, 236 N.C. App. 219, 235 (2014) (quoting *State v. Smith*, 188 N.C. App. 842, 845 (2008)).

Here, the record reflects that the trial court's calculation distributing $631,852.03 to plaintiff was the result of a clerical error, namely double-counting the $100,800.00 previously distributed marital portion of the Ductilcrete interest. Accordingly, we reverse the trial court's order with respect to the distributive award ordering defendant to pay the sum of $400,850.01 as divisible property, and remand to the trial court for

correction of the distribution. The correct distribution is: to plaintiff, one-half interest of Ductilcrete as her sole and separate property in the amount of $631,852.03, reduced by $100,800.00 and $225,983.00 for credited interim distributions, for a remaining entitlement of $305,069.03; and to defendant, one-half interest of Ductilcrete as his sole and separate property in the amount of $631,852.03, reduced by $100,800.00 for interim distribution, for a remaining entitlement of $531,052.03.

C. Alimony

[3] Finally, defendant contends the alimony order is invalid due to its reliance on the equitable distribution order.

The trial court's determination of whether a spouse is entitled to alimony is reviewed de novo. *Barrett v. Barrett*, 140 N.C. App. 369, 371 (2000) (citing *Rickert v. Rickert*, 282 N.C. 373, 379 (1972)). The trial court's determination of the amount, duration, and manner of payment of alimony is reviewed for abuse of discretion. *Id.* (citing *Quick v. Quick*, 305 N.C. 446, 453 (1982)). "[W]hen the trial court sits without a jury, the standard of review on appeal is whether . . . competent evidence . . . support[s] the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Collins v. Collins*, 243 N.C. App. 696, 699 (2015) (citation omitted). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97 (1991) (citations omitted).

"The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors[.]" N.C.G.S. § 50-16.3A(a). "The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment." N.C.G.S. § 50-16.3A(c).

Defendant's argument is founded solely in previously discussed challenges to the equitable distribution order. The alimony order does feature the same erroneous total of $631,852.00 without subtracting for previous distributions, but did not appear to specifically factor that number into the decretal portion ordering defendant to pay $6,000.00 per month. If anything, a higher total distribution in the alimony order would serve to reduce plaintiff's net shortfall; had the order correctly found plaintiff's net distribution on the interest to be $305,069.03, the award of monthly alimony may have been higher than $6,000.00. We

further note that the alimony order was set to terminate on 31 July 2024 and is no longer in effect.

Defendant does not specifically challenge the remainder of the alimony order. We find the trial court complied with N.C.G.S. § 50-16.3A, and accordingly the trial court's alimony order is affirmed to the extent that it remains.

III. Conclusion

For the foregoing reasons, we affirm the trial court's indicative ruling, reverse the equitable distribution order and remand for correction consistent with this opinion, and affirm the alimony order.

AFFIRMED IN PART, REVERSED IN PART & REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges COLLINS and WOOD concur.

DAVID BRADFORD FARRINGTON AND
MARGARET ELIZABETH FARRINGTON, PLAINTIFFS
v.
WV INVESTMENTS, LLC, DEFENDANT

No. COA23-416

Filed 5 November 2024

1. Trespass—real property—agent-principal liability—not applicable to landlord-tenant relationships

In a lawsuit brought by plaintiff property owners against their neighboring property owner (defendant)—a landlord whose tenants were predominantly college students—arising from tenants and their guests repeatedly blocking plaintiffs' access easement (a driveway) and crossing over plaintiffs' parking easement to exit defendant's property, the trial court properly rejected plaintiffs' trespass claim, which relied on the doctrine of agent-principal liability (a principal is liable for unauthorized acts by an agent if subsequent conduct tends to show ratification by the principal), because that doctrine did not apply to landlord-tenant relationships. Moreover, even assuming the doctrine had applied, plaintiffs had not presented evidence of ratification by defendant of the tenants' trespass.

2. Nuisance—common law—often coexistent with negligence—judgment affirmed if correct under any theory of law

In a lawsuit brought by plaintiff property owners against their neighboring property owner (defendant)—a landlord whose tenants were predominantly college students—arising from tenants and their guests repeatedly blocking plaintiffs' access easement (a driveway) and crossing over plaintiffs' parking easement to exit defendant's property, where the trial court held that defendant was negligent in repeatedly failing to control its tenants, the court did not err by rejecting plaintiffs' closely related nuisance claim because the constituent nuisances alleged by plaintiffs fell within the negligence holding.

3. Negligence—parking—municipal ordinance enforcement—proximate cause of encroachment—competent evidence

In a lawsuit brought by plaintiff property owners against their neighboring property owner (defendant)—a landlord whose tenants were predominantly college students—arising from tenants and their guests repeatedly blocking plaintiffs' access easement (a driveway) and crossing over plaintiffs' parking easement to exit defendant's property, the trial court's determination that defendant was negligent in failing to control its tenants was not error where the challenged findings of fact regarding the Town of Boone's municipal parking enforcement—which defendant argued misconstrued defendant's responsibility to ensure his tenants' compliance with intra-property navigability—were supported by competent evidence (even though testimony would also have supported different findings).

4. Damages and Remedies—negligence—absence of findings of fact regarding calculation of damages—remand required

The trial court's award of $65,000 in negligence damages to plaintiff property owners from their neighboring property owner (defendant)—a landlord whose tenants had repeatedly blocked an access easement (a driveway) and crossed over a parking easement to exit defendant's property—was reversed and the matter remanded where the court failed to document the calculations underlying the award amount; a reviewable legal conclusion on damages required more than transcript evidence indicating how the court might have reached its final decision.

5. Injunctions—permanent—Civil Procedure Rule 65—noncompliance—remand required

In a lawsuit brought by plaintiff property owners against their neighboring property owner (defendant)—a landlord whose tenants were predominantly college students—arising from tenants

and their guests repeatedly blocking plaintiffs' access easement (a driveway) and crossing over plaintiffs' parking easement to exit defendant's property, the trial court's permanent injunction failed to sufficiently specify the acts enjoined in reasonable detail, and further erred in imposing an unsolicited written payment plan that the parties must follow to settle damages awarded to plaintiffs that lacked any apparent basis in the record or in law. Accordingly, the injunction did not comply with the requirements of Civil Procedure Rule 65, and the matter was remanded for further consideration.

Appeal by WV Investments, LLC from judgment entered 7 October 2022 by Judge Kimberly Y. Best in Watauga County Superior Court. Heard in the Court of Appeals 17 October 2023.

Moffatt & Moffatt, PLLC, by Attorneys Tyler R. Moffat and Joseph T. Petrack, for the plaintiffs-appellants.

Poyner-Spruill, LLP, by Attorneys N. Cosmo Zinkow and Andrew H. Erteschik, for the defendant-appellant.

STADING, Judge.

I. Background

This case involves a combination of property and tort claims between David Bradford Farrington and Margaret Elizabeth Farrington ("Plaintiffs"), and WV Investments, LLC ("Defendant"). Plaintiffs own their family residence at 600 Grand Boulevard ("600 Property"), in the Town of Boone. On the adjacent parcel at 610 Grand Boulevard ("610 Property"), Defendant administers and rents out a small apartment complex through its constituent member-managers, David J. Welsh and Jeffrey J. Vanacore. The complex is a single building that houses four, separate, two-bedroom, dwelling units primarily occupied by Appalachian State University students.

A. Facts

In 2015, the original owner of the 600 and 610 Properties conveyed half of the then-single parcel to Defendant. Along the rear property line, the owner retained an exclusive access easement ("Access Easement") along part of the 600 Property driveway and a 610 Property-exclusive parking easement ("Parking Easement") onto the portion of the 610 Property adjacent to the Access Easement. Around March 2010, Defendant conveyed the 600 Property to Plaintiffs and recorded the

Access and Parking Easements. The 610 Property owners and their assigns could use the Parking Easement subject to the rules and regulations specified in Defendant's standard lease contract (the "Lease Contract) offered to all tenants.

The Lease Contract bound the tenants and Defendant, as landlord, to certain contractual rights and obligations relevant here. The Lease Contract's rules and regulations provision expressly incorporates the following tenant requirements enforceable by Defendant:

> (14) **PARKING**: Please use only the number of spaces assigned to you. . . . Park in marked spaces only. Policies are enforced 24 hours a day. Parking Policies are strictly enforced in order to assure you of the number of spaces assigned you on your Lease Contract.
>
> You agree to abide by parking policies, rules, signs and regulations that apply to your dwelling's parking lot(s). **There will be no exceptions to parking policies and signs, so please do not request an exception.**
>
> . . .
>
> (38) **TENANT'S OBLIGATIONS**: The tenant shall not violate any local ordinance in or about the dwelling unit, and shall not commit or permit any waste or nuisance, disturbance, annoyance, inconvenience, or damage . . . to the occupancy of any adjoining house and/or apartment, or the neighborhood.

Both properties are in one of the Town of Boone's "Neighborhood Conservation Districts" subject to the Unified Development Ordinance ("UDO"). The UDO states: "All tenants of rental property must complete and file a Residential Parking Registration Form with the Administrator . . . [to be] issued parking stickers" by the Town Administrator. Boone, N.C., Unif'd Dev. Ordinance art. 14, § 14.41.03(A)–(B) (2024).

Soon after Plaintiffs moved into the 600 Property, the 610 Property tenants began regularly throwing loud parties, blocking the Access Easement, and crossing over the Parking Easement to leave the property. In 2015, Defendant boarded its first set of tenants independent of the previous owner. At Plaintiffs' repeated requests, Welsh emailed the then-tenants over the years to remind them that "the only place [they] are allowed to park is in [their] [own] parking spot," and that they can never "leave cars in the shared driveway" between the Properties. Despite several similar communications from 2015 to 2020, the tenants

continued disregarding these instructions. The Town of Boone notified Mr. Farrington that it issued only eighteen parking stickers to the 610 Property tenants over that period, thirteen of which were issued in 2019.

B. Procedural Posture

On 14 April 2021, Plaintiffs filed a complaint against Defendant, alleging that it committed multiple instances of common-law trespass, common-law nuisance, and negligence through a chronic lack of tenant management. The complaint also sought an order to permanently enjoin Defendant from allowing the 610 Property tenants to park or trespass on the 600 Property without valid Town of Boone parking stickers. Defendant denied all claims. On 13 June 2022, the trial court conducted a bench trial in which the parties offered competing evidence.

After ruling for and against each party on various claims, the trial court entered an order ("Order"), documenting its findings of fact and conclusions of law. The trial court found Defendant negligent in his duties owed to Plaintiffs as the landlord of the adjacent 610 Property. It also awarded $65,000 in damages to Plaintiffs through a "written payment plan" and enjoined Defendant in several respects described below. The trial court rejected the trespass and nuisance claims, reasoning that Plaintiffs failed to adduce "sufficient evidence to hold" Defendant liable for either tort. Plaintiffs and Defendant timely appealed and cross-appealed several aspects of the Order.

1. Findings of Fact

Finding No. 6 stated in part: "[t]he testimony revealed that . . . a maximum of six (6) vehicles at a time can park in that area and still have room to turn around . . . without trespassing on the [600] [P]roperty." Findings No. 10 and No. 12, respectively, stated that when the vehicle limit is exceeded, it becomes "virtually impossible for vehicles to safely access the rear of the [610] [P]roperty . . . without trespassing across the [ ] Parking Easement" (Finding No. 10), and that, under these conditions, they "encroach" onto the 600 Property via "ingress, egress, and regress" from the 610 Property (Finding No. 12).

The trial court also found that "[P]laintiffs have repeatedly requested" Defendant to require its tenants to obtain parking stickers from the Town of Boone, as required by its ordinances (Finding No. 14), to "limit the number and use of vehicles . . . and prohibit Defendant's tenants from crossing and trespassing across the [ ] Parking Easement" (Finding No. 15), and to "manage parking on the [610] [P]roperty" (Finding No. 19). These findings charged Defendant with failing to fulfill

Plaintiffs' requests, with Finding No. 14 specifying that Defendant "[d]id not comply with the Town of Boone ordinances in a consistent manner and recently only [complied] after this lawsuit was filed." Another finding clarified that Defendant "has historically failed to ensure that its tenants comply with Town of Boone Ordinances" (Finding No. 19). Finally, the trial court incorporated section fourteen of the rules and regulations regarding the tenants' parking requirements as Finding No. 16.

2. Conclusions of Law

In relevant part, the trial court enjoined Defendant "from issuing more parking stickers than spaces [the 610] [P]roperty permits," to "inform its tenants that all of tenant's vehicles will require a Town of Boone parking sticker," and to "take such action as is necessary to prevent its tenants from trespassing upon and damaging" the 600 Property. The trial court also ordered Defendant to pay Plaintiffs $65,000 in damages for its negligence in accordance "with a written payment plan agreed upon by the parties."

II. Jurisdiction

This Court has jurisdiction to review the Order pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023) ("any final judgment of a superior court").

III. Analysis

On appeal, both Plaintiffs and Defendant raise their own issues with the Order. Plaintiffs argue that the trial court erred in: (1) concluding that they did not adduce sufficient evidence to hold Defendant liable for trespass; (2) concluding that they did not adduce sufficient evidence to categorize Defendant's property as a nuisance to the 600 Property; and (3) fashioning injunctive relief applicable to their actual injuries caused by Defendant.

As a cross-appellant, Defendant argues that the trial court erred in: (1) relying on incompetent evidence to reach specific erroneous findings of fact; (2) concluding that Defendant owed Plaintiffs a legally cognizable $65,000 in damages; and (3) issuing an injunction with unenforceable, vague commands.

For the reasons discussed below, we hold that the trial court: (1) did not err in reaching the contested findings of fact; (2) did err in concluding that Defendant owed Plaintiff $65,000 in damages without further documentation; and (3) did err by issuing an injunction too imprecise to enforce.

A. Common Law Charges

Plaintiffs argue that the trial court erred in concluding that they failed to adduce sufficient evidence to hold Defendant liable for either trespass or nuisance at common law. In support of their trespass claim, Plaintiffs suggest that Defendant's continued rent collections throughout the alleged trespass period gave rise to vicarious liability from the tenants' encroachments. As for their nuisance claim, Plaintiffs point to Defendant's "willful and persistent refusal" to adequately control its tenants. We disagree and hold that the trial court did not err in reaching either conclusion.

1. Trespass

[1] A plaintiff must prove three elements to establish a claim for real-property trespass: "(1) that the defendant caused actual damage to the plaintiff, (2) by entering the plaintiff's real property without authorization, (3) which the plaintiff contemporaneously possessed at the time of the alleged trespass." *Keyzer v. Amerlink, Ltd.*, 173 N.C. App. 284, 289, 618 S.E.2d 768, 772 (2005) (citation omitted). Additionally, a defendant may incur third-party liability through an agent's actions or by the conduct of co-conspirators. *See, e.g.*, *Horton v. Hensley*, 23 N.C. 163 (1840) (addressing co-conspirators as principals); *McBryde v. Coggins-McIntosh Lumber Co.*, 246 N.C. 415, 98 S.E.2d 663 (1957) (dealing with agents and principals).

A principal can be liable for an agent's unauthorized actions if evidence shows the principal ratified those actions after the fact. As the court stated, a principal is liable when subsequent conduct "reasonably tends to show an intention on his part to ratify the agent's unauthorized acts." *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 229, 721 S.E.2d 256, 262 (2012). However, Plaintiffs' assertion that the 610 Property tenants are agents of Defendant is flawed.

Plaintiffs' trespass claim fails because it seeks to apply general principles of agent-principal liability to a landlord-tenant relationship where they do not belong. To accept such an argument would indeed "break new ground." *Cf.* N.C. Gen. Stat. § 42-1 (2023) ("No lessor of property, *merely by reason that he is to receive as rent* . . . shall be held a partner of the lessee." (emphasis added)).

Defendant acknowledges that Plaintiffs have legal possession of the 600 Property. Furthermore, Defendant leaves its tenants' regular encroachments onto the 600 Property and Parking Easement unchallenged, which caused actual damage. Yet Plaintiffs' argument suffers

from a crucial deficiency: they do not allege that Welsh, Vanacore, or any other agent of Defendant personally trespassed onto the 600 Property or its easements. In fact, Plaintiffs explicitly admit that the alleged trespasses were "not by the Defendant but instead by the tenants and guests of [the] 610" Property.

Plaintiffs' position is undermined by evidence of emails from Welsh instructing Defendant's tenants "not to park in the Access Easement." Even assuming a vicarious landlord-tenant relationship, Defendant's documented refusal to "ratify the [tenants'] unauthorized acts" effectively severs any possible link to third-party trespass liability. *Carter*, 218 N.C. App. at 229, 721 S.E.2d at 262. We thus hold that the trial court did not err in determining that Plaintiffs failed to present sufficient evidence to support a common-law trespass claim as a matter of law.

2. Nuisance

[2] Second, Plaintiffs argue that the trial court erred in concluding that they failed to adduce sufficient evidence to hold Defendant liable for common law nuisance. Plaintiffs point to Defendant's "willful and persistent refusal" to control its tenants adequately. We disagree because the constituent nuisances alleged here appropriately fall within the trial court's otherwise undisturbed holding of negligence by Defendant.

North Carolina distinguishes between negligence and nuisance even though "the line of demarcation between them is often indistinct and difficult to define." *Midgett v. N.C. State Hwy. Comm'n*, 265 N.C. 373, 379, 144 S.E.2d 121, 126 (1965). "[T]he two torts may coexist and be practically inseparable[.]" *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 191, 77 S.E.2d 682, 688 (1953). In order for Plaintiffs to assert a *prima facie* nuisance claim, they must show: (1) Defendant unreasonably used its property under circumstances that invaded or otherwise interfered with Plaintiffs' use of their property; and (2) Defendant's usage caused "substantial injury and loss of value to" Plaintiffs' property. *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 618, 124 S.E.2d 809, 814 (1962). On the other hand, an alleged nuisance may be "negligence-born" and must thus "make obeisance to its parentage" as a question of law. *Butler v. Carolina Power & Light Co.*, 218 N.C. 116, 121, 10 S.E.2d 603, 606 (1940) (citation omitted). Against the backdrop of these legal principles, we uphold a trial court's judgment "if it is correct upon *any* theory of law." *Manpower of Guilford Cnty., Inc. v. Hedgecock*, 42 N.C. App. 515, 519, 257 S.E.2d 109, 113 (1979) (emphasis added) ("A correct ruling by a trial court will not be set aside merely because the court gives a wrong or insufficient reason for its ruling. . . . The ruling must be upheld if it is

correct upon any theory of law."). Put more simply, we leave untouched a legally sound result even if "the court gives a wrong or insufficient reason for its ruling." *Id.*

Here, the trial court reached a legally sound conclusion in characterizing Defendant's repeated failure to adequately control its tenants as negligence without separable nuisance. The trial court found that Defendant's tenants often encroached onto Plaintiffs' property and parked their vehicles without the required Town of Boone parking stickers. The trial court also found that Plaintiffs suffered cognizable damages based on Defendant's actions. The trial court could have rationally determined that these findings amounted to circumstantially "unreasonable" property interferences that caused "substantial injury" to Plaintiffs. *Watts*, 256 N.C. at 618, 124 S.E.2d at 814. Thus, we hold that the trial court did not err in concluding that Plaintiffs failed to adduce sufficient evidence to hold Defendant liable for common law nuisance independent of its negligence holding.

B. Negligence

[3] Defendant challenges the trial court's negligence holding by suggesting that incompetent evidence supports specific erroneous findings of fact. Defendant asserts that these findings misapprehend its role in parking-ordinances enforcement and the intra-property navigability of the vehicles themselves. We disturb a finding of fact only if the trial court in question abused its discretion in reaching it, which occurs if the finding is so "manifestly unsupported by reason" or "arbitrary that it could not have been the result of a reasoned decision." *Lacey v. Kirk*, 238 N.C. App. 376, 381, 767 S.E.2d 632, 638 (2014) (citation omitted). By contrast, we review "question[s] of law or legal inference" *de novo*. *Id.* For the reasons discussed below, we hold that competent evidence supports the trial court's findings of fact, which in turn support its conclusions of legal negligence.

1. Findings of Fact

Defendant bifurcates his factual challenges between those findings that address municipal parking requirements (Findings Nos. 14, 15, 17, and 19) and tenant-vehicle navigability between the properties (Findings Nos. 6, 10, 12, 15, and 19). Neither party challenges any other finding of fact that conclusively binds us here. *See Durham Hosiery Mill, L.P. v. Morris*, 217 N.C. App. 590, 592, 720 S.E.2d 426, 427 (2011). In reaching decisions, a trial court sitting as a factfinder must "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." *Coble v. Coble*, 300 N.C. 708,

712, 268 S.E.2d 185, 189 (1980) (citing N.C. Gen. Stat. § 1A-1, Rule 52(a) (2023)). On appeal, we do not assess "the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble*, 300 N.C. at 712–13, 268 S.E.2d at 189 (citations omitted). And if competent evidence supports "sufficient findings of fact," we generally will not reverse a trial court's order "because of other erroneous findings which do not affect the conclusions." *Clark v. Dyer*, 236 N.C. App. 9, 24, 762 S.E.2d 838, 846 (2014) (citation omitted). Because the Order involves municipal parking enforcement by the Town of Boone—not Defendant—and is supported by competent record evidence for its "causation-based findings," any error in reaching Finding No. 14 was harmless. The trial court also did not err in its Findings Nos. 6, 10, 12, 15, 17, and 19.

a. Municipal Parking Enforcement

Competent evidence supports the trial court's unambiguous findings about the Town of Boone's municipal parking enforcement. If a trial court renders reasonably ambiguous findings or conclusions "in light of all relevant circumstances, the court should adopt the interpretation that is in line with the law applicable to the case." *Faucette v. 6303 Carmel Rd., LLC*, 242 N.C. App. 267, 273, 775 S.E.2d 316, 322 (2015). Relevant circumstances include "the pleadings, issues, [and] the facts of the case." *Id.* Despite this fact-specific discretion, our case law has long recognized that any "[f]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light." *McGill v. Town of Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939); *see also Johnson v. S. Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004). The trial court's challenged findings of fact regarding parking enforcement are neither an ambiguous judgment nor a legal misapprehension.

Challenges grounded in ambiguity to the trial court's Findings Nos. 15 and 19 fail outright. By failing to challenge Finding No. 16, Defendant and Plaintiffs affirm Defendant's contractual obligation to enforce the parking policies for the 610 Property parking lot. The Order refers to Defendant's contractual duties to "enforce the Town of Boone's requirements for parking stickers," to "ensure that its tenants comply with Town of Boone Ordinances," and to "manage parking on its property." Even if the term "enforce" is ambiguous, the requirement that tenants "not violate any local ordinance" merits the deference we afford to a trial court's interpretation. *See Faucette*, 242 N.C. App. at 273, 775 S.E.2d at 322 (quoting *Blevins v. Welch*, 137 N.C. App. 98, 102, 527 S.E.2d 667, 670-71 (2000)) (" 'Generally, the interpretation of judgments presents a question of law that is fully reviewable on appeal.' However, this Court

will afford some degree of deference to the trial court's interpretation of an ambiguous judgment.").

Finding No. 14's second sentence states that Defendant "did not comply with the Town of Boone ordinances in a consistent manner." Read in isolation, this excerpt might imply some ambiguity as to whether the trial court understood the Town of Boone's "Neighborhood Conservation Districts" ordinance to legally bind Defendant instead of the tenants themselves. But Defendant challenges only this "isolated part[ ]" of a larger "whole," Finding No. 14, which lists more than just Defendant's purported non-compliance. *Faucette*, 242 N.C. App. at 273, 775 S.E.2d at 322 ("Judgments must be interpreted like other written documents, not by focusing on isolated parts, but as a whole."). Finding No. 14 confirms the trial court's understanding that Defendant had "to require its tenants to obtain parking stickers from the Town of Boone, as required by ordinances of the Town."

We also dispense with Defendant's and Plaintiffs' challenge to Finding No. 17 because it lacks any additional support beyond a conclusory reference to the trial court's alleged misapprehension regarding the nature and scope of the Town of Boone's ordinance. "It is not the role of an appellate court to construct arguments for the parties, or to flush out incomplete arguments" and we will not do so here. *Est. of Hurst ex rel. Cherry v. Jones*, 230 N.C. App. 162, 178, 750 S.E.2d 14, 25 (2013). We thus hold that the trial court did not error in reaching Finding No. 14. The trial court also did not err in its Findings Nos. 15, 17, and 19 to the extent they addressed Defendant's arguments about the Town of Boone's municipal parking regulations.

b. Encroachment Causation

Competent evidence also supports the trial court's findings of fact regarding proximate causation of the tenants' encroachments onto the 600 Property. A trial court's findings of fact supported by competent evidence bind us on appeal even if they might "support findings to the contrary." *Mann Contractors, Inc. v. Flair With Goldsmith Consultants–II*, 135 N.C. App. 772, 775, 522 S.E.2d 118, 121 (1999). Here, Defendant challenges the trial court's finding that more than six vehicles in the 610 Property parking lot make it "virtually impossible" to exit without trespass by arguing that *any* number of vehicles makes it impossible. We believe that Findings Nos. 6, 10, 12, 15, and 19 reveal, to varying degrees, that Defendant proximately caused Plaintiffs' injuries. Allowing six or fewer cars still permitted tenants to "ingress, egress, and regress from the rear parking area," which Defendant had a duty to reasonably regulate for Plaintiffs' benefit.

To support its position, Defendant argues that statements by Charles Ritter, a former 610 Property tenant who testified that the small driveway size occasionally "forced" them "to go into [Plaintiffs'] property by either removing stakes" or "simply running" them over to leave. Defendant suggests that this testimony demonstrates an inability to prevent tortious conduct, thus establishing an independent cause of Plaintiffs' injuries. However, in the same testimony, Ritter confirmed that the tenants could exit the parking lot and use the easement without trespassing, even "[w]ith the six cars parked there." Given the competing evidence, the trial court could reasonably have determined that the tenants still had the means to "ingress, egress, and regress from the rear parking area" without trespassing onto Plaintiffs' property. We therefore hold that the trial court did not err in reaching Findings Nos. 6, 10, 12, 15, and 19 to the extent they address Defendant's arguments about the proximate causation of its negligence.

2. Conclusions of Law

Defendant does not attack the conclusion of legal negligence itself. Yet Defendant compares the trial court's error to *Plymouth Fertilizer Co. v. Selby*, 67 N.C. App. 681, 313 S.E.2d 885 (1984). In *Plymouth*, the trial court inadequately documented its findings, and the Court of Appeals suspended the N.C. Rules of Appellate Procedure "to prevent manifest injustice" despite the injured "defendant [ ] so ignoring [them] as to render th[e] appeal" otherwise dismissible. 67 N.C. App. at 682, 313 S.E.2d at 885 (citing N.C. R. App. P. 2). The *Plymouth* trial court so systematically failed to "resolv[e] critical issues raised by the evidence" in its findings that this Court effectively wrote an order for it. *Id.* at 683, 313 S.E.2d at 885.

Defendant incorrectly pulls from dictum mentioning the *Plymouth* Court's "uncertain[ty] of *any* construction of the evidence that would support the conclusions of law made by" the trial court. *Id.* at 686, 313 S.E.2d at 888 (emphasis added). Here, we are unable to discern any errors that resemble those present in *Plymouth*. Thus, we hold that the trial court relied on judicially sound findings of fact throughout the Order.

C. Damages Awarded

[4] Defendant next argues that the trial court erred in holding that Defendant owed plaintiffs $65,000 in negligence damages because the trial court did not document the underlying calculation in its findings. We agree that this conclusion of law lacks sufficient findings to support it. Contrary to Plaintiffs' response, a reviewable legal conclusion

requires more than just transcript evidence indicating how the trial court might have reached its final decision. As mentioned, a trial court's findings "supported by competent evidence" amount to a jury verdict even if other evidence might "support findings to the contrary." *Mann Contractors*, 135 N.C. App. at 775, 522 S.E.2d at 775. But if the record does show contrary evidence, the trial court must "make specific findings upon which [it] base[s] its conclusions" or risk reversible error on appeal. *Id.*; *see* N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2023). The trial court must specify these findings "enough to indicate" to this Court that it "determine[d] what pertinent facts" the evidence "actually established . . . ." *Coble*, 300 N.C. at 713, 268 S.E.2d at 189.

Relying on *Mann Contractors*, Defendant correctly notes that the trial court's failure to show its math within the Order prevents us from adequately reviewing the damages awarded as a question of law. In *Mann Contractors*, this Court remanded the case for a new bench trial on the narrow issue of calculable damages stemming from a contract dispute over home renovations. *Mann Contractors*, 135 N.C. App. at 776, 522 S.E.2d at 121. The *Mann Contractors* defendant appealed an award of $36,000 in damages to plaintiff, arguing that the trial court did not support this amount with any requisite findings of fact. *Id.* at 774, 522 S.E.2d at 120. Our Court agreed, reasoning that the trial court did not correctly address in its findings "the factual dispute with [ ] respect to either the necessity or cost of" any contrary calculations. *Id.* at 774, 522 S.E.2d at 121.

Here, the trial court did not document the methodology used to arrive at the $65,000 in damages award to Plaintiffs. On appeal, Plaintiffs attempt to recalculate the amount after the fact by drawing on scattered transcript excerpts of Welsh's trial testimony and their counsel's closing argument. But neither the parties nor this Court can determine the evidentiary soundness of the purported $5,300 per month in the 610 Property rental income, the estimated "quarter of [Plaintiffs'] property . . . not usable," or the relevant forty-nine months of negligent conduct "within the statute of limitations." That is the trial court's duty. The trial court did not document any findings of fact to support its conclusion of law concerning damages owed. Thus, the trial court erred in concluding that Defendant owed Plaintiff $65,000 in damages and we thus remand to determine "what amount, if any, [P]laintiff is entitled to recover from [D]efendant." *Mann Contractors*, 135 N.C. App. at 775, 268 S.E.2d at 121.

D. Injunctive Relief

[5] Both Plaintiffs and Defendant challenge the trial court's permanent injunction. At this juncture, however, the parties' respective challenges

to the injunction diverge. Plaintiffs accept the injunction but argue that the trial court erred by imposing a written payment plan that the parties must follow to settle the damages awarded to Plaintiffs. We agree with Plaintiffs that the trial court erred in adding this unsolicited requirement to the injunction, as it lacks any apparent basis in the record or current law. Conversely, Defendant rejects the injunction entirely and contends that the trial court erred by issuing one so legally imprecise as to be unenforceable. For the reasons discussed below, we find that this constitutes error.

When a trial court fashions a permanent injunction, "[e]very order granting an injunction. . . shall set forth the reasons for its issuance; shall be in specific terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained." N.C. Gen. Stat. § 1A-1, Rule 65(d) (2023). We assess this reasonable-detail requirement by asking "whether the party enjoined can know from the language of the order itself, and without having to resort to other documents, *exactly what the court is ordering it to do*." *Auto. Dealer Res., Inc. v. Occidental Life Ins. of N.C.*, 15 N.C. App. 634, 642, 190 S.E.2d 729, 734 (1972).

The imposed injunction at least partially fails this test because neither Defendant nor this Court can, without resorting to other documents, determine what the trial court reasonably means by a "necessary" action. *Id.* The two intended results of "preventing [the] tenants from trespassing upon and damaging" the 600 Property are clear enough given Defendant's negligence. Even so, we cannot discern with any reasonable certainty what actions the trial court considers to be "necessary" to achieve them. The trial court does outline in its findings and conclusions what actions by Defendant amounted to negligence, such as failing to act after receiving "notice that its tenants' vehicles . . . were encroaching on" the 600 Property. But it does not attempt to tie this documentation to its injunctive command in any reasonable or fair way for Defendant. Accordingly, we hold that the injunction is not specific enough to comply with statutory requirements and remand for further consideration. N.C. Gen. Stat. § 1A-1, Rule 65(d).

IV. Conclusion

For the reasons above, we hold that the trial court did not err in: (1) concluding that Plaintiffs failed to adduce sufficient evidence to hold Defendant liable for trespass; (2) concluding that Plaintiffs failed to adduce sufficient evidence to hold Defendant liable for nuisance; (3) fashioning injunctive relief applicable to their actual injuries; and (4) reaching Findings Nos. 6, 10, 12, 14, 15, 17, and 19. However, we hold

that the trial court erred in: (1) concluding that Defendant owed plaintiff $65,000 in damages without documenting further findings of fact; and (2) issuing an injunction too legally imprecise for Defendant to obey.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges ZACHARY and WOOD concur.

HEATHER MARIE FITZGERALD, PLAINTIFF
v.
SAVANNAH FORTNER, TYLER HIBBETT, DONNA PERRELL, MICHAEL (TODD) PERRELL, THOMAS B. GRUBBS, AND COURTNEY GRUBBS, DEFENDANTS

No. COA24-24

Filed 5 November 2024

1. Child Abuse, Dependency, and Neglect—neglect—transfer to Chapter 50 civil custody case—improper termination of jurisdiction by juvenile court—lack of findings

In a juvenile neglect matter—in which the minor child was appointed a guardian (her maternal great-grandmother) who subsequently developed health issues and died, after which another family member (the child's paternal aunt) filed a complaint for custody and a motion for a temporary custody order—the juvenile court failed to properly terminate its own jurisdiction pursuant to N.C.G.S. § 7B-911 before transferring the case to the Chapter 50 court because it did not make any findings of fact regarding the child's permanent plan and the effect any change in that plan would have on the child's parents. Since the case was improperly transferred, the Chapter 50 court lacked subject matter jurisdiction to enter a custody order.

2. Jurisdiction—juvenile neglect matter—motion to review and dissolve guardianship—filed by non-parties—lack of standing

In a juvenile neglect proceeding, in which the court appointed a family member as guardian for the minor child, non-family members who filed a motion to review and dissolve the guardianship lacked standing to do so because they were not legal parties to the juvenile proceeding. Therefore, the trial court lacked jurisdiction to review and enter an order on the motion, which could have been brought either by the guardian (who, due to her own health considerations,

had expressed interest in having the movants help plan for the minor child's future care) or the department of social services.

Appeal by plaintiff from order entered 30 May 2023 by Judge Jon W. Welborn in Davidson County District Court. Heard in the Court of Appeals 12 June 2024.

Robinson & Lawing, LLP, by Attorney Christopher M. Watford, for plaintiff-appellant.

Spidell Family Law, by Attorney Harvey W. Barbee, Jr., for defendant-appellees Thomas B. Grubbs and Courtney Grubbs.

THOMPSON, Judge.

Katherine,[1] a minor, was removed from her biological parents' custody and placed in a kinship placement with her maternal great-grandmother (Guardian). Unfortunately, modification to the guardianship/custody of Katherine was not determined before Guardian passed away. Both appellant and appellees have demonstrated interest in obtaining custody of Katherine. As such, the juvenile court determined that it was in Katherine's best interest to terminate its jurisdiction and transfer jurisdiction to the Chapter 50 court. After careful review, we reverse the Chapter 50 court's 30 May 2023 order and the juvenile court's 17 June 2023 orders, and remand for further proceedings.

I. Factual Background and Procedural History

On 17 February 2020, the Davidson County Department of Social Services (DSS) filed a juvenile abuse/neglect/dependency petition regarding Katherine in the Juvenile Division of Davidson County District Court (juvenile court). On 22 July 2020, the juvenile court adjudicated Katherine a neglected juvenile, and a permanent plan of care was established wherein the primary plan was guardianship and the secondary plan was reunification with Katherine's parents.

On 26 April 2021, the juvenile court entered a review and permanency planning order. Pursuant to this order, Guardian was appointed as Katherine's legal guardian.

1. Pseudonyms or initials are used to protect the identity of the minor child throughout this opinion.

After Guardian was diagnosed with a terminal illness, she and Katherine moved in with Donna Perrell (Guardian's daughter) and Todd Perrell (Guardian's son-in-law) (the Perrells) so that the Perrells could help take care of both Katherine and Guardian. However, the Perrells had several children of their own and asked the appellees, Thomas and Courtney Grubbs, to help take care of Katherine. The record is void of any effort by DSS or Guardian to address these changes to Katherine's placement and caretaker arrangements for almost a year. On 18 February 2022, the appellees filed a motion for review and to dissolve Guardian's guardianship. Within this document, the appellees alleged that based on Guardian's chronic illness, Guardian was "concerned that she may not be able to provide sufficiently for" Katherine and that Guardian asked the appellees "to help her plan for [Katherine]'s care and implement that plan." The appellees further indicated that Katherine began living with them around Christmas 2021 and would visit Guardian and call her on the telephone. Guardian passed away on 23 March 2022. Again, there is no indication from the record that the juvenile court's secondary plan of reunification with Katherine's parents was ever brought back to the juvenile court's review.

On 24 March 2022, Heather Fitzgerald (appellant) filed a complaint for custody and a motion for temporary custody order for Katherine.[2] In her complaint, appellant alleged that "[c]ircumstance[s] exist[ed] to warrant an expedited hearing in th[e] matter for the entry of a temporary custody order[,]" because of Guardian's death.

On 17 June 2022, the appellees' motion for dissolution of the guardianship came on for hearing in the juvenile court. As a result, the juvenile court made, *inter alia*, the following finding of fact:

> 30. Following the death of the Guardian, it is appropriate for further Orders of the Court to be made pursuant to Chapter 50 of the North Carolina General Statutes and that a copy of this Order be placed in the resulting civil file with the parties hereto named as necessary parties therein. Pursuant to N.C. [Gen. Stat.] §[ ] 7B-911, the persons to whom this Court awards custody must be parties in the civil action for child custody.

The juvenile court concluded that:

> 1. The Court has jurisdiction over the parties and over the subject matter of this action, pursuant to Chapter 7B of the North Carolina General Statutes.

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2. Appellant is Katherine's paternal aunt.

> 2. Upon the death of the appointed guardian of the person of the minor child, the Guardianship previously ordered in this juvenile proceeding is dissolved.
>
> 3. It is in the best interests of the minor child[ ] to maintain stability in her care until such time as the Court may receive home studies on the Movants, [the appellees], and the paternal aunt, [appellant], each of whom has expressed an interest in being awarded custody of the minor child, to place the minor child in the temporary custody of her respite care providers, [the Perrells].
>
> 4. It is in the best interest of the minor child and in the best interest of justice, pursuant to N.C. [Gen. Stat.] § 7B-911, that the jurisdiction in this juvenile proceeding should be terminated and custody of the juvenile awarded to an appropriate person, as set forth below.
>
> 5. This matter should be filed in the civil action relating to the custody of the minor child in Davidson County file number 22 CVD 560, with the parties and caption set forth below.

Also on 17 June 2022, the juvenile court entered an order acknowledging that the juvenile court terminated its jurisdiction and transferred jurisdiction of the consolidated issues—namely, appellees' motion to dissolve the guardianship and appellant's complaint for custody of Katherine—to the Civil Division of the Davidson County District Court (Chapter 50 court).

On 17 August 2022, the Chapter 50 court ordered that appellant, appellees, and Katherine's biological parents attend mediation. On 21 September 2022, appellant and her attorney, Katherine's biological parents, and the appellees and their attorney attended a mediation conference, which resulted in an impasse and left the issue of custody of Katherine remaining for trial.

On 30 May 2023, the Chapter 50 court entered a custody order pertaining to Katherine. Pursuant to this order, the court granted the appellees sole legal and physical custody of Katherine and ordered, *inter alia*, a gradual decrease in visitation with appellant unless mutually agreed upon between the parties.

On 26 June 2023, appellant entered timely written notice of appeal.

II. Appellate Jurisdiction

As a threshold matter, we address whether this Court has jurisdiction to review the child custody order. Appellant-petitioner filed an amended petition for writ of certiorari (PWC) contemporaneously with this appeal in the event that the lower court's purported lack of subject matter jurisdiction deprived this Court of the authority to review the appeal. However, the Chapter 50 court's 30 May 2023 child custody order constitutes a final resolution of the parties' custody claims over Katherine. Thus, this appeal is properly before us. *See Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013) (explaining that an order that completely decides the merits of an action constitutes a final judgment for the purposes of appeal). As such, we dismiss as moot appellant-petitioner's PWC and get to the merits of the matter on appeal.

III. Discussion

A. Standard of Review

"Whether a trial court has subject[ ]matter jurisdiction is a question of law, reviewed de novo on appeal." *McMillan v. McMillan*, 267 N.C. App. 537, 542, 833 S.E.2d 692, 695 (2019) (citation omitted). Subject matter jurisdiction "derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law." *Id.* Moreover, "the trial court's subject [ ]matter jurisdiction may be challenged at any stage of the proceedings." *Id.* (citation omitted).

B. N.C. Gen. Stat. § 7B-911

[1] Appellant first argues that the juvenile court failed to properly terminate its jurisdiction under N.C. Gen. Stat. § 7B-911, and thus, the Chapter 50 court lacked subject matter jurisdiction to enter the 30 May 2023 custody order. We agree.

Under North Carolina law, "[t]he court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2023). And "[w]hen the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of [eighteen] years or is otherwise emancipated, whichever occurs first." N.C. Gen. Stat. § 7B-201(a). Furthermore, this Court has recognized that there are certain cases that "originate[ ] as abuse, neglect, or dependency proceedings under Chapter 7B of the General Statutes," but over time, DSS's involvement becomes unnecessary "and the case becomes a custody dispute between private parties which is properly

handled pursuant to the provisions of Chapter 50." *Sherrick v. Sherrick*, 209 N.C. App. 166, 169, 704 S.E.2d 314, 317 (2011). Moreover, "there is a clear dividing line between the exercise of the juvenile court's jurisdiction and the [Chapter 50] court's jurisdiction, and that line is drawn by N.C. Gen. Stat. § 7B-911." *Id.*

N.C. Gen. Stat. § 7B-911 "provides the procedure for transferring a Chapter 7B juvenile proceeding to a Chapter 50 civil action." *Id.* The procedure outlined in this statute provides the juvenile protection, and the juvenile's custodial situation stability, throughout the transition from juvenile court to Chapter 50 court. *Id.* Thus, N.C. Gen. Stat. § 7B-911 "requires that the juvenile court enter a permanent order prior to termination of its jurisdiction[,]" *id.*, and the order must satisfy the following:

> (1) Make findings and conclusions that support the entry of a custody order in an action under Chapter 50 of the General Statutes or, if the juvenile is already the subject of a custody order entered pursuant to Chapter 50, makes findings and conclusions that support modification of that order pursuant to [N.C. Gen. Stat. §] 50-13.7.
>
> (2) Make the following findings:
>
> a. There is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.
>
> b. At least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.

N.C. Gen. Stat. § 7B-911(c).

Here, the juvenile court exercised its jurisdiction over the neglect proceeding pursuant to N.C. Gen. Stat. §§ 7B-200, 7B-201, and 50A-201, and continued to have jurisdiction until its 17 June 2022 Order that purported to, *inter alia*, terminate jurisdiction pursuant to N.C. Gen. Stat. § 7B-911. While the record evidences the juvenile court's valiant attempt at complying with N.C. Gen. Stat. § 7B-911 under the circumstances, the juvenile court neglected to make findings that speak to N.C. Gen. Stat. § 7B-911(c)(2)(b). The order states in relevant part:

> 1. [Katherine] had been placed in the physical custody of [Guardian], with respite care provided by [the Perrells]

and has been in such custody for a period in excess of six months next preceding the filing of the motion.

2. In a Review and Permanency Planning Order entered in this matter on [5 October] 2021, the [juvenile c]ourt ordered that [Guardian], maternal great-grandmother, remain appointed guardian of the person of the minor child, [Katherine], pursuant to N.C. [Gen. Stat. §] [ ]7B-600. The said [juvenile c]ourt Order further provided, 'In the event the Guardian wishes to return custody to any parent or third party, the matter must be brought back before the [j]uvenile [c]ourt for Davidson County, North Carolina.'

3. In about November 2021, [Guardian] . . . was diagnosed with cancer and moved herself and [Katherine] into the home of [the Perrells]. Donna Perrell is the Guardian's daughter and Todd [ ] Perrell is the Guardian's son-in-law. The Davidson County [DSS] had previously conducted a home study and approved the home of [the Perrells] as a *respite resource* for [Katherine]. (Emphasis added.)

. . . .

7. [Katherine] was adjudicated to be a neglected juvenile on [22 July] 2020. The [juvenile c]ourt granted guardianship of [Katherine] to Guardian on [17 March] 2021.

8. The Guardian passed away on [23 March] 2022.

9. The [g]uardianship dissolved by death of the appointed Guardian in this matter.

10. The [DSS] and the Guardian *Ad Litem* agree that it is in the best interests of [Katherine] to establish a temporary custody order to avoid the need to return [Katherine] to the custody of the [DSS].

. . . .

17. The best interest of [Katherine] continues to be served by retaining [Katherine] in her current placement, namely in the home of the Perrells.

. . . .

25. Mr. Perrell testified that it was the wish of the Guardian and [the Perrells] that the [appellees] be either substituted as [g]uardians or awarded custody of [Katherine].

. . . .

> 29. There is not a need for continued State intervention on behalf of [Katherine] through a juvenile court proceeding.
>
> 30. Following the death of the Guardian, it is appropriate for further Orders of the Court to be made pursuant to Chapter 50 of the North Carolina General Statutes and that a copy of this Order be placed in the resulting civil file with the parties hereto named as necessary parties therein. Pursuant to N.C. [Gen. Stat. §] 7B-911, the persons to whom this [c]ourt awards custody must be parties in the civil action for child custody.

The juvenile court's first finding of fact mentions that Katherine had been in the physical custody of Guardian, "with respite care provided by" the Perrells for at least six months preceding the filing of the appellees' motion for review. However, this finding is insufficient to satisfy the requirements of N.C. Gen. Stat. § 7B-911(c)(2)(b) because prior to this order, the juvenile court had not determined that placement with the Perrells was a permanent plan for Katherine. Rather, the juvenile court's determination as it relates to a permanent plan for Katherine was, "guardianship with a relative or court approved caretaker[.]" Further, the juvenile court did not address its previously ordered secondary plan or give sufficient findings of fact about the change in the permanent plan regarding the parents. On review, the juvenile court gave deference to the appellees because the year-long arrangements allowed them to continue bonding and acting in the capacity of Guardian without court intervention or authorization. While the appellees may have stepped up to care for Katherine with the best intentions of providing guardianship or *in loco parentis* custody, Katherine's parents still had constitutional priority and secondary custody consideration once Guardian could no longer fulfill her role. Reasonable efforts would have placed Katherine's matter before the juvenile court once DSS became aware of Guardian's declining health and Katherine's placement with non-parties to this case.

Thus, we hold that the juvenile court never terminated its jurisdiction and the case was never properly transferred to the Chapter 50 court; therefore, the district court, acting under its Chapter 50 jurisdiction, had no subject matter jurisdiction to enter its 30 May 2023 child custody order.

C. Standing

[2] Appellant next contends that the appellees lacked standing to bring their motion to review and dissolve the guardianship. We agree.

" 'Standing' refers to the issue of whether a party has a sufficient stake in an otherwise justiciable controversy that he or she may properly seek adjudication of the matter." *Violette v. Town of Cornelius*, 283 N.C. App. 565, 568, 874 S.E.2d 217, 220 (2022) (citation omitted). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, and is a question of law which this Court reviews de novo." *Smith v. Forsyth Cnty. Bd. of Adjustment*, 186 N.C. App. 651, 653, 652 S.E.2d 355, 357 (2007) (internal quotation marks and citations omitted).

Appellant contends that the appellees lacked standing because they were not legal parties to the juvenile proceedings, and the appellees concede this point. After careful review, we hold that the appellees lacked standing to bring their motion.

In addition to the appellees not being legal parties to the juvenile proceeding pursuant to N.C. Gen. Stat. § 7B-401.1, the 26 April 2021 guardianship order explicitly states that, "[i]n the event the Guardian wishes to return custody to any parent or third party, the matter *must* be brought back before the [j]uvenile [c]ourt for Davidson County, North Carolina." (Emphasis added.) The record indicates that Guardian was still alive at the time the appellees brought their motion for review of the guardianship. More importantly, the appellees put DSS on notice regarding Katherine's guardianship. The appellees informed DSS of Guardian's health condition, Guardian's desire for Katherine to be placed with the appellees, that Katherine had been living with them for a number of months, and the appellees asked DSS what steps needed to be taken to dissolve the guardianship so that they could assume the role of guardians or obtain custody of Katherine. Thus, we hold that the appellees lacked standing and either Katherine's Guardian or DSS could have brought a motion to review the guardianship.

IV. Conclusion

Based on the foregoing reasons, we hold that the juvenile court failed to properly terminate its jurisdiction over the neglect proceedings, and thus, the Chapter 50 court lacked subject matter jurisdiction to enter its child custody order on 30 May 2023. As such, we vacate the 30 May 2023 child custody order, 17 June 2022 juvenile court order, and the juvenile court's 17 June 2022 transfer order, and remand for further proceedings consistent with this opinion. On remand, Katherine shall be returned to the nonsecure custody of Davidson County DSS pursuant

to N.C. Gen. Stat. § 7B-507, and this case remains within the juvenile court's jurisdiction unless and until that court properly terminates its jurisdiction pursuant to N.C. Gen. Stat. § 7B-911. Furthermore, we conclude that the appellees lacked standing to bring their motion for review and dissolution of the guardianship, and thus, the juvenile court lacked subject matter jurisdiction to review said motion.

VACATED AND REMANDED.

Chief Judge DILLON and Judge GORE concur.

JAMES HAWHEE, PETITIONER
v.
WAKE COUNTY, RESPONDENT

No. COA24-165

Filed 5 November 2024

1. Appeal and Error—contested case—North Carolina Human Resources Act—applicability—wrong procedure for filing appeal

In a contested case claiming wrongful termination under the North Carolina Human Resources Act (NCHRA), which the Office of Administrative Hearings (OAH) dismissed after determining that petitioner was not a state employee subject to the NCHRA, petitioner missed the deadline to appeal to the superior court pursuant to Article 3 of Chapter 150B of the General Statutes (for a determination of whether he was in fact subject to the NCHRA) where the OAH mistakenly instructed him to appeal directly to the Court of Appeals under N.C.G.S. § 126-34.02(a) (outlining the procedure for employees that are subject to the NCHRA to appeal an OAH ruling). Although the Court of Appeals agreed to treat petitioner's brief as a petition for a writ of certiorari, the court declined to issue the writ because the petition lacked merit.

2. Administrative Law—jurisdiction—contested case—termination from employment—applicability of North Carolina Human Resources Act

In a contested case filed by a former water quality director (petitioner) for Wake County, in which petitioner brought a wrongful termination claim under the North Carolina Human Resources Act (NCHRA), the Office of Administrative Hearings (OAH) properly

dismissed the case for lack of subject matter jurisdiction on the basis that petitioner was not subject to the NCHRA, which applies only to State employees who were continuously employed by a covered local government entity for twelve months prior to being terminated. First, petitioner did not qualify as a "State employee" because he worked for a county agency rather than a State agency for nine months before his termination. Second, he worked specifically for a consolidated county human services agency—which is not a covered entity under the NCHRA—whose county board had not elected to subject its employees to the NCHRA at the time of petitioner's employment.

Appeal by petitioner from order entered 27 October 2023 by Administrative Law Judge Michael C. Byrne in the Office of Administrative Hearings. Heard in the Court of Appeals 11 September 2024.

James M. Hawhee, pro se for petitioner-appellant.

Roger A. Askew, Senior Deputy County Attorney, for respondent-appellee.

FLOOD, Judge.

Petitioner James Hawhee appeals the order by the North Carolina Office of Administrative Hearings ("OAH") dismissing his claim that he was terminated without just cause for lack of subject matter jurisdiction. Specifically, Petitioner contends that because he was a State employee, and he worked for an entity covered by the North Carolina Human Resources Act ("NCHRA"), OAH had subject matter jurisdiction over his claim. Upon our review, we deny Petitioner's petition for writ of certiorari ("PWC") for lack of merit and dismiss Petitioner's appeal for lack of jurisdiction.

I. Factual and Procedural Background

On 4 January 2022, Petitioner was hired by Respondent Wake County and began working in the Environmental Services Department ("ESD") as the Water Quality Director. Nine months later, on 7 October 2022, Petitioner was terminated from his position.

Petitioner believed he was terminated without just cause under the NCHRA and filed a contested case with OAH on 22 May 2023. OAH dismissed Petitioner's claim on 27 October 2023 for lack of subject matter jurisdiction. OAH found that Petitioner was not subject to the NCHRA, finding that "Petitioner at the time of his termination was not employed

by any agency of the State of North Carolina[,]" "Petitioner was not employed with Wake County . . . as of the date Wake County combined its human services functions into a consolidated human services agency[,]" and "Wake County's Board of Commissions has not elected to subject its employees to the [NCHRA.]" As such, per these findings, OAH concluded it did not have subject matter jurisdiction over Petitioner's case.

Petitioner timely appealed.

II. Jurisdiction

[1] "In case of a dispute as to whether an employee is subject to [the NCHRA], the dispute shall be resolved as provided in Article 3 of Chapter 150B of the General Statutes." N.C. Gen. Stat. § 126-5(h) (2023). "If the agency and the other person do not agree to a resolution of the dispute through informal procedures . . . the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a 'contested case.' " N.C. Gen. Stat. § 150B-22(b) (2023). "A contested case shall be commenced . . . by filing a petition with [OAH.]" N.C. Gen. Stat. § 150B-23(a) (2023). "In each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law." N.C. Gen. Stat. § 150B-34(a) (2023).

"Any party or person aggrieved by the final decision in a contested case . . . is entitled to judicial review of the decision[.]" N.C. Gen. Stat. § 150B-43 (2023). "To obtain judicial review of a final decision . . . the person seeking review must file a petition in superior court within 30 days after the person is served with a written copy of the decision." N.C. Gen. Stat. § 150B-45 (2023). If the person fails to file during the required time, they waive their right to judicial review. *Id.*

Here, Petitioner failed to follow the requisite procedure after OAH erroneously directed Petitioner to appeal directly to the Court of Appeals pursuant to N.C. Gen. Stat. § 126-34.02(a), which provides that "[a]n aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals[.]" N.C. Gen. Stat. § 126-34.02(a) (2023). An employee subject to the NCHRA who disputes the outcome of a decision by OAH can then directly appeal to this Court pursuant to N.C. Gen. Stat. § 126-34.02(a) as an "aggrieved party" under the NCHRA. *See* N.C. Gen. Stat. § 126-34.02(a). Because OAH concluded Petitioner was *not* an employee subject the NCHRA, and thus not subject to N.C. Gen. Stat. § 126-34.02(a) as an aggrieved party under the NCHRA, OAH should have directed Petitioner to follow the requirements of N.C. Gen. Stat. § 126-5(h), and to appeal per Article 3 of

Chapter 150B of the General Statutes for determination of whether Petitioner was an employee subject to the NCHRA. *See* N.C. Gen. Stat. § 126-5(h) (directing a petitioner to appeal following Article 3 of Chapter 150B when there is a dispute as to whether an employee is subject to the NCHRA).

Petitioner, however, followed OAH's erroneous directions and thus missed the thirty-day window for appeal to the superior court, as provided under Chapter 150B. *See* N.C. Gen. Stat. § 150B-45. Petitioner therefore requests that we treat his brief as a PWC pursuant to the North Carolina Rules of Appellate Procedure Rule 21(a)(1), should we conclude he does not have a right of direct appeal to this Court. *See* N.C. R. App. P. Rule 21(a)(1) ("The [PWC] may be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]"). We conclude a proper appeal would have been filed under Chapter 150B, and therefore will consider Petitioner's brief as a PWC.

Under N.C. R. App. P. 21(a)(1), "the [petitioner]'s [PWC] must show merit or that error was probably committed below[.]" *State v. Hernandez*, 899 S.E.2d 899, 906 (N.C. App. 2024) (citation and internal quotations omitted). For the reasons discussed below, we conclude Petitioner's PWC lacks merit, and Petitioner has failed to show that error was committed by OAH; thus, we deny Petitioner's PWC and dismiss Petitioner's appeal for lack of jurisdiction.

III. Standard of Review

"Chapter 150B, the Administrative Procedure Act, specifically governs the scope and standard of this Court's review of an administrative agency's final decision." *Harris v. N.C. Dep't of Pub. Safety*, 252 N.C. App. 94, 98, 798 S.E.2d 127, 132 (2017), *aff'd*, 370 N.C. 386, 808 S.E.2d 142 (2017). Chapter 150B provides:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2023).

"The standard of review is dictated by the substantive nature of each assignment of error." *Russell v. N.C. Dep't of Pub. Safety*, 282 N.C. App. 542, 547, 871 S.E.2d 821, 826 (2022) (citation omitted). "[Q]uestions of law receive *de novo* review, whereas fact-intensive issues such as sufficiency of the evidence to support an agency's decision are reviewed under the whole-record test." *Id.* at 547, 871 S.E.2d at 826 (citation omitted). Whether a lower court had subject matter jurisdiction is a question of law, and thus, is reviewed by this Court de novo. *See Vanderburg v. N.C. Dep't of Rev.*, 168 N.C. App. 598, 608-09, 608 S.E.2d 831, 839 (2005). "Under a de novo review, we consider the matter anew and freely substitute our own judgment for the agency's judgment." *Fonvielle v. N.C. Coastal Res. Comm'n*, 288 N.C. App. 284, 287, 887 S.E.2d 93, 96 (2023) (citation omitted) (cleaned up).

IV. Analysis

[2] Petitioner contends that OAH erred by concluding Petitioner was not subject to the NCHRA because (A) he was not a State employee, and (B) he was not employed by a covered local government entity listed in [N.C. Gen. Stat.] §126-5(a)(2) at the time of his termination[,]" and thus erred in its conclusion that OAH lacked subject matter jurisdiction. We discuss each argument, in turn.

A. State Employee

Petitioner contends that OAH erred in failing to recognize Petitioner as a State employee. We disagree.

"The right to appeal to an administrative agency is granted by statute[.]" *Lewis v. N.C. Dep't of Hum. Res.*, 92 N.C. App. 737, 739, 375 S.E.2d 712, 714 (1989). "Chapter 126 of the North Carolina General Statutes gives State employees the right to an administrative hearing in [] OAH for actions arising under [the NCHRA]." *Nailing v. UNC-CH*, 117 N.C. App. 318, 324, 451 S.E.2d 351, 355 (1994). N.C. Gen. Stat. § 126-34.02(a) provides that "a State employee, or former State employee may file a contested case in [OAH.]" N.C. Gen. Stat. § 126-34.02(a). Contested cases under this chapter, as relevant here, include "just cause for dismissal[.]" N.C. Gen. Stat. § 126-34.02(b)(3) ("A career State employee may allege

that he or she was dismissed, demoted, or suspended for disciplinary reasons without just cause.").

A person is covered by the NCHRA if they are a State employee or an employee of one of the local entities under N.C. Gen. Stat. § 126-5(a)(2). N.C. Gen. Stat. § 126-1.1(a) (2023). A State employee is defined as (1) being "in a permanent position with a permanent appointment[,]" and (2) having been "continuously employed by the State of North Carolina or a local entity as provided in [N.C. Gen. Stat. §] 126-5(a)(2) in a position subject to the [NCHRA] for the immediate [twelve] preceding months." N.C. Gen. Stat. § 126-1.1(a).

Here, OAH found that "Petitioner[,] at the time of his termination[,] was not employed by any agency of the State of North Carolina." Petitioner worked for Respondent, a county agency, rather than an agency of the state and, thus, OAH concluded that Petitioner was not a State employee at the time of his termination. Additionally, Petitioner had not been "continuously employed by the State of North Carolina . . . for the immediate [twelve] preceding months" because he had been working for Respondent, a county agency, for the last nine months prior to termination, and thus, could not have been "continuously employed by the State of North Carolina . . . for the immediate [twelve] preceding months." *See* N.C. Gen. Stat. § 126-1.1(a)(2).

As Petitioner worked for a county agency rather than a State agency, OAH correctly concluded Petitioner was not a State employee. *See* N.C. Gen. Stat. § 126-1.1(a).

B. Local Entity

Plaintiff next contends OAH erred in concluding he is "not subject to the NCHRA because he was not employed by a covered local government entity listed in [N.C. Gen. Stat.] §126-5(a)(2) at the time of his termination[.]" We disagree.

The local entities under N.C. Gen. Stat. § 126-5(a)(2) for which an employee may work and be covered by the NCHRA are limited to the following:

> a. Area mental health, developmental disabilities, and substance abuse authorities, except as otherwise provided in Chapter 122C of the General Statutes.
>
> b. Local social services departments.
>
> c. County health departments and district health departments.

> d. Local emergency management agencies that receive federal grant-in-aid funds.

N.C. Gen. Stat. § 126-5(a)(2). Employees of consolidated human services agencies are not covered by the NCHRA. *See* N.C. Gen. Stat. § 126-5(a)(2) ("An employee of a consolidated county human services agency created pursuant to [N.C. Gen. Stat. §] 153A-77(b) is not considered an employee of an entity listed in this subdivision."). A county board may, however, elect to subject its uncovered employees to NCHRA coverage. *See* N.C. Gen. Stat. § 126-5(a)(3).

Here, OAH found that Petitioner's place of employment was a consolidated county human services agency, and that the "Wake County Board of Commissions has not elected to subject its employees to the [NCHRA]." Upon our review of the Record, we agree that Petitioner's place of employment was a consolidated county human services agency at the time of his termination, as evidenced by a 1996 ordinance, a copy of which was included in the Record, whereupon Respondent was consolidated into a county human services agency. Further, the Wake County Board of Commissions, at the time of Petitioner's termination, had not elected to subject Wake County employees to the NCHRA. Thus, Petitioner was not subject to the NCHRA as an employee of a consolidated county human services agency during his employment. *See* N.C. Gen. Stat. §§ 126-5(a)(2), (a)(3).

Because Petitioner was neither a State employee nor an employee of one of the local entities under N.C. Gen. Stat. § 126-5(a)(2), OAH correctly dismissed Petitioner's claim for lack of subject matter jurisdiction. *See Lewis*, 92 N.C. App. at 739, 375 S.E.2d at 714; *see also* N.C. Gen. Stat. § 126-1.1(a).

IV. Conclusion

Upon our de novo review for any errors of law by the administrative agency, we conclude Petitioner is not subject to the NCHRA, as he was not a State employee at the time of his termination nor for the preceding twelve months prior to termination, and he worked for a consolidated county human services agency whose county board had not elected to subject its employees to the NCHRA at the time of his employment. *See Russell*, 282 N.C. App. at 547, 871 S.E.2d at 826. Thus, we deny Petitioner's PWC for lack of merit and dismiss Petitioner's appeal for lack of jurisdiction.

DISMISSED.

Judges CARPENTER and STADING concur.

IN THE MATTER OF A.K.H.

No. COA24-143

Filed 5 November 2024

1. Termination of Parental Rights—parental right to counsel—withdrawal of attorney—consent—failure to participate

In a juvenile matter in which respondent-father's daughter had been adjudicated neglected and dependent in 2016, after which respondent entered into a case plan, the trial court did not violate respondent's right to counsel by allowing his privately-retained counsel (who respondent had retained to replace his initial court-appointed counsel) to withdraw from the case in 2019, and by appointing a new attorney to represent respondent in 2022 only after the department of social services filed a petition to terminate respondent's parental rights. Respondent waived and forfeited his right to counsel by signing a consent order to allow his attorney to withdraw in 2019 and by failing to attend and participate in the proceedings or to disclose his location.

2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—prolonged lack of engagement

The trial court properly terminated a father's parental rights to his daughter on the ground of willful failure to make reasonable progress to correct the conditions which led to the child's removal where: the child had been in foster care for 77 months, respondent did not engage with the department of social services (DSS) for nearly three years until DSS filed a petition to terminate his parental rights, respondent did not complete his case plan, and respondent did not seek visitation with his daughter or make any attempts to communicate with her.

Appeal by respondent from judgment entered 19 October 2023 by Judge Ashley Watlington-Simms in Guilford County District Court. Heard in the Court of Appeals 9 October 2024.

J. Thomas Diepenbrock, for the respondent-appellant father.

Mercedes O. Chut, for the petitioner-appellee Guilford County DHHS.

Administrative Office of the Courts GAL Appellate Counsel, Robert C. Montgomery, for guardian ad litem.

TYSON, Judge.

Anthony Wayne Hicks ("Respondent") appeals from order entered 19 October 2023, which terminated his parental rights. We affirm.

I. Background

Respondent is the biological father of "Alice," born February 2014. Alice lived with her mother, Shona Holley; Ronald Collins, her mother's boyfriend; "Ava," Holley and Collins' daughter; and, "Walter," Holley and William Griffith's son. *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of minors).

Guilford County Department of Health and Human Services ("DHHS") received a report of purported domestic violence between Holley and Collins. The report alleged Collins had assaulted Holley and had thrown Walter across a room. Law enforcement officers reported they observed lacerations, scratches, and bruises on Holley and a swollen abrasion on Walter's forehead.

Holley admitted the allegations of domestic violence. She also told investigators she had multiple mental health diagnoses, including: schizophrenia and bipolar disorder. She stated the family had been living in her maternal grandfather's residence, but he had recently passed away. The family was required to move and had no place to go.

DHHS referred Holley to a shelter for domestic violence victims, but she declined to go. DHHS entered into a safety plan with Holley, which required her to live apart from Collins and to keep him away from the children. DHHS made unannounced visits to the home on 28 January 2016 and 2 February 2016. Collins was present and inside the home during both visits. DHHS filed juvenile petitions alleging Alice, Ava, and Walter to be neglected and dependent and obtained nonsecure custody of all three children on 4 February 2016. The trial court adjudicated all three children as neglected and dependent on 26 May 2016.

DHHS contacted Respondent on 2 March 2016 and requested he respond to the Department. Respondent told a social worker over the telephone he had received the letter and requested a paternity test of Alice on 28 March 2016. Respondent underwent a paternity test the same day. Respondent was notified he was Alice's father on 20 April 2016.

The trial court appointed Amanda Feder, Esq. to represent Respondent and held an adjudication hearing on 25 May 2016. Defendant was not present. Defendant had contacted Feder and DHHS. The trial court adjudicated all three children as neglected and dependent on 25 May 2016.

Respondent entered into a case plan on 30 June 2016, which required him to *inter alia*: (1) obtain and maintain stable and safe housing for at least six months, provide a copy of his lease to DHHS, and cooperate with announced and unannounced home visits; (2) obtain and maintain employment or sufficient income to support himself and Alice for at least six months and provide proof of employment/income as requested by DHHS; (3) resolve pending criminal charges; (4) obtain a sex specific evaluation; (5) complete a parenting psychological assessment; and, (6) complete the Parent Assessment Training and Education ("PATE") Program.

The trial court held an initial disposition hearing on 11 January 2017. Respondent was residing with his mother and wife, but failed to provide DHHS with proof he was a tenant or occupant on the lease to the residence. Respondent was not employed, but he was receiving Veterans Administration disability benefits totaling $407.75 per month. Respondent completed his parenting psychological evaluation. Respondent was recommended to participate in therapy "where he can demonstrate the ability to maintain a stable and healthy lifestyle to be a consistent role model for [Alice]" and to "spend more time demonstrating his sincerity and commitment to [Alice]." Respondent also completed the PATE Program and had entered into a voluntary child support agreement.

Respondent had not completed his sex-specific evaluation. The trial court found Respondent "had not developed a relationship with [Alice] and was not actively participating in parenting [Alice]."

Respondent had been arrested during 2002 in Hillsboro, Ohio and was charged with unlawful sexual conduct with a minor. Respondent was twenty-two years old and the alleged victim was fourteen. Respondent was convicted of unlawful sexual conduct with a minor in 2007. Respondent is a registered sex offender. The trial court identified Respondent's status being a sex offender as a barrier to reunification.

The trial court changed the primary permanent plan to adoption with a secondary plan of reunification on 3 May 2017. DHHS filed a petition to terminate Respondent's parental rights on 2 March 2018.

Respondent did not communicate with DHHS from 9 March 2018 until 18 October 2018.

Respondent obtained a sex offender assessment at the Sandhills Center on 1 February 2018. The assessment inventory of behaviors did not find any "sexual deviant behaviors" from Respondent's answers, but his "Sex Item Truthfulness Scale score is in the Problem Risk (70-89th percentile) range." The assessor recommended Respondent "continue his outpatient treatment to address ongoing concerns."

Respondent reported he had completed a sex offender evaluation with Dr. Roach in Indian Trail during a Child and Family Team Meeting at DHHS consisting of three three-hour sessions with Dr. Roach. Respondent reported he was required to pay a $3,000 fee to receive the written report. Dr. Roach told DHHS he and Respondent were "never ever to coordinate a date and time for the sex offender evaluation." After Respondent was given the terms and conditions of the evaluation/assessment, Dr. Roach never heard back from Respondent.

Respondent reported he had received diagnoses of post-traumatic stress disorder, bipolar disorder, and attention deficit disorder. Respondent's provider prescribed medication for these conditions and recommended for him to attend a medication management appointment every ninety days. Respondent attended five of these appointments from September 2016 until June 2018.

At the 10 May 2019 permanency planning hearing, the trial court found Respondent continued to live with his mother and wife in Candor. The trial court found the condition of the residence was unsuitable for Alice because there were 15-20 dogs present outside of the home and the flooring of the home was "completely covered and saturated with dog feces and urine."

Respondent's probation officer would not enter the residence because she had found some of the dogs to be "vicious" and an overwhelming odor of dog feces and urine so strong "she could not breathe." Respondent's probation officer described the condition of the residence as "deplorable" and reported it to Richmond County Adult Protective Services.

DHHS was unable to have the Richmond County Department of Social Services visit the residence because Respondent would not respond. Respondent was found to have not made progress in therapy, having last attended therapy in November 2016. Respondent was employed as a truck driver making $350 to $990 per week, in addition

to his monthly Veterans Administration disability payment of $466 per month.

At the hearing the trial court determined Respondent was not "making adequate progress within a reasonable period of time" and was "not actively participating in or cooperating with the plan, the Department, or the Guardian *ad Litem* for his daughter." The trial court stayed the termination of parental rights ("TPR") action because Holley, the mother, was making progress on her case plan.

Respondent informed DHHS he was moving to Montgomery County and would be employed at Carolina Structural System as a truck driver for fifty to seventy-five hours per week making $18.00 per hour. Respondent did not give DHHS documentation of this income. Respondent did not have contact with DHHS from 12 June 2019 until the termination of parental rights hearing on 7 March 2023.

Respondent did not attend the 20 November 2019 permanency planning hearing, the 5 May 2021 hearing to shift Holley's unsupervised visits to supervised visits, or the 8 March 2022 permanency planning hearing.

Respondent was $1,295.75 in arrears of child support at the time of the 8 March 2022 permanency planning hearing. Respondent had not participated in shared parenting with Alice's foster parents since 6 October 2019. The trial court lifted the stay on Respondent and Holley's TPR on 8 March 2022.

DHHS filed a petition to terminate Respondent's parental rights on 3 August 2022. Following a hearing the trial court terminated Respondent's parental rights to Alice for neglect, failure to make reasonable progress, and dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (2), and (6) (2023). Holley's parental rights were terminated to Alice and Ava for the same grounds. Holley did not appeal. Respondent appeals.

II. Jurisdiction

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

III. Issues

Respondent argues the trial court violated his right to counsel and erred by improperly ordering the termination of his parental rights.

IV. Right to Counsel

[1] Respondent argues the trial court denied his right to counsel by allowing his attorney to withdraw from 2 August 2019 until 13 August

2022 when the court appointed Respondent an attorney for the TPR action.

A. Standard of Review

Our Supreme Court has recently addressed a parent's statutory right to counsel and held:

> A trial court's determination concerning whether a parent has waived his or her right to counsel is a conclusion of law that must be made in light of the statutorily[-] prescribed criteria, so we review the question of whether the trial court erroneously determined that a parent waived or forfeited his or her statutory right to counsel in a termination of parental rights proceeding using a *de novo* standard of review.

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

B. Analysis

N.C. Gen. Stat. § 7B-1101(a) mandates parents to be represented by counsel during termination of parental rights actions, unless there is a showing the parent has forfeited or waived such right. N.C. Gen. Stat. § 7B-1101(a) (2023).

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

Our Supreme Court has held a parent waives their right to representation when their actions rise to the level of "egregious dilatory or abusive conduct." *In re K.M.W.*, 376 N.C. at 209, 851 S.E.2d at 860 (citation omitted).

Our Supreme Court in *T.A.M.*, explained:

> A parent, by repeatedly failing to communicate with appointed counsel, by failing to attend numerous hearings, and by admittedly avoiding receiving mail and other communications from DSS and other interested parties,

> could successfully manipulate the judicial system to seriously delay the termination of parental rights proceeding. Under *K.M.W.*, the trial court would be required to halt a termination-of-parental-rights hearing, track down a parent, ensure the motion to withdraw was properly served and inquire into the efforts made by counsel to contact the parent, . . . all before allowing counsel to withdraw from representation. And under these facts, trial courts would be obliged to re-appoint counsel for it all to begin again. These extensive and burdensome processes would impair judicial efficiency and drain already scarce judicial resources, while thwarting the over-arching North Carolina policy to find permanency for the juvenile at the earliest possible age.

In re T.A.M., 378 N.C. 64, 74-75, 859 S.E.2d 163, 170 (2021) (citations omitted).

The trial court made the following unchallenged findings of fact regarding Respondent's counsel's withdrawal:

> 53d. The respondent father was advised of his right to counsel, elected court-appointed counsel previously, and was awarded and confirmed a court-appointed counsel. At some point he then privately retained his own counsel. At some point after his privately retained attorney had made an appearance in the case, [Respondent] signed a Consent Order allowing his privately retained attorney to withdraw. [Respondent] had been previously involved with the court process since the inception of this case. However, in 2019 he stopped engaging in contact with [DHHS], stopped engaged (sic) in the case plan he entered into on June 30th 2016[.]
>
> . . .
>
> 54a. At some point, [Respondent]'s court-appointed attorney was replaced with privately[-]retained counsel, and on August 2, 2019, he consented to the withdrawal of his retained counsel. [Respondent] has been going through the court process since the minor child came into custody, and was made aware of this right to counsel, his right to represent himself, and his right to hire his own attorney. From August of 2019 when he consented to the removal of his retained counsel and at no point thereafter

> did he petition the Court for new court appointed counsel until years later, after he failed to have any contact with GCDHHS and did not engage with GCDHHS or avail himself to the Guardian Ad Litem for the child. [Respondent] previously exercised his rights to appointed counsel, so his refusal to engaged (sic) with GCDHHS from 2019 until he was appointed Attorney Williams is not a valid excuse for this Court's consideration as justification for his lack of participation in his case plan regarding the juvenile.

Contrary to Respondent's arguments, the trial court's uncontested findings show Respondent had consented to his counsel's withdrawal by signing off on the order to withdraw. Respondent failed to attend and participate in proceedings and refused to disclose his location(s). Respondent waived and forfeited his right to counsel. *Id.* Respondent's argument is overruled.

V. Termination of Parental Rights

[2] "[A]n adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order. . . . [I]f this Court upholds the trial court's order in which it concludes that a particular ground for termination exists, then we need not review any remaining grounds." *In re J.S.*, 374 N.C. 811, 815, 845 S.E.2d 66, 71 (2020) (citations omitted).

A. Standard of Review

"We review a trial court's adjudication [to terminate parental rights] under N.C.G.S. § 7B-1111 to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (citation and internal quotation marks omitted). "The trial court's supported findings are deemed conclusive even if the record contains evidence that would support a contrary finding." *In re L.D.*, 380 N.C. 766, 770, 869 S.E.2d 667, 671 (2022) (citation and internal quotation marks omitted).

Unchallenged findings of fact are presumed to be supported by sufficient evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." (citations omitted)).

In a termination of parental rights hearing, "[t]he burden in such proceedings shall be upon the petitioner or movant and all findings of

fact shall be based on clear, cogent, and convincing evidence." N.C. Gen. Stat. § 7B-1109(f) (2023). When a challenged finding of fact is not necessary to support a trial court's conclusions, those findings "need not be reviewed on appeal." *See In re C.J.*, 373 N.C. 260, 262, 837 S.E.2d 859, 860 (2020) (citation omitted).

B. Analysis

Courts may terminate a parent's rights to the exclusive care, custody, and control of their child only after certain limited, statutorily-defined grounds are proven. N.C. Gen. Stat. § 7B-1111. A court may terminate parental rights if the evidence and findings clearly and convincingly demonstrate and support a conclusion:

> The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty.

N.C. Gen. Stat. § 7B-1111(a)(2) (2023).

Our Supreme Court has outlined the analysis trial courts must perform before terminating a parent's parental rights pursuant to this ground:

> Termination under this ground requires the trial court to perform a two-step analysis where it must determine by clear, cogent, and convincing evidence whether (1) a child has been willfully left by the parent in foster care or placement outside the home for over twelve months, *and* (2) the parent has not made reasonable progress under the circumstances to correct the conditions which led to the removal of the child.

In re Z.A.M., 374 N.C. 88, 95, 839 S.E.2d 792, 797 (2020) (emphasis supplied) (citation omitted).

"[A] respondent's prolonged inability to improve her situation, despite some efforts in that direction, will support a finding of willfulness regardless of her good intentions, and will support a finding of lack of progress . . . sufficient to warrant termination of parental rights under section 7B-1111(a)(2)." *In re J.W.*, 173 N.C. App. 450, 465-66, 619 S.E.2d 534, 545 (2005) (citation and internal quotation marks omitted).

"Leaving a child in foster care or placement outside the home is willful when a parent has the ability to show reasonable progress, but is unwilling to make the effort." *In re A.J.P.*, 375 N.C. 516, 525, 849 S.E.2d 839, 848 (2020) (citation, internal quotation marks, and alterations omitted).

Our Supreme Court stated:

> Parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(2). However, in order for a respondent's noncompliance with her case plan to support the termination of her parental rights, there must be a nexus between the components of the court-approved case plan with which the respondent failed to comply and the conditions which led to the child's removal from the parental home.

In re J.S., 374 N.C. at 815-16, 845 S.E.2d at 71 (citation, internal quotation marks, and alterations omitted).

The Supreme Court further explained a parent's non-compliance with case plan conditions are relevant, "provided that the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home." *In re T.M.L.*, 377 N.C. 369, 379, 856 S.E.2d 785, 793 (2021) (citation and quotation marks omitted).

By the time of the termination hearing, Alice had remained in foster care "continuously for 77 months," and Respondent had not made "reasonable progress under the circumstances to correct the conditions that led to removal." Respondent did not engage with DHHS from 2019 until the TPR petition was filed. Respondent did not complete his assigned case plan. Respondent did not reach out to Alice in any way, and did not request for the Court to allow him to visit her. Here, Respondent, was confirmed as Alice's father only after DHHS had notified him and he requested a paternity test.

"[T]he case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home." *Id.* The trial court did not err by terminating Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

VI. Conclusion

Respondent's right to counsel was not violated after he expressly consented to his attorney's withdrawal. Father failed to attend and participate in termination proceedings, refused to disclose his address to DHHS, was unjustifiably difficult to communicate with, was in arrears in his support obligations, and had made little progress complying with his case plan.

Respondent's parental rights were properly terminated under N.C. Gen. Stat. § 7B-1111(a)(2). *See In re T.M.L.*, 377 N.C. at 379, 856 S.E.2d at 793. We need not address Respondent's remaining arguments on appeal regarding grounds for termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) and (6). *In re J.S.*, 374 N.C. at 815, 845 S.E.2d at 71 (citation omitted). The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges GORE and FLOOD concur.

IN THE MATTERS OF B.E., L.E., L.E., C.W., F.W., B.W.

No. COA24-416

Filed 5 November 2024

1. Child Abuse, Dependency, and Neglect—adjudication and disposition order—subject matter jurisdiction—home state of juveniles

In a neglect proceeding, the district court had jurisdiction over three of the mother's children, despite the existence of a previous child custody order concerning those juveniles entered by a court in Virginia, where the mother did not challenge the district court's finding of fact that North Carolina was the home state for the children and because, when the Virginia court entered its child custody order in 2023, the children had been residing in North Carolina since at least 2018—making North Carolina the juvenile's "home state" pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)—and North Carolina had not declined jurisdiction.

2. Child Abuse, Dependency, and Neglect—adjudication and disposition order—transfer to Chapter 50

IN RE B.E.

[296 N.C. App. 364 (2024)]

In a neglect proceeding, the district court did not err in transferring the cases on disposition to Chapter 50 actions without making findings of fact pursuant to N.C.G.S. § 7B-911(c) because that statutory mandate only applies where a district court enters a civil custody order under that section and terminates the court's jurisdiction in a juvenile proceeding, and here, the mother appealed from an adjudication order and two dispositional orders—not from civil custody orders.

Appeal by respondent-mother from orders entered 6 February 2024 by Judge Meader W. Harriss, III in Currituck County District Court. Heard in the Court of Appeals 9 October 2024.

Richard Croutharmel for respondent-appellant mother.

Frank P. Hiner, IV for petitioner-appellee Currituck County Department of Social Services.

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

FLOOD, Judge.

Respondent-Mother appeals adjudication and disposition orders by the trial court, contending: (A) the trial court did not have subject matter jurisdiction because the state of Virginia had previously filed a child custody order as to some of the children, and (B) the trial court erred when it transferred the cases to Chapter 50 actions because the trial court failed to make the requisite N.C. Gen. Stat. § 7B-911(c) findings to support such a transfer. Upon review, we conclude the trial court had proper subject matter jurisdiction and thus dismiss that claim. We also dismiss Respondent-Mother's assignment of transfer error because N.C. Gen. Stat. § 7B-911(c) applies only to civil custody orders, from which Respondent-Mother has not appealed.

I. Factual and Procedural Background

On 26 June 2023, the Currituck County Department of Social Services ("DSS") filed juvenile petitions alleging neglect of the children B.E. ("Ben"), L.E. ("Lexi"), L.E. ("Lea"), C.W. ("Corwin"), F.W. ("Fawn"), and B.W. ("Breawna").[1] The juveniles ranged in age from three years to sixteen years.

1. Pseudonyms agreed upon by the parties are used to protect the identities of the minor children pursuant to N.C. R. App. P. 42(b).

The day before DSS filed its petitions, on 25 June 2023, Respondent-Mother's neighbor was awoken early Sunday morning by a tapping noise coming from her front door. The neighbor opened her front door and found a "small child standing there with nothing on but a soggy diaper." The child was between two and three years of age, and the neighbor did not recognize the child. The child ran off in the direction of the street; the neighbor chased the child and grabbed the child's hand, concluded the child was likely Respondent-Mother's, and walked the child to Respondent-Mother's home.

Upon arriving at Respondent-Mother's home, the neighbor found the front door open, and the child went inside. The neighbor knocked on the front door but did not enter the house. Respondent-Mother then walked halfway down the stairs from upstairs, came into the neighbor's view, and appeared to have just awakened. The neighbor asked Respondent-Mother if the child was hers, to which Respondent-Mother responded with a mumbling sound. The neighbor left and called DSS to report the incident.

After the neighbor left, Respondent-Mother woke sixteen-year-old Corwin and told him to "get up" because they were "going to the beach." Five minutes before leaving, Respondent-Mother confided to Corwin that "CPS is on the way, we have to leave." [2] Respondent-Mother and the children left by car, with Corwin in the passenger seat, and Ben, Lexi, Fawn, and Breawna in the back seat along with their two dogs. At this time, Respondent-Mother was also the adoptive mother of Lea, but she had driven Lea to Ohio two days before, around 23 June 2023, to give her to Lea's biological mother without any court order or without the knowledge of Lea's biological father.

The children did not have breakfast before leaving, nor had they packed any extra clothes for the trip. Several of the children had been prescribed medication, which had also been left at the house. A few of the children brought their phones, but Respondent-Mother confiscated the phones thirty minutes into the drive and proceeded to turn off the phones' locator function.

Three hours into the trip, Respondent-Mother informed Corwin that they were not actually going to the beach, but instead, she was taking them to a mental hospital because "we all need[] help." At some point during the drive, Breawna proclaimed she needed to urinate, but Respondent-Mother would not stop, and Breawna subsequently

2. We understand this abbreviation to mean Child Protective Services.

urinated on herself inside the car. Respondent-Mother drove two more hours before stopping at a Target retail store and sending Corwin inside to buy Breawna a new change of clothes.

At another point during the drive, in the afternoon, Respondent-Mother stopped the car at a Taco Bell restaurant. Corwin and Respondent-Mother began fighting, and Corwin exited the car. Respondent-Mother drove around the parking lot while Corwin sat on a bench. A police officer eventually arrived and approached Corwin, who informed the officer that "his mother mentally and physically abuses him and his siblings" and described several incidents of Respondent-Mother's poor behavior and treatment of the children. The officer told Corwin to get back in the car with Respondent-Mother and that the officer would make a report.

After leaving the Taco Bell, Respondent-Mother drove the children to a friend's home in Winston-Salem, where they stayed for the next two nights. At the friend's home, there were two other young girls and a boy. Respondent-Mother's children and the other children shared rooms. While they were at the friend's home, Respondent-Mother bought her children a change of clothes, but the two youngest children did not have shoes, and none of the children had toothbrushes.

On 27 June 2023, at 10:00 p.m., Respondent-Mother gathered her children in the car and informed them they were heading back home. At some point during the drive, however, she informed the children that they were going a mental hospital in Asheville because "[w]e all need help." On 28 June 2023, at around 2:30 a.m., Respondent-Mother and the children arrived in Asheville, but the Record is unclear as to where they arrived, exactly.

During Respondent-Mother's period of driving the children across North Carolina, DSS called Respondent-Mother multiple times and became concerned with Respondent-Mother's mental health. During the phone calls with DSS, Respondent-Mother spoke "very rapid[ly]" and "incoherent[ly]" with "no details or specifics," "jump[ed] from one thing to another," and claimed she had filed a case against DSS with the Supreme Court of the United States. She also told DSS she had made appointments for the children at Brynn Marr Behavioral Hospital because they were in a state of crisis; however, DSS later confirmed there were no appointments that had been made for the children. At some point Respondent-Mother stopped communicating with DSS, and DSS contacted the fathers of the children and maternal grandparents to try to figure out where Respondent-Mother was taking the children.

DSS also contacted many hospitals and law enforcement agencies during this time to help determine the location of the children.

On 28 June 2023, DSS received a call from a child crisis center in Buncombe County, and from the information imparted in this call, DSS was able to retrieve the children from the center and pick up Lea from Ohio. The Record is unclear whether Respondent-Mother was with the children at the crisis center or had dropped the children off.

The Currituck County District Court, Judge Meader W. Harriss, III presiding, held a hearing on 13 December 2023 on DSS' petitions alleging neglect of the children. The trial court found that, based on Respondent-Mother's actions, as described above, the children were neglected. Regarding Lea, the trial court found that Respondent-Mother and Lea's biological father had previously entered a divorce decree in Virginia, which included a separation agreement ("Virginia Separation Agreement"), granting Respondent-Mother custody over Lexi, Lea, and Ben (the "E children"). From this Virginia Separation Agreement, the trial court found Respondent-Mother's placement of Lea with Lea's biological mother was worrisome, as the agreement listed "numerous concerns and constraints" related to Lea's biological mother.

At the hearing, the father of the E children testified that Lexi and Ben had lived in Currituck County with Respondent-Mother their entire lives, and Lea had lived there since October 2018, prior to her short placement with her biological mother by Respondent-Mother. The trial court determined the state of Virginia did not properly follow the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") when entering its Virginia Separation Agreement and ruled the Virginia Separation Agreement was null and void as it pertained to the E children. The trial court concluded that North Carolina was the home state of all the children under the UCCJEA, and that it had the proper subject matter jurisdiction under the UCCJEA to enter the relevant orders.

After the hearing, the trial court entered an adjudication order on 6 February 2024, adjudicating the children as neglected juveniles. That same day, the trial court also entered two dispositional orders, one for the E children and the other for Corwin, Fawn, and Breawna (the "W children"). The trial court concluded that it was in the best interests of the E children to be with their father and ordered no visitation from Respondent-Mother. The trial court also concluded for the W children that it was in their best interests to be with their father and ordered no visitation from Respondent-Mother.

At the end of dispositional orders, the trial court noted the cases should be transferred to a Chapter 50 proceeding, but that it would retain jurisdiction "[u]ntil [the case] is converted into a Chapter 50 civil custody order[.]" Respondent-Mother timely appealed on 14 February 2024.

II. Jurisdiction

This Court has jurisdiction over Respondent-Mother's appeal pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2), and 7B-1001(a)(3)–(4) (2023).

III. Analysis

On appeal, Respondent-Mother contends: (A) the trial court did not have subject matter jurisdiction as to the E children, and (B) the trial court erred when it transferred the cases on disposition to Chapter 50 actions. We address each argument, in turn.

A. Subject Matter Jurisdiction

[1] Respondent-Mother first argues the trial court did not have subject matter jurisdiction over the E children because the state of Virginia had previously filed a child custody order as to the E children and was therefore the proper state to determine any changes. We disagree.

"Issues of subject matter jurisdiction may be raised for the first time on appeal." *In re K.A.D.*, 187 N.C. App. 502, 503, 653 S.E.2d 427, 428 (2007). "In reviewing a question of subject matter jurisdiction, our standard of review is *de novo*." *Id.* at 503, 653 S.E.2d at 428 (citation omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re K.S.*, 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (citation omitted) (cleaned up).

"It is axiomatic that a trial court must have subject matter jurisdiction over a case to act in that case." *In re J.H.*, 244 N.C. App. 255, 259, 780 S.E.2d 228, 233 (2015) (citation omitted). "When a [trial] court decides a matter without . . . having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened." *Id.* at 259, 780 S.E.2d at 233 (citation omitted). Further,

> the North Carolina Juvenile Code grants our district courts "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." However, the jurisdictional requirements of the [UCCJEA] and the Parental Kidnapping Prevention Act ("PKPA") must also be satisfied for a court to have authority to adjudicate petitions filed pursuant to our juvenile code.

In re E.J., 225 N.C. App. 333, 336, 738 S.E.2d 204, 206 (2013) (internal citation omitted).

As provided by the UCCJEA, a trial court, whether in North Carolina or Virginia, has subject matter jurisdiction to enter an initial child custody order:

> (a) Except as otherwise provided in [N.C. Gen. Stat.] 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:
>
> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;
>
> (2) A court of another state does not have jurisdiction under subdivision (1), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under [N.C. Gen. Stat.] 50A-207 or [N.C. Gen. Stat.] 50A-208, and:
>
> a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
>
> b. Substantial evidence is available in this State concerning the child's care, protection, training, and personal relationships[.]

N.C. Gen. Stat. § 50A-201 (2023); *see also* Va. Code Ann. § 20-146.12(A)(1)–(4). "Giving priority to a child's home state is the central provision of the UCCJEA, and the UCCJEA is intended to avoid jurisdictional competition and conflict with courts of other States in matters of child custody." *Sulier v. Veneskey*, 285 N.C. App. 644, 666, 878 S.E.2d 633, 646 (2022) (citation omitted) (cleaned up). "If North Carolina is the 'home state' and 'a parent or person acting as a parent continues to live in this State,' jurisdiction falls under subsection (a)(1)." *Id.* at 666, 878 S.E.2d at 646; *see also In re N.B.*, 289 N.C. App. 525, 530, 890 S.E.2d 199, 203 (2023) ("A child's 'home state' under the UCCJEA is the state in which the child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding, including a proceeding on abuse, neglect, or

dependency allegations." (citation and internal quotation marks omitted) (cleaned up)).

Respondent-Mother does not challenge the trial court's finding of fact that North Carolina is the home state for the E children. This finding is binding on appeal. *See In re D.S.*, 286 N.C. App. 1, 13, 879 S.E.2d 335, 344 (2022) (providing that uncontested findings of fact are binding on appeal).

Respondent-Mother, instead, contends the trial court was not permitted to end its analysis with the children's home state, but it was also required to conduct a "significant connection" analysis under N.C. Gen. Stat. § 50A-201(a)(2) (2023) and Va. Code Ann. § 20-146.12(A)(2). Both North Carolina and Virginia, however, place the home state as the primacy place of jurisdiction for child custody, and the trial court need look further only if there is no home state. *See Chick v. Chick*, 164 N.C. App. 444, 448, 596 S.E.2d 303, 307 (2004) ("Under . . . North Carolina's UCCJEA . . . jurisdictional primacy is given to the home state of a minor child."); *see also Prizzia v. Prizzia*, 58 Va. App. 137, 148, 707 S.E.2d 461, 466 (2011) (holding the home state as "the exclusive jurisdictional basis for making a child custody determination by a court of this Commonwealth").

A trial court shall recognize and enforce another state's child custody order if that other state "exercised jurisdiction in substantial conformity" with the UCCJEA when making its child custody determination. N.C. Gen. Stat. § 50A-303 (2023). Under the UCCJEA, both North Carolina and Virginia must determine the children's home state before entering a child custody order. *See* N.C. Gen. Stat. § 50A-201(a)(2) (2023) (providing that a trial court must determine that another state is not the home state or that the home state has declined to exercise jurisdiction); *see also* Va. Code Ann. § 20-146.12(A)(2) (providing the same determination requirements as articulated in N.C. Gen. Stat. § 50A-201(a)(2)).

When Virginia made its initial child custody determination in 2023, all three of the E children had been living in North Carolina at least since 2018, making North Carolina the home state under the UCCJEA, and North Carolina had not declined jurisdiction. *See* N.C. Gen. Stat. § 50A-201(a)(2); *see also* Va. Code Ann. § 20-146.12(A)(2). The trial court was not required to recognize and enforce the Virginia Separation Agreement. *See* N.C. Gen. Stat. § 50A-303 (providing that a trial court does not have to recognize and enforce another state's child custody order if that other state failed to "exercise[] jurisdiction in substantial conformity" with the UCCJEA). Without proper jurisdiction under the

UCCJEA, the Virginia Separation Agreement was null and void as it pertained to the children. *See In re J.H.*, 244 N.C. App. at 259, 780 S.E.2d at 233. As the home state, North Carolina acquired proper jurisdiction under the UCCJEA to enter the child custody determinations. *See* N.C. Gen. Stat. § 50A-201(a)(1) (2023).

Because North Carolina is the home state of the E children, the trial court was not required to recognize the Virginia Separation Agreement, and it properly exercised subject matter jurisdiction over the matter. *See* N.C. Gen. Stat. § 50A-201; *see also* N.C. Gen. Stat. § 50A-303. Accordingly, we dismiss Respondent-Mother's claim regarding lack of subject matter jurisdiction.

B. Transfer to Chapter 50

[2] Respondent-Mother also argues the trial court erred when it transferred the cases on disposition to Chapter 50 actions, because the trial court failed to make the requisite N.C. Gen. Stat. § 7B-911(c) findings to support such a transfer. Specifically, Respondent-Mother contends "neither disposition order contains a finding that continued State intervention on behalf of the juveniles through a juvenile court proceeding is no longer necessary." We disagree.

"[T]he failure to follow a statutory mandate is a question of law" and is reviewed de novo. *In re G.C.*, 230 N.C. App. 511, 516, 750 S.E.2d 548, 551 (2013). Under N.C. Gen. Stat. § 7B-911(a), "[u]pon placing custody with a parent or other appropriate person, the [trial] court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person[.]" N.C. Gen. Stat. § 7B-911(a)(2023). To terminate a juvenile proceeding and enter the case to a Chapter 50 proceeding as a civil action, the trial court must make certain findings of fact, including whether "[t]here is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding." N.C. Gen. Stat. § 7B-911(c)(2) (2023).

This Court has previously held that "N.C. Gen. Stat. § 7B-911(c) applies only when a trial court *enters* a civil custody order under this section and terminates the court's jurisdiction in a juvenile proceeding." *In re H.S.F.*, 182 N.C. App. 739, 743–44, 645 S.E.2d 383, 385 (2007) (citation omitted) (cleaned up) (emphasis added). In *In re H.S.F.*, the respondent similarly argued the trial court failed to make the proper findings of fact under N.C. Gen. Stat. § 7B-911(c), and appealed from the review order where the trial court stated "[pursuant] to N.C. [Gen. Stat.]

7B-911, the Clerk of Court shall open a Chapter 50 file[.]" *Id.* at 741, 645 S.E.2d at 384.

Upon review, this Court held that, "[a]ccording to [N.C. Gen. Stat. § 7B-911(c)'s] plain and definite meaning, the requirements of N.C. Gen. Stat. § 7B-911(c) only apply to civil custody orders[.]" *Id.* at 744, 645 S.E.2d at 385–86. Thus, we dismissed the respondent's appeal for failure to appeal from an entered civil custody order to which an N.C. Gen. Stat. § 7B-911(c) argument would apply. *Id.* at 744, 645 S.E.2d at 386.

Here, Respondent-Mother appeals only from an adjudication order and two dispositional orders, but not from civil custody orders. The trial court's dispositional orders state the trial court will retain jurisdiction "[u]ntil [the case] is converted into a Chapter 50 civil custody order[.]" Although the language of N.C. Gen. Stat. § 7B-911(c) has changed since 2007, the current plain language of the statute provides that the trial court must make the necessary findings "[w]hen entering an order under [Chapter 50.]" N.C. Gen. Stat. § 7B-911(c). Thus, under our caselaw and statutes, Respondent-Mother's argument is without merit as there is no civil custody order appealed from for which N.C. Gen. Stat. § 7B-911(c) would apply. *See In re H.S.F.*, 182 N.C. App. at 743–44, 645 S.E.2d at 385. Accordingly, we dismiss this assignment of error. *See id.* at 743–44, 645 S.E.2d at 385.

IV. Conclusion

Upon our de novo review, we conclude the trial court had proper subject matter jurisdiction and North Carolina was the home state. We therefore dismiss Respondent-Mother's subject matter jurisdiction claim. Additionally, we dismiss Respondent-Mother's argument that the trial court did not make the statutorily required findings of fact under N.C. Gen. Stat. § 7B-911(c) when transferring the case to Chapter 50, because N.C. Gen. Stat. § 7B-911(c) applies only to appeals from civil custody orders, and Respondent-Mother does not appeal from such an order.

DISMISSED.

Judges TYSON and GORE concur.

IN RE J.M.V.

[296 N.C. App. 374 (2024)]

IN THE MATTER OF J.M.V., JR. & S.M.Z.

No. COA23-1105

Filed 5 November 2024

1. Termination of Parental Rights—findings of fact—sufficiency of evidence—allegations of sexual abuse—failure to object to hearsay

In an appeal from an order terminating respondent-father's parental rights to his son on multiple grounds, the appellate court concluded that sufficient evidence was presented to support all but one of the findings of fact challenged by respondent; the appellate court disregarded one finding regarding respondent's comprehension of his son's needs as being unsupported by the evidence. With regard to respondent's arguments that testimony from the social worker and social worker supervisor (regarding sexual allegations made by another minor child in the home) was based on hearsay, the appellate court concluded that respondent waived those arguments because he failed either to object, lodge a continuing objection, or renew objections to the challenged testimony, and elicited similar testimony on cross-examination.

2. Termination of Parental Rights—grounds for termination—neglect—likelihood of repetition of neglect—failure to acknowledge impact of actions on child

The trial court properly terminated respondent-father's parental rights to his son on the ground of neglect where the court's findings supported its conclusions that the child was previously neglected—for being left unattended and falling down at least five stairs when he was three years old—and that there was a likelihood of future neglect if the child were returned to respondent's care. Although respondent completed most aspects of his case plan, he did not display any improvement or new skills after completing parenting classes, continued to challenge the adjudication of neglect as well as sexual abuse allegations made by another minor child in the home, and, despite being solely reliant on outside services for his day-to-day maintenance, he expressed his intent to reduce those services if he resumed custody.

3. Termination of Parental Rights—findings of fact—sufficiency of evidence—lack of progress—allegations of sexual abuse—failure to object to hearsay

In an appeal from an order terminating respondent-mother's parental rights to her two children, the appellate court concluded that sufficient evidence was presented to support all of the findings of fact challenged by respondent. Although respondent contended that she completed aspects of her case plan, evidence showed that the conditions which led to the removal of the children from the home continued to exist, respondent continued to suffer from serious mental and physical health issues, and respondent failed to demonstrate any improvement after completing a parenting class. With regard to respondent's challenge to several findings as being based on hearsay (regarding sexual abuse allegations made by her older child, as testified to by the social worker and social worker supervisor), the appellate court concluded that respondent waived her challenge because she failed to renew her initial objection to the challenged testimony and elicited some of the same evidence on cross-examination.

4. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—ongoing health issues—lack of stability

The trial court properly terminated respondent-mother's parental rights to her two children based on the ground of willful failure to make reasonable progress on correcting the conditions which led to the children's removal from the home where, although respondent made some progress on her case plan, she continued to deny sexual abuse allegations made by the older child that were substantiated by the department of social services, she failed to demonstrate any improvement in her parenting skills, and she continued to suffer from serious mental and physical health issues.

Appeal by respondent-parents from orders entered 30 August 2023 by Judge Gretchen Hollar Kirkman in Surry County District Court. Heard in the Court of Appeals 11 October 2024.

R. Blake Cheek for petitioner-appellee Surry County Department of Social Services.

James N. Freeman, Jr. for Guardian ad Litem.

Anné C. Wright for respondent-appellant father.

J. Thomas Diepenbrock for respondent-appellant mother.

TYSON, Judge.

Respondent-mother appeals from the trial court's orders terminating her parental rights to her minor children J.M.V. ("James") and S.M.Z ("Stephen") on the grounds of neglect, willful failure to make reasonable progress, and dependency. Respondent-father, the biological father of James, appeals from the trial court's orders terminating his parental rights upon the same grounds. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of minors).

I. Background

The Surry County Department of Social Services ("DSS") filed juvenile petitions on 16 April 2021, alleging then seven-year-old Stephen and three-year-old James were neglected and dependent juveniles due to improper care, supervision, discipline, and remedial care; and both were living in an injurious environment. DSS had become involved with the family on 31 March 2021 on alleged improper supervision when James was allegedly left unattended and fell down at least five stairs. Respondent-mother thought James may have a concussion, but she did not seek medical attention.

DSS met with the family on 15 April 2021 at The Shepherd's House, where the family was residing at the time, to conduct a child and family team meeting and to identify an alternative safety plan for the children. DSS learned the children had not eaten or drank fluids that day as of 11:30 a.m., and they had not been allowed to drink the night prior because they failed to consume all of their food for supper.

Respondent-father admitted he suffered from bi-polar disorder, depression, panic attacks, and ADHD, but he was not receiving treatment. Respondent-mother admitted she had been diagnosed with depression and anxiety, but she also was not receiving treatment. Respondent-mother also reported she had been recently having seizures, which had gotten worse with stress, and respondent-father would not allow her to get medical treatment because of their inability to pay the medical bills.

The petitions also alleged Stephen had been previously placed in foster care in Iredell County in 2016 and was adjudicated neglected, due to respondent-mother's untreated mental health issues, chronic homelessness, and her inability to meet Stephen's basic needs. Following Stephen's return to respondents' care, the family resided in multiple states and in several shelters without staying involved with services put in place. Based upon these allegations, DSS obtained nonsecure custody of the children on 16 April 2021.

On 19 April 2021, respondents entered into case plans to address issues of mental health needs, parenting capacity/skills, lack of housing, and employment. Respondent-father's plan also addressed anger management.

Due to a conflict of interest with Surry County DSS, the case was transferred to Yadkin County on or about 5 May 2021. The Yadkin County District Court held a hearing on the petitions on 7 October 2021. On 3 November 2021, the court entered an order adjudicating the children as neglected and dependent juveniles. The court found both children had unaddressed speech delays and respondent-mother suffered from cognitive impairment.

Respondent-mother also had physical health issues causing her "hands [to] shake uncontrollably and she [was] very limited (sic) in the care she can provide the children. [Respondent-father] ha[d] to focus on providing care for the mother which thereby diminishe[d] his ability to provide adequate care to the children." Respondents were given one hour of supervised visitation every two weeks, contingent upon them appearing sober and not being incarcerated.

In a separate disposition order entered the same day, the court transferred the matter to Surry County, after having determined that the conflict of interest no longer existed and continued custody of the children with Surry County DSS.

The Surry County District Court held a permanency planning hearing on 20 January 2022. The court set the permanent plan as reunification with respondents with a secondary plan of termination of parental rights and adoption. The court also ordered respondents to obtain mental health assessments and comply with the necessary and recommended treatment and to comply with the components of their case plans in an order entered 31 January 2022.

Following a 15 September 2022 review hearing, the trial court entered a permanency planning order on 17 October 2022 changing the primary permanent plan to termination of parental rights and adoption with a secondary plan of reunification. The court found since the last hearing, Stephen had alleged respondents' had sexually abused him while he was in their care. DSS investigated the allegations and internally substantiated sexual abuse by both respondents. Respondents were placed on the responsible individuals list ("RIL") and did not petition for judicial review. The court also found DSS noted some concerns regarding respondent-mother's decline in health. She requires assistance getting in and out of chairs, to maintain her balance, and to get

down and up from the floor during visits. The court found respondents had not actively engaged in or cooperated with the plans, DSS, or the guardian *ad litem* ("GAL") and had acted inconsistently with the health or safety of their children. The court ordered no visitation for respondents due to Stephen's allegations and the internal DSS substantiation of the sexual abuse.

DSS filed a motion to terminate respondents' parental rights, on 2 March 2023, based upon the grounds of neglect, willful failure to make reasonable progress to correct the conditions which led to the children's removal from the home, and dependency. *See* N.C. Gen. Stat. §§ 7B-1111(a)(1), (2), and (6) (2023).

The trial court heard the motion on 18 April and 7 June 2023. In an order entered 30 August 2023, the trial court found all three grounds existed to terminate respondents' parental rights as alleged in the petitions. In a separate disposition order, the court concluded termination of respondents' parental rights was in the children's best interests and terminated respondent-mother's parental rights to James and Stephen, and respondent-father's parental rights to James. Respondents timely filed notices of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(7) (2023).

III. Analysis

Respondent-father and respondent-mother challenge several of the trial court's findings of fact as lacking sufficient evidentiary support and challenge the trial court's adjudication concluding grounds existed to terminate respondents' parental rights to their children.

A. Standard of Review

We review a trial court's adjudication concluding grounds exist to terminate parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law." *In re E.H.P.*, 372 N.C. 388, 392, 831 S.E.2d 49, 52 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). "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 R.G.L.*, 379 N.C. 452, 456, 866 S.E.2d 401, 408 (2021) (quoting *In re B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305 (2019)).

"Findings of fact not challenged by respondent are deemed [to be] supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citation omitted). "Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *Id.* at 407, 831 S.E.2d at 58–59. "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (citation omitted).

B. Respondent-Father's Appeal

1. Challenged Findings

[1] Respondent-father challenges findings of fact referencing Stephen's allegations of sexual abuse against respondents and DSS' purported substantiation of those allegations. Respondent-father challenges findings of fact 24, 71, 74, 75, 91, 94, 95, and 96, and asserts they are not supported by clear and convincing evidence. He argues the testimony from the social worker and the social worker supervisor was inadmissible hearsay. Respondent-father argues the trial court erred in admitting the hearsay and cumulative testimonies over respondents' preserved objections.

a. Hearsay

Although respondent-father initially objected to the social worker's testimony on hearsay grounds, he failed to lodge a continuing objection or renew his objections to the same testimony by the social worker later in her direct examination. Respondent-father also elicited similar testimony during his cross-examination of her. Respondent-father has lost the benefit of his prior objection. *State v. Davis*, 239 N.C. App. 522, 537, 768 S.E.2d 903, 912 (2015) ("When, as here, evidence is admitted over objection, but the same or similar evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.") (citations, quotation marks, and brackets omitted).

During her direct examination, the social worker testified:

> Q. Now, likewise with [respondent-father], Ms. - - I'm sorry, [respondent-mother], [Stephen] made allegations of sexual abuse against [respondent-father]?
>
> A. He did.
>
> Q. And as you testified to, those allegations were substantiated?

A. Correct.

Q. And was [respondent-father] placed on the RIL – the responsible individuals list?

A. Yes, he was.

Q. As we sit here today, is he still on that list?

A. He is.

Q. Has [respondent-father] ever made any statements to the Department regarding his role or any type of culpability regarding those sexual abuse allegations?

A. He has.

Q. What are those statements?

A. He has stated that the Department has lied and made [Stephen] say those things.

Q. How many times has he made that statement to the Department?

A. I couldn't count on one hand. Many times. Multiple times.

Q. Has he ever made any admission to the Department that he accepts responsibility for these allegations that were made against him?

A. No, he has not.

Q. To the Department's knowledge, has [respondent-father] received any type of treatment or – mental health treatment regarding these sexual abuse allegations that were made against him?

A. I have no record of any treatment.

No objections were made to this testimony.

Respondent-father also failed to object to similar cumulative evidence by the social worker supervisor later in her testimony. Respondent-father testified during his direct examination regarding DSS' purported substantiation of the sexual abuse allegations in September 2021, claiming Stephen's foster parents had made them up and had coached Stephen.

Respondent-father has waived his objections on hearsay grounds on appeal, "and the social worker's testimony must be considered to be competent evidence." *In re J.C.L.*, 374 N.C. 772, 775, 845 S.E.2d 44, 49 (2020). The testimony of the social worker and supervisor, as well as respondent-father's own testimony, support the trial court's findings of fact, and they are "deemed conclusive for appellate review purposes." *Id.*

Respondent-father did not challenge other findings of fact referencing the sexual abuse allegations, which are binding on appeal. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58. The court found:

> 40. Respondent Father completed a psychological evaluation with Dr. Chris Shaeffer with TriCare, P.A. on March 10, 2022. . . . However, when asked about the sexual abuse allegations Respondent Father reported that the accusations were false.
>
> 41. Respondent Father continues to deny the accusations regarding the minor children's allegations that he sexually assaulted the juveniles.
>
> . . . .
>
> 43. On multiple occasions, the Respondent Father accused the Department of directing the juveniles to lie about the sexual abuse allegations towards Respondent Father and Respondent Mother.
>
> . . . .
>
> 46. Respondent Father has not discussed the sexual abuse allegations with his counselor throughout the life of the underlying case.

Respondent-father's challenges to findings of fact 24, 71, 74, 75, 91, 94, 95, and 96 regarding the sexual abuse allegations are waived and overruled.

b. Finding of Fact 33

Respondent-father challenges the portion of finding of fact 33 stating that he had "planned to reduce services with Easter[s]eals if the children were returned to his custody and care." He argues his testimony "was that he believed the need for services would be somewhat reduced when the stress of family separation was no longer present" and intensive in-home services would be "a must" if the children were returned to their home.

During his cross examination, respondent-father testified:

> Q. And at this point, [respondent-father], do you plan to continue to receive services for the foreseeable future?
>
> A. Until everything dies down.
>
> Q. What is everything dies down, [ ]?
>
> A. Court, DHS, and getting our boys back, so.
>
> . . . .
>
> Q. . . . So my understanding from what you just said is that if – that you – your plan would be, once all the court stuff dies down, to basically stop utilizing the – community support services for Easterseals?
>
> A. As much. It still needs to be done right there, because for the – because I end up having in-home thing. They work with the family. Kids and the family, and they work with them. Because that's a must anyway to have that.

During redirect, respondent-father testified he was going to try to use Easterseals less after the children returned home "because there will be less stress, and the only thing possibly do right there is, if needed, it will be the transportation be what's needed."

Respondent-father further explained he believed he would need less counseling, if the children were returned to his care, because the majority of the reason he needed counseling at the time was for his depression from having his children removed. He stated that he would not "be refusing support. It's just I won't be needing them as much." While ambiguous and viewed in another light the family may need less care at home, the court's finding respondent-father had planned to reduce his services with Easterseals after the children were returned to his care is supported. This finding, standing alone, would not support a conclusion to terminate their parental rights.

c. Finding of Facts 36 and 86

Respondent-father challenges findings of fact 36 and 86 to the extent they find he failed to display any improvements in his parenting skills during visitations after completing the DSS plan's mandated parenting course. He argues, although the social worker testified she did not observe improvements in respondent-father's parenting before and after parenting classes, no evidence tends to shows she had observed any visits prior to respondent-father completing his parenting class because supervision was still with Yadkin County DSS at that time.

The social worker testified that she did not see a discernible difference in the visits after completion of the parenting classes, she did not see either respondent implement any skills from the parenting course on a consistent basis, and respondent-father showed "the same behavior before the completion of it to after the end of the visits that we had."

The social worker testified respondent-father had spent most of his attention during visits on respondent-mother and making sure her needs were met. While the social worker testified he did engage in more play with the children, "[t]here were still multiple bathroom breaks during the [two-hour] visits." The social worker supervisor also cumulatively testified she had not observed respondents demonstrate additional skills or show any improvement in their parenting abilities after completing the DSS's mandated plan parenting classes. This testimony supports the trial court's findings. Respondent-father's challenge is overruled.

d. Finding of Fact 42

Respondent-father next challenges finding of fact 42 in which the court found that he "shows no comprehension of the juveniles' needs as he continues to deny that either of the juveniles are developmentally delayed or in need of any services." Respondent-father asserts he acknowledged both children had speech delays, needed services, and had discussed the delays with the parenting educator. We agree.

Respondent-father testified that he knew James needed speech therapy and had worked with him until they could get him into speech therapy and Stephen "had to start school to get him in speech[.]" The parenting teacher also testified both respondents had informed her of the developmental delays the children had, including speech. We agree with respondents this finding is not supported, does not meet any of DSS' burdens, and fails to support any conclusion. We disregard it. *In re N.G.*, 374 N.C. 891, 901, 845 S.E.2d 16, 24 (2020) (disregarding findings of fact not supported by clear, cogent, and convincing evidence).

e. Finding of Fact 47

Respondent-father challenges the portion of finding of fact 47 stating that he "lacks insight into how his actions affect the minor children" as unsupported by the evidence. Respondent-father asserts he was both "involved and engaged" when participating in his parenting class, and the parenting educator's own assessments of him showed improvement in his parenting skills at the end of the program.

At the termination hearing, respondent-father continued to challenge the reasons the children were initially removed from the home,

or the children were ever abused or neglected. He asserted DSS, the foster parents, and the staff at The Shephard's House made up the allegations, because it is the fastest way to terminate respondents' parental rights and to get the children adopted. Substantial evidence in the record supports the trial court's finding. Respondent-father's challenge is overruled.

f. Findings of Fact 49 and 90

Respondent-father also challenges findings of fact 49 and 90 in which the court found that respondent-father continued to not take responsibility for his actions. Respondent-father asserts he did not deny that the circumstances that led to the children being removed from the home existed, but "[r]ather he denied that the children were left alone[,]" or that he had abused the children, or that the children were neglected in general.

He asserts his parental rights to challenge the accusations and "[t]hese denials do not equate to a failure to take responsibility for his actions when the alleged actions he denies were not properly found by the trial court to have happened."

Respondent-father continued to challenge the reasons the children were initially removed from their care and were neglected, despite the trial court having previously adjudicated the children as neglected. In the initial adjudication order, the court had found that the children were neglected based in part on them being "left unattended" while at "The Shepherd's House" where the family was residing at the time, and James had purportedly fallen down the stairs.

During the termination hearing, respondent-father challenged the adjudication finding he had left the children "alone unsupervised at the Shepherd's House." Respondent-father also testified the foster parents had coached Stephen into making the purported sexual abuse allegations to undermine their parental rights to facilitate adoption. He asserts DSS did not work with them to meet the statutory and ordered goal of reunification, did not want anything to have to do with the truth because truth did not "fit their narrative."

The trial court found:

> 43. On multiple occasions, the Respondent Father accused [DSS] of directing the juveniles to lie about the sexual abuse allegations towards Respondent Father and Respondent Mother.

> 44. Respondent Father also accused staff at The Shepherd's House of making false reports that the children were unsupervised and not being appropriately fed.
>
> 45. Respondent Father accused staff at The Shepherd's House, DSS, the juveniles, and the juveniles' foster parents of lying in order to keep the children away from him and Respondent Mother.

Even if findings of fact 49 and 90 are unsupported and untrue, Respondent-father did not challenge findings of fact 43, 44 and 45, which are binding on appeal. These findings support the trial court's conclusions.

2. Grounds for Termination

[2] Respondent-father challenges the trial court's conclusion that grounds existed to terminate his parental rights based upon neglect. "[A] fit parent is presumed to act in the child's best interest and that there is normally . . . no reason for the [S]tate to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001) (citing *Troxel v. Granville*, 530 U.S. 57, 68-69, 147 L. Ed. 2d 49, 58 (2000)).

Our Supreme Court has long and consistently held "natural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children." *Price v. Howard*, 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997); *see also David N. v. Jason N.*, 359 N.C. 303, 305, 608 S.E.2d 751, 752-53 (2005).

"[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be *no reason for the State to inject itself* into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68-69, 147 L. Ed. 2d at 58 (emphasis supplied).

"[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *David N.*, 359 N.C. at 307, 608 S.E.2d at 753. "[W]hile a fit and suitable parent is entitled to the [care,] custody [and control] of his child, it is equally true that where fitness and suitability are absent[,] he loses this right," subject to DSS supporting statutory reunification to preserve the family and aid the parents to reunite with their children. *Id.* at 305, 608 S.E.2d

at 753 citation and quotation marks omitted); *see also Troxel*, 530 U.S. at 68-69, 147 L. Ed. 2d at 58; *Adams*, 354 N.C. at 61, 550 S.E.2d at 502.

By statutory definition, a juvenile may only be found to be "neglected" when their parent "[d]oes not provide proper care, supervision, or discipline" or "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15) (a), (e) (2023). A trial court may terminate parental rights under N.C. Gen. Stat. § 7B-1111(a)(1) only upon a finding that the parent has neglected their child such that the child meets the statutory definition of being a "neglected juvenile" and DSS has proven the presence of the likelihood of future neglect by the parent. N.C. Gen. Stat. § 7B-1111(a)(1) (2023).

"When a child has been out of the parent's custody for a significant period of time by the point at which the termination proceeding occurs, neglect may be established by a showing that the child was neglected on a previous occasion *and* the presence of the likelihood of future neglect by the parent if the child were to be returned to the parent's care." *In re J.D.O.*, 381 N.C. 799, 810, 874 S.E.2d 507, 517 (2022) (citation omitted) (emphasis supplied).

"When determining whether such future neglect is likely, the [trial] court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re R.L.D.*, 375 N.C. 838, 841, 851 S.E.2d 17, 20 (2020) (citation omitted). "Relevant to the determination of probability of repetition of neglect is whether the parent has made any meaningful progress in eliminating the conditions that led to the removal of the children." *In re O.W.D.A.*, 375 N.C. 645, 654, 849 S.E.2d 824, 831 (2020) (citation omitted).

Our Supreme Court has held:

> We hold that evidence of neglect by a parent prior to losing custody of a child . . . is admissible in subsequent proceedings to terminate parental rights. The trial court *must also consider any evidence of changed conditions* in light of the evidence of prior neglect *and the probability of a repetition of neglect*. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*.

In re Ballard, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (internal citation omitted) (first two emphases supplied).

Respondent-father does not challenge the trial court's determination the children were previously neglected, but he argues findings of fact are insufficient to support the trial court's determination that there was a likelihood of repetition of neglect if James were returned home. Respondent-father argues he had complied with his case plan and asserts his and respondent-mother's circumstances had significantly improved at the time of the termination hearing from the time when the children were removed from their care. *In re Ballard* mandates the trial court must "consider *any* evidence of changed conditions" and compliance with the case plan and completion of portions thereof is evidence of and creates a presumption of "changed conditions." *Id.* (emphasis supplied).

Although respondent-father did engage and participate in the services and completed portions of DSS' case plan, "a case plan is not just a checklist," and parents are "required to demonstrate acknowledgment and understanding of why the juvenile entered DSS custody as well as changed behaviors." *In re R.L.R.*, 381 N.C. 863, 875, 874 S.E.2d 579, 589 (2022) (citation and internal quotation marks omitted); *see also In re M.T.*, 285 N.C. App. 305, 332, 877 S.E.2d 732, 751 (2022) ("Parental compliance with a case plan alone is not always sufficient to preserve parental rights.").

The evidence and supported findings demonstrate respondent-father completed most aspects of his case plan. He denied the children were ever neglected, and blamed The Shepherd's House and DSS for the children being removed from their care. The court found respondent-father had completed the parenting class, and the social worker and supervisor had opined he did not display improved parenting capacity or demonstrate any skills learned during his visitations with the children.

Respondent-father continued to challenge the sexual abuse allegations, accused the foster parents of making up the allegations, to facilitate their adoption of his children and failed to discuss the allegations with his counselor throughout the life of the case.

The court also found respondent-father "is solely reliant upon Easter[s]eals for his day-to-day maintenance" and that "[i]t is expected" he "will continue to require peer support services from Easter[s]eals for the foreseeable future[;]" however respondent-father "planned to reduce his services with Easter[s]eals if the children were returned to his custody and care."

In arguing that the neglect ground should be reversed, respondent-father cites this Court's decision in *In re C.N.*, 266 N.C. App. 463, 831 S.E.2d 878 (2019). In that case, the children had been removed from the

respondent-mother's care after the youngest child had spilled Mr. Clean liquid detergent onto herself and the respondent-mother had promptly sought medical assistance. *Id.* at 469, 831 S.E.2d at 883. In reversing the ground of neglect, this Court determined that "[n]o evidence shows and the trial court made no findings indicating such actions were likely to be repeated." *Id.* The Court also reversed the ground under N.C. Gen. Stat. § 7B-1111(a)(2) for failing to make reasonable progress in correcting the conditions that led to the children's removal from the home. Although the respondent-mother had not addressed all of the concerns from her case plan, this Court noted the uncontested progress she had made and held that "[t]he evidence presented and the trial court's findings are insufficient to support the conclusion that 'neglect is ongoing, and there is a probability of repetition of neglect.' " *Id.*

This Court's decision in *In re C.N.* was later reviewed by and remanded to this Court from our Supreme Court to reconsider its holding in light of the Supreme Court's decisions in *In re B.O.A.*, 372 N.C. 372, 831 S.E.2d 305 (2019) and *In re D.W.P.*, 373 N.C. 327, 838 S.E.2d 396 (2020). *In re C.N.*, 373 N.C. 568 (2020).

In the case of *In re D.W.P.*, our Supreme Court affirmed the trial court's order terminating the respondent-mother's parental rights on the ground of neglect. *In re D.W.P.*, 373 N.C. at 340, 838 S.E.2d at 406. The respondent-mother's eleven-month-old son was treated for a broken femur and had numerous other fractures that were in the process of healing. *Id.* at 328, 838 S.E.2d at 399.

In affirming the trial court's conclusion that neglect was likely to reoccur if the children were returned to the respondent-mother's care, our Supreme Court recognized the respondent-mother had made some progress on her case plan, but it noted the troublesome nature of the respondent-mother's "continued failure to acknowledge the likely cause of [her son's] injuries." *Id.* at 339, 838 S.E.2d at 406.

The Court further noted that despite the mother's recognition that her fiancé could have caused her son's injuries, she had re-established a relationship with him that resulted in domestic violence and had "refuse[d] to make a realistic attempt to understand how [her son] was injured or to acknowledge how her relationships affect her children's wellbeing." *Id.* at 340, 838 S.E.2d at 406.

Upon remand in *In re C.N.*, this Court again reversed the trial court's termination of the mother's parental rights on the ground of neglect, determining that "[n]o evidence shows and the trial court made no finding indicating *either* [*the*] *Respondent-mother had denied responsibility*

or a probability that her actions were likely to be repeated." *In re C.N.*, 271 N.C. App. 20, 26, 842 S.E.2d 627, 630 (2020) (emphasis supplied). In contrast to *In re D.W.P.*, this Court determined that "[n]othing indicates [the] Respondent-mother has continued to place her children at risk or failed to acknowledge her neglect was the cause of the initial injury to [the child] and the instance of lack of supervision of [another child]." *Id.*

Here, the trial court found respondent-father's continued actions and how they impacted the children, he continued to challenge the adjudication he had previously neglected the children, and, a likelihood existed the children would be neglected again if returned to his home. The trial court's findings sufficiently support its conclusion grounds existed to terminate respondent-father's parental rights to James based upon neglect. *See In re L.G.G.*, 379 N.C. 258, 271, 864 S.E.2d 302, 310 (2021). The trial court did not err in terminating respondent-father's parental rights to James based on neglect.

Because only one ground is needed to support a trial court's order terminating parental rights, it is unnecessary to address respondent-father's arguments regarding the other two grounds of willful failure to make reasonable progress and dependency. *See In re C.K.I.*, 379 N.C. 207, 210, 864 S.E.2d 323, 326 (2021).

C. Respondent-Mother's Appeal

1. Challenged Findings

[3] Similar to respondent-father, respondent-mother challenges several findings of fact referring to the purported sexual abuse allegations made by Stephen as unsupported because they rely upon inadmissible hearsay. Like respondent-father, respondent-mother initially objected to the challenged testimony, but later failed to make a standing objection or renew her objections to similar evidence during the testimony of the social worker and the cumulative evidence of her supervisor, and she also elicited some of the same evidence during her cross examination of the social worker.

As with respondent-father, respondent-mother lost the benefit of her prior preserved objections and waived any challenge to the admission of the hearsay. *Davis*, 239 N.C. App. at 537, 768 S.E.2d at 912. We overrule respondent-mother's challenges to findings 24, 71, 74, 91, 94, and 96.

Respondent-mother also challenges findings of fact 90, 101, 105, 106, 108, 111, and 113 to the extent they state that she had failed to comply with her case plan or to make reasonable progress. She contends she fully engaged in her case plan with DSS, noting that she has consistently

engaged in therapy since March 2022, successfully completed a psychological evaluation in March 2022, has obtained and maintained independent housing, and has attended to her medical needs and has improved her physical health.

The findings show respondent-mother made progress on her case plan, but the conditions that led to the children's removal from her care continued to exist. Respondent-mother completed the parenting class; however, DSS staff opined she demonstrated no changed parenting behaviors during her every two-week visitations with the children. She purportedly sat on a bench during the visits and did "not engage with the juveniles."

Respondent-mother continued to suffer issues with economic and domestic instability, had not obtained employment or disability benefits, and was reliant upon Easterseals to maintain her day-to-day needs. While respondent-mother "made significant improvements in her physical health," she continued to suffer from ongoing medical issues of anxiety, depression, and partial complex seizures, which were exacerbated by stress and anxiety. Respondent-mother also continued to deny the children were neglected and she agreed with respondent-father regarding the purported false, contrived and unproven sexual abuse allegations. The trial court found respondent-mother has failed to make reasonable progress in correcting the conditions which led to the children's removal.

2. Grounds for Termination

[4] Respondent-mother argues the trial court's proper findings of fact do not support its conclusion there is a likelihood of repetition of future neglect. She contends she substantially completed and complied with the components of her DSS case plan, and, the court's conclusion is not supported.

Although respondent-mother made progress on her case plan, she failed to demonstrate an "acknowledgment and understanding of why the juvenile[s] entered DSS custody as well as changed behaviors." *In re R.L.R.*, 381 N.C. at 875, 874 S.E.2d at 589.

The findings show respondent-mother had failed to demonstrate understanding of her role in the children being removed from her and respondent-father's care, continued to deny the children were neglected, lacked the capacity to protect the children from respondent-father, and had failed to demonstrate significant improvement in her parenting capability.

While respondent-mother clearly made some improvement in her physical health, the court found her psychological evaluation indicated she displayed "clear impairment in her short-term memory and attention" and that "[h]er cognitive challenges are significant and are sufficient to create substantial challenges to parenting."

Respondent-mother also had not secured economic or domestic stability. This finding alone cannot support termination of her parental rights. N.C. Gen. Stat. § 7B-1111(a)(2) includes the "poverty exception," which provides "No parental rights, however, shall be terminated for the sole reason that the parents are unable to care for the juvenile on account of their poverty." N.C. Gen. Stat. § 7B-1111(a)(2) (2023).

Our Supreme Court has recently held: "The poverty exception in N.C.G.S. § 7B-1111(a)(2) does not define the 'elements' of this statutory ground for terminating parental rights. The exception instead establishes what is *not* a willful failure to make reasonable progress under the circumstances for purposes of N.C.G.S. § 7B-1111(a)(2)." *In re T.M.L.*, 377 N.C. 369, 382, 856 S.E.2d 785, 794 (2021). We disregard this finding as unsupported and irrelevant. *In re N.G.*, 374 N.C. at 901, 845 S.E.2d at 24 (disregarding findings of fact not supported by clear, cogent, and convincing evidence).

The trial court did not err in concluding grounds existed to terminate respondent-mother's parental rights based upon failure to make reasonable progress.

Because we conclude the trial court properly found grounds existed based upon failure to make reasonable progress, we do not address respondent-mother's challenges to the trial court's other grounds. *See In re C.K.I.*, 379 N.C. at 210, 864 S.E.2d at 326.

IV. Conclusion

The trial court did not err in determining grounds existed to terminate respondent-father's parental rights on the ground of neglect and respondent-mother's parental rights on the ground of failure to make reasonable progress. Respondents do not challenge the trial court's determination that termination of their parental rights was in the children's best interests. The trial court's orders are affirmed.

AFFIRMED.

Judges WOOD and GORE concur.

IN RE S.D.H.

[296 N.C. App. 392 (2024)]

IN THE MATTER OF S.D.H., D.W.H.

No. COA23-1099

Filed 5 November 2024

1. Appeal and Error—petition for certiorari—termination of parental rights—merit and extraordinary circumstances shown

In a father's appeal from an order terminating his parental rights in his children, where his notice of appeal did not comply with Appellate Rule 3, his petition for a writ of certiorari was allowed because: (1) his main argument—that the trial court failed to adhere to statutory mandates concerning the guardian ad litem assigned to the case—had merit, and (2) since the gravity of such error—where the fundamental rights of a parent are at stake—could have resulted in substantial harm to both the father and his children, extraordinary circumstances existed to justify issuing the writ.

2. Termination of Parental Rights—disposition—guardian ad litem—no evidence or recommendations offered—statutory mandate—court's implicit duty to ensure compliance

At the disposition phase of a termination of parental rights proceeding, where the trial court ruled that terminating a father's parental rights would serve the children's best interests, the court abused its discretion by making that ruling without having received any evidence or recommendations from the guardian ad litem (GAL), who was serving a dual role as both GAL and attorney advocate. The GAL violated the statutory mandates in N.C.G.S. §§ 7B-601 and 7B-1108 by failing to testify, present evidence of an investigation, or make any recommendations regarding the children's best interests during the adjudication or disposition hearings; consequently, prejudice was presumed on appeal. Further, the Juvenile Code imposes an implicit duty upon trial courts to ensure that GALs perform their statutory duties—something the trial court failed to do here.

Appeal by Respondent-Father from a termination of parental rights order entered 19 September 2023 and amended 3 October 2023 by Judge Mark L. Killian in Caldwell County District Court. Heard in the Court of Appeals 1 May 2024.

Hooks Law, P.C., by Laura G. Hooks, for Respondent-Appellant Father.

Stephen M. Shoeberle for Petitioners-Appellees.

No brief filed on behalf of the Guardian ad Litem.

CARPENTER, Judge.

Respondent-Father appeals from an amended order entered 3 October 2023 ("the Order") terminating his parental rights to his minor children S.D.H. ("Stella") and D.W.H. ("Decker").[1] On appeal, Respondent-Father argues that the trial court abused its discretion by ruling on disposition absent guardian ad litem evidence and failed to consider relevant best interest factors. After careful review, we largely agree with Respondent-Father. Without disturbing the trial court's determinations concerning the adjudicatory phase, we vacate the disposition portion of the Order and remand for a new disposition hearing.

I. Factual & Procedural Background

Stella and Decker (collectively "the Juveniles") are the subject of this appeal, which arises from the Order. The Juveniles have been the subject of parallel litigation across Virginia and North Carolina involving one nuclear family. The Paternal Grandparents (collectively "Petitioners") are the biological father and stepmother of Respondent-Father.

In October 2017, Decker was born to Respondent-Father and Decker's Mother, who is not a party to this appeal. Respondent-Father was incarcerated right after Decker was born, but subsequently acquired legal custody of Decker for two years in Virginia. In May 2019, Stella was born to Respondent-Father and Stella's Mother, who is not a party to this appeal. Stella was originally placed in the custody of Respondent-Father's mother in Virginia, and never resided with Respondent-Father.

Respondent-Father has a well-documented history of illegal drug use, including heroin, fentanyl, opiates, and methamphetamine. As a result, he has encountered challenges in providing a safe environment for the Juveniles. Petitioners gained physical custody of Decker in August 2020, after Maternal Grandmother drove Decker from Virginia to North Carolina and placed him in their care. A Virginia trial court placed Stella with Petitioners in North Carolina, after Petitioners requested custody to reunite her with Decker. Stella's case involved the Virginia Department of Social Services ("Virginia DSS") in juvenile court for Virginia.

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

On 13 January 2021, the Virginia court entered a final "Order for Custody/Parenting Time/Visitation" granting the Paternal Grandfather legal custody of Stella. The same day, the Virginia court entered a "Child Protective Order – Abuse and Neglect" for Stella as to Respondent-Father and Stella's Mother. In relevant part, the Virginia court's findings recognized Respondent-Father had a serious drug problem and issued a no-contact order in protection of Stella. The order directed, in relevant part, the following:

> (1) [Respondent-Father] shall not use illegal drugs nor prescription drugs in excess of prescribed amounts.
>
> (2) [Respondent-Father] shall have no contact with [Stella] until such time as he has passed a hair follicle drug test or he has passed four consecutive clean drug tests as arranged by [Virginia DSS].
>
> (3) [Respondent-Father] shall be subject to random drug testing at his own expense at the request of [Virginia DSS]. Should he refuse to comply with a request for drug testing within 24-hours then the test shall be deemed positive.
>
> (4) Once [Respondent-Father] has complied with [number (2)] of this Exhibit, he shall be allowed supervised visitation with [Stella] as supervised by [Paternal Grandfather] or his designee.
>
> (5) Should [Respondent-Father] have a test deemed positive or test positive for illegal drugs then he shall have no contact with [Stella] until such time as he has passed four consecutive clean drug tests as administered by DSS. Thereafter he shall again have supervised contact as supervised by [Paternal Grandfather] or his designee.
>
> . . .
>
> (8) [Virginia DSS] shall not be required to maintain the case if there has been no contact by the parents after two months.
>
> (9) All parties shall obey the laws of the Commonwealth and be of good behavior.

The record shows that Respondent-Father did not submit drug tests to Virginia DSS or take further steps to gain visitation rights. Respondent-Father's last lawful contact with Stella, prior to the issuance of the "Child Protective Order – Abuse and Neglect," was October 2020.

A provision in the Virginia order left uncertain which jurisdiction—Virginia or North Carolina—was proper amidst proceedings in both

states. In February 2023, the Virginia court concluded jurisdiction was more appropriate in North Carolina, as Virginia was no longer a convenient forum.

On 19 January 2021, Petitioners filed a civil custody action in Caldwell County, North Carolina requesting legal custody of Decker. On 14 June 2021, after the trial court entered an *ex parte* temporary order awarding Paternal Grandfather custody of Decker in January of 2021, the trial court entered a permanent custody order awarding Paternal Grandfather sole legal custody of Decker. The trial court granted Respondent-Father visitation rights, contingent on his meeting the following conditions:

> (1) [Respondent-Father] must have six (6) consecutive clean drug screens at least twenty-five (25) days and not more than thirty-two (32) days apart from the last test. If [Respondent-Father] misses one (1) test, or has a positive test, [he] will begin the sequence over again;
>
> (2) [Respondent-Father] shall obtain a substance abuse assessment and follow the recommended treatment;
>
> (3) [Respondent-Father] shall sign the necessary releases so the [Petitioners] can know the treatment plan for [him]; (4) [Petitioners] may request random drug screens and [Respondent-Father] must pay for same. If the results are negative, [Petitioners] shall reimburse [Respondent-Father] for the cost of the test(s). Should [Respondent-Father] refuse to comply with a drug test within twenty-four (24) hours of such request, then the test shall be deemed positive;
>
> (5) Should [Respondent-Father] have a positive test result, the whole process starts over and [he] must have six (6) consecutive negative test results before visiting;
>
> (6) [Respondent-Father] shall [not] use illegal controlled substances nor prescription medications in excess of prescribed amounts;
>
> (7) [Respondent-Father] shall [not] consume alcohol to excess in the presence of the minor child;
>
> (8) There shall be no telephone contact, or any other contact, with the [Decker] at this time;
>
> (9) All visits shall take place in North Carolina, and the [Respondent-Father] shall not remove [Decker] from the care of the [Petitioners].

The record shows Respondent-Father failed to submit drug test results to Petitioners or take further steps to gain visitation rights. Respondent-Father's last lawful visit with Decker, prior to the custody order, was on 28 December 2020.

In January 2023, Petitioners filed a petition to terminate Respondent-Father's parental rights to the Juveniles, alleging neglect, nonsupport, and willful abandonment. The trial court appointed Attorney Jared T. Amos (the "Guardian ad Litem") in the dual roles of guardian ad litem and attorney advocate. The adjudication and disposition hearings occurred on 22 August 2023. The trial court received testimony from Paternal Step-Grandmother, Respondent-Father, and arguments from all parties; however, it did not receive testimony, written reports, or recommendations from the Guardian ad Litem, aside from argument in his capacity as attorney advocate.[2]

Paternal Step-Grandmother testified that while the Juveniles were in the custody of Petitioners, they had not received child support from Respondent-Father. The Juveniles had healthcare needs which Petitioners addressed. Stella was tongue-tied, which required surgery. She also underwent surgery to have her tonsils and adenoids removed. The surgery resulted in Stella having a series of infections which improved after further treatment. Decker had impacted eardrums, which resulted in developmental delays in speech and hearing. Decker attended weekly therapy because he had issues playing properly with other children. The Paternal Step-Grandmother testified that Respondent-Father had not participated in the Juveniles' medical decisions or care.

Respondent-Father testified that he and Paternal Grandfather had a complicated relationship, and his few attempts to contact Petitioners were not well received. Respondent-Father acknowledged his past drug problems and incarceration in his testimony. Respondent-Father put forth evidence, including a letter from his Virginia probation officer, reporting that: Respondent-Father commenced supervised probation on 8 July 2022; his adjustment to supervision had been satisfactory; he had reported to all scheduled appointments and tested negative for all administered drug screens; he had no known arrests; he had been employed by a rehabilitation facility since January 2023 and had recently become employed by a manufacturing company. Respondent-Father resided in Virginia for the duration of these proceedings. Respondent-Father

2. The parties, with the exception of the Guardian ad Litem, presented disposition evidence during the adjudication phase, without objection or subsequent challenge on appeal by Respondent-Father.

conceded that he had not made the same effort to contact Stella as he had Decker, and he attributed this disparity to the no-contact order and the bond he formed with Decker in the two years he had custody.

On 22 August 2023, the trial court concluded that adjudication grounds existed to terminate Respondent-Father's parental rights, before proceeding to disposition. Petitioners' counsel presented no new evidence and asked the trial court to accept the evidence presented at adjudication. Respondent-Father's counsel presented no new evidence. The Guardian ad Litem did not testify or present any evidence of an investigation. After closing arguments, the trial court determined it was in the Juveniles' best interest to terminate Respondent-Father's parental rights.

On 19 September 2023, the trial court entered an adjudication and disposition order in the termination of parental rights proceeding. On 3 October 2023, the trial court entered the Order, which concluded that termination was in the Juveniles' best interest.

On 26 September 2023, Respondent-Father filed a written notice of appeal. Then, on 6 October 2023, he filed a timely, yet defective, amended written notice of appeal.

II. Jurisdiction

[1] Respondent-Father has a right to appeal pursuant to N.C. Gen. Stat. § 7B-1001(a)(7) (2023). Respondent-Father's amended notice of appeal, however, did not comply with Rule 3 because it did not correctly identify the title and filing date of the Order. *See* N.C. R. App. P. 3(d) ("The notice of appeal . . . shall designate the judgment or order from which appeal is taken . . . .").

As a result, Respondent-Father filed a petition for writ of certiorari ("PWC"). A PWC is a "prerogative writ" which we may issue to aid our jurisdiction. *See* N.C. Gen. Stat. § 7A-32(c) (2023). But issuing a PWC is an extraordinary measure. *See Cryan v. Nat'l Council of YMCA of the U.S.*, 384 N.C. 569, 572, 887 S.E.2d 848, 851 (2023). A petitioner must satisfy a two-part test before we will issue a PWC. *See id.* at 572, 887 S.E.2d at 851. "First, a writ of certiorari should issue only if the petitioner can show 'merit or that error was probably committed below.' " *Id.* at 572, 887 S.E.2d at 851 (quoting *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021)). "Second, a writ of certiorari should issue only if there are 'extraordinary circumstances' to justify it." *Id.* at 572–73, 887 S.E.2d at 851 (quoting *Moore v. Moody*, 304 N.C. 719, 720, 285 S.E.2d 811, 812 (1982)). "We require extraordinary circumstances because a writ of

certiorari 'is not intended as a substitute for a notice of appeal.' " *Id.* at 573, 887 S.E.2d at 851 (quoting *Ricks*, 378 N.C. at 741, 862 S.E.2d at 839).

"If courts issued writs of certiorari solely on the showing of some error below, it would 'render meaningless the rules governing the time and manner of noticing appeals.' " *Id.* at 573, 887 S.E.2d at 851 (quoting *Ricks*, 378 N.C. at 741, 862 S.E.2d at 839). An extraordinary circumstance "generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Id.* at 573, 887 S.E.2d at 851 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23, 848 S.E.2d 1, 11 (2020)).

Here, Respondent-Father argues the trial court failed to adhere to statutory mandates concerning the guardian ad litem. After careful review, there is merit to his argument. *See id.* at 572, 887 S.E.2d at 851. Further, the gravity of such error, where the fundamental rights of a parent are at stake, could result in substantial harm to both Respondent-Father and the Juveniles. *See id.* at 573, 887 S.E.2d at 851. Accordingly, this is an extraordinary circumstance. *See id.* at 572, 887 S.E.2d at 851. In our discretion, we allow Respondent-Father's PWC to aid our jurisdiction.

III. Issue

[2] The sole issue on appeal is whether the trial court abused its discretion in concluding that it was in the best interest of the Juveniles to terminate Respondent-Father's parental rights at the disposition stage.

IV. Analysis

Respondent-Father argues that the trial court abused its discretion during the disposition stage of the termination of parental rights proceeding. Specifically, Respondent-Father argues that the trial court erred by ruling on disposition absent guardian ad litem evidence and failing to consider relevant best interest factors. Conversely, Petitioners argue that the record was sufficient and Respondent-Father's arguments lack legal justification.

In short, we agree with Respondent-Father. Although the trial court considered several best interest factors, the trial court abused its discretion by ruling on disposition without necessary evidence from the Guardian ad Litem concerning the best interests of the Juveniles.

A. Termination of Parental Rights

A termination of parental rights proceeding is a two-stage process—adjudication and disposition. *In re A.B.*, 239 N.C. App. 157, 160, 768

S.E.2d 573, 575 (2015). "After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest." N.C. Gen. Stat. § 7B-1110(a) (2023).

"We review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence." *In re C.B.*, 375 N.C. 556, 560, 850 S.E.2d 324, 328 (2020). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). "[O]ur appellate courts are bound by the trial court's findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re Montgomery*, 311 N.C. 101, 110–11, 316 S.E.2d 246, 252–53 (1984).

"The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion." *In re C.B.*, 375 N.C. at 560, 850 S.E.2d at 327. "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

At the dispositional stage, the trial court must consider several factors in its best interest analysis and make written findings regarding those that are relevant:

> (1) The age of the juvenile. (2) The likelihood of adoption of the juvenile. (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile. (4) The bond between the juvenile and the parent. (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement. (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a). "[I]t is the province of the trial court to weigh the relevant factors in determining [the child's] best interests." *In re J.C.L.*, 374 N.C. 772, 787, 845 S.E.2d 44, 56 (2020).

B. Guardian ad Litem

"When an appellant argues the trial court failed to follow a statutory mandate, the error is preserved, and the issue is a question of law and reviewed de novo." *In re J.C.-B.*, 276 N.C. App. 180, 192, 856 S.E.2d 883,

892 (2021). "A statutory mandate that automatically preserves an issue for appellate review is one that, either: (1) requires a specific act by a trial judge; or (2) leaves no doubt that the legislature intended to place the responsibility on the judge presiding at the trial, or at specific courtroom proceedings that the trial judge has authority to direct." *In re E.D.*, 372 N.C. 111, 121–22, 827 S.E.2d 450, 457 (2019) (*purgandum*).

The Juvenile Code requires that the trial court appoint a guardian ad litem for juvenile(s) in two scenarios. *See* N.C. Gen. Stat. §§ 7B-601(a), -1108(b) (2023). In the first scenario, the trial court must appoint a guardian ad litem in abuse and neglect cases, and may do so in dependency cases. N.C. Gen. Stat. § 7B-601(a). Second, when a petitioner files a petition to initiate a private termination proceeding and respondent answers denying any material allegations, the trial court must appoint a guardian ad litem to ensure the juvenile's best interest is represented. N.C. Gen. Stat. § 7B-1108(b). Additionally, this subsection mandates that "[a] licensed attorney shall be appointed to assist those guardians ad litem who are not attorneys licensed to practice in North Carolina." *Id.*

A guardian ad litem appointed under section 7B-1108 has the same duties as a guardian ad litem appointed under section 7B-601. *See* N.C. Gen. Stat. §§ 7B-601(a), -1108(b). In pertinent part, a guardian ad litem's responsibilities are as follows:

> To make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; . . . to offer evidence and examine witnesses at adjudication; . . . to conduct follow-up investigations to insure that the orders of the court are being properly executed; to report to the court when the needs of the juvenile are not being met; and to protect and promote the best interests of the juvenile until formally relieved of the responsibility by the court.

N.C. Gen. Stat. § 7B-601(a). A guardian ad litem program " 'represents' a juvenile within the meaning of N.C. [Gen. Stat.] §§ 7B-601 and 7B-1108 by performing the duties listed in [N.C. Gen. Stat. §] 7B-601." *In re J.H.K.*, 365 N.C. 171, 178, 711 S.E.2d 118, 122 (2011) (reasoning that a guardian ad litem volunteer who "regularly filed reports describing the children's needs" and other important matters, including "her recommendations concerning the best interests of the children in light of her ongoing investigation" satisfied the requirements of N.C. Gen. Stat. § 7B-601).

Nevertheless, "the guardian ad litem and the attorney advocate perform distinct and separate roles under the juvenile code." *In re R.A.H.*,

171 N.C. App. 427, 431, 614 S.E.2d 382, 385 (2005). Once appointed, the guardian ad litem is "involved at all stages of the proceeding, interviewing the child, the parents, and any other persons relevant to the proceedings . . ." to "acquire intimate knowledge pertinent to the best interests of the child." *Id.* at 431, 614 S.E.2d at 385. The guardian ad litem should work "with all parties to both determine what course of action was in the best interests of the child, and how best to pursue that course of action." *Id.* at 431, 614 S.E.2d at 385. Thereafter during disposition, the guardian ad litem must offer evidence, either written reports, testimony, or both, recommending to the trial court which course of action is in the best interests of the child. Otherwise, the trial court is not properly equipped to rule on best interests, and we are in no position to review the trial court's dispositional ruling.

Unlike the guardian ad litem, the attorney advocate "is not required to conduct [a] field investigation, or interview witnesses." *Id.* at 431, 614 S.E.2d at 385. The attorney advocate's role is to protect the juvenile's legal rights, by "provid[ing] legal advice and assistance to the guardian ad litem in representing the minor child." *Id.* at 431, 614 S.E.2d at 385.

Consequently, "[t]he functions of the guardian ad litem and the attorney advocate are not sufficiently similar to allow one to 'pinch hit' for the other when the best interest of a juvenile is at stake." *Id.* at 431, 614 S.E.2d at 385.

One of the stated purposes of our Juvenile Code is "[t]o provide standards . . . 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(5) (2023) (emphasis added).

When "a child [is] not represented by a guardian ad litem at a critical stage of the termination proceedings," we "must presume prejudice." *In re R.A.H.*, 171 N.C. App. at 431, 614 S.E.2d at 385. Under such circumstances, "[t]he trial court should have terminated the hearing, appointed a guardian ad litem for [the juvenile], and set a new hearing date giving the guardian ad litem sufficient time to become familiar with the case and make the relevant inquiries and investigations." *Id.* at 431–32, 614 S.E.2d at 385.

Although sections 7B-601 and 7B-1108 compel action on the part of the guardian ad litem, it is the evidentiary basis for the trial court's ruling and ultimately the parties who suffer when the guardian ad litem fails to adhere to statutory requirements. *See* N.C. Gen. Stat. §§ 7B-601(a),

-1108(b). "[T]he 'paramount importance of the child's best interest and the need to place children in safe, permanent homes within a reasonable time' weigh[s] heavily throughout every phase of a juvenile proceeding." *In re O.E.M.*, 379 N.C. 27, 34, 864 S.E.2d 257, 263 (2021) (quoting *In re T.R.P.*, 360 N.C. 588, 601, 636 S.E.2d 787, 796 (2006)). Indeed, the stakes are considerably higher for a respondent in a termination proceeding than in an abuse, neglect, or dependency proceeding, as it may result in the "permanent severance of the parent-child relationship and the extinguishment of an individual's constitutional status as a parent." *See id.* at 34, 864 S.E.2d at 263.

Sections 7B-601 and 7B-1108 do not explicitly state it is the trial court's responsibility to ensure the guardian ad litem performs its statutory duties; however, given the legislature's emphasis on providing permanence within a reasonable amount of time, we believe this goal is best served by the trial court monitoring the guardian ad litem's performance of its statutory duties in the first instance rather than waiting for appellate review. *See* N.C. Gen. Stat. §§ 7B-601(a), -1108(b); *see also* N.C. Gen. Stat. § 7B-100(5) (2023). As the "polar star" in North Carolina is the best interest of the child, the trial court must be equipped to make an informed decision which is supported by the evidence. *See In re R.A.H.*, 171 N.C. App. at 431, 614 S.E.2d at 385. Therefore, we conclude that the Juvenile Code imposes an implicit duty upon the trial court to ensure the role(s) of the guardian ad litem are performed as required by statute. *See* N.C. Gen. Stat. §§ 7B-601(a), -1108(b); *see also* N.C. Gen. Stat. § 7B-100(5).

In *In re R.A.H.*, we reasoned that when the trial court realized a juvenile's best interest was not represented by a guardian ad litem, the trial court should have terminated the hearing, appointed a guardian ad litem, and set a new hearing date to permit an investigation. 171 N.C. App. at 431–32, 614 S.E.2d at 385. There, although the trial court properly appointed an attorney advocate for the duration of the proceedings, the court failed to appoint a guardian ad litem pursuant to section 7B-601 until four days into the termination hearing, despite the petition alleging neglect. *Id.* at 429–30, 614 S.E.2d at 384–85. On appeal, we concluded that where a child's best interest is not represented by a guardian ad litem at a critical stage of termination proceedings, we must presume prejudice. *See id.* at 431, 614 S.E.2d at 385. The trial court should monitor whether a juvenile's best interest is represented by a guardian ad litem by assessing whether they performed their mandatory duties, distinct from those required of the attorney advocate. *Id.* at 431–32, 614 S.E.2d at 385.

We review Respondent-Father's arguments against this framework. Respondent-Father challenges the sufficiency of the evidence supporting findings of fact 33 and 34, which state in part: "[t]hat the termination of the parental rights of the [Respondent-Father] with regards to [the Juveniles] would be in the best interest of the minor children" and "[t]hat in evaluating whether or not it is in the best interests of the minor children to terminate the parental rights of Respondent Father, the Court has also considered the factors delineated in 7B-1110." Specifically, Respondent-Father argues that the Guardian ad Litem did not fulfill his statutorily-required role. Therefore, he asserts the trial court did not follow statutory mandates by ruling on disposition absent critical evidence from the Guardian ad Litem. We agree.

Here, the trial court appointed the Guardian ad Litem to represent the best interests of the Juveniles. In the Order, the trial court noted the Guardian ad Litem "was present at the hearing, having been appointed as the Guardian ad Litem for [the Juveniles]," and decreed after the proceeding "[t]hat having completed his services for which he was involved, [the Guardian ad Litem], [was] hereby released and discharged as the Guardian ad Litem for [the Juveniles] and shall have no further duties and responsibilities regarding this case." The Guardian ad Litem performed dual roles as guardian ad litem and as attorney advocate. *See In re J.H.K.*, 365 N.C. at 175, 711 S.E.2d at 120.

After careful review, the record is devoid of evidence offered by the Guardian ad Litem. This case is analogous to *In re R.A.H.*, where a guardian ad litem was not appointed by the trial court until four days into the termination of parental rights hearing, and thus no pre-trial investigation was completed and no reports were produced for the record. *See* 171 N.C. App. at 429–30, 614 S.E.2d at 384–85. Accordingly, the juvenile lacked representation of their best interest during a critical stage of the termination hearing. *See id.* at 431, 614 S.E.2d at 385.

Here, the Guardian ad Litem provided no indication that he conducted a pre-trial investigation or prepared reports to assist the trial court in understanding the Juveniles' family dynamics or determining what was in their best interest. Therefore, the trial court erred by ruling on disposition absent evidence of the Guardian ad Litem's investigation. Because the Juveniles lacked adequate representation of their best interests during a critical stage of this proceeding, we presume prejudice. *See id.* at 431, 614 S.E.2d at 385. As a result, we do not reach Respondent-Father's argument that the trial court failed to consider relevant best interest factors.

In this case, we have no indication that the Guardian ad Litem completed his duties as required by statute. *See* N.C. Gen. Stat. § 7B-601. Thus, just as the trial court had the explicit statutory duty to appoint the Guardian ad Litem prior to this termination of parental rights proceeding, the trial court had an implicit duty to receive information or evidence from the Guardian ad Litem at the hearing to allow the trial court to determine whether the Guardian ad Litem sufficiently performed his duties. Otherwise, the trial court would have no input from the statutorily-appointed Guardian ad Litem regarding family dynamics and circumstances which are necessary to permit the trial court to make an informed decision as to the best interest of the Juveniles. To allow otherwise would defeat the purpose of the statutory requirement that a Guardian ad Litem be appointed. *See* N.C. Gen. Stat. § 7B-601(a); *see also* N.C. Gen. Stat. § 7B-100(5).

In juvenile cases where a guardian ad litem is required, a trial court cannot properly consider all relevant criteria set out in Section 7B-1110(a) where it wholly lacks evidence from the guardian ad litem for the juveniles. *See* N.C. Gen. Stat. § 7B-1110(a). Consequently, a trial court's ruling on disposition cannot be the result of a reasoned decision absent evidence of a guardian ad litem's investigation and corresponding recommendations. *See In re T.L.H.*, 368 N.C. at 107, 772 S.E.2d at 455. Accordingly, the trial court abused its discretion by concluding termination was in the best interest of the Juveniles without hearing evidence from the Guardian ad Litem. *See id.* at 107, 772 S.E.2d at 455; N.C. Gen. Stat. § 7B-1110.

Rather than issuing a ruling under these circumstances, the trial court should have terminated the hearing, instructed the Guardian ad Litem to perform its duties, and set a later hearing date providing sufficient time for the Guardian ad Litem to investigate and develop best interest recommendations. *See In re R.A.H.*, 171 N.C. App. at 431–32, 614 S.E.2d at 385; *see also* N.C. Gen. Stat. § 7B-601(a).

V. Conclusion

In sum, the trial court abused its discretion by ruling on disposition absent evidence from the Guardian ad Litem. We hold that a guardian ad litem in a termination of parental rights proceeding must offer evidence to aid the trial court's best interests determination on disposition and to provide a basis for appellate review. A valid termination of parental rights requires adherence to the statutorily-mandated procedure so the trial court is equipped to rule on the best interest of the child. Without

disturbing the trial court's ruling on adjudication, we vacate the Order and remand for a new disposition hearing.

VACATED AND REMANDED FOR NEW DISPOSITION HEARING.

Judges TYSON and ARROWOOD concur.

PERCELL JONES, JR., PLAINTIFF
v.
CATHOLIC CHARITIES OF THE DIOCESE OF RALEIGH, INC., THE FOUNDATION OF THE ROMAN CATHOLIC DIOCESE OF RALEIGH, INC.; ROMAN CATHOLIC DIOCESE OF RALEIGH, INC.; AND ROMAN CATHOLIC CHURCH, DEFENDANTS

No. COA23-146

Filed 5 November 2024

Civil Procedure—Rule 41(b)—failure to prosecute—six-month delay in serving complaint—factors favoring dismissal

In a sexual abuse case filed under the SAFE Child Act against a Catholic organization and diocese (defendants), the trial court properly granted defendants' motion to dismiss the action for failure to prosecute under Civil Procedure Rule 41(b), where plaintiff failed to serve the complaint for over six months post-filing. Plaintiff's delay was unreasonable—if not deliberate—where, even though two alias and pluries summons were issued during those six months, he made no attempt to serve either the initial summons and complaint or the first alias and pluries summons despite knowing exactly how to locate defendants. Further, this delay prejudiced defendants' ability to investigate and preserve evidence on plaintiff's nearly sixty-year-old claims. Finally, the court did not abuse its discretion in determining that no lesser sanction than dismissal with prejudice would be appropriate under the circumstances.

Appeal by defendants from judgment entered 22 September 2022 by Judge R. Kent Harrell in Robeson County Superior Court. Heard in the Court of Appeals 9 October 2024.

Lanier Law Group, P.A., by Laurie J. Meilleur, and Robert O. Jenkins, for the plaintiff-appellant.

Poyner & Spruill, LLP, by Steven B. Epstein, for the defendant-appellee.

TYSON, Judge.

Percell Jones, Jr. ("Plaintiff") appeals from order entered 12 September 2022. We affirm.

I. Background

Plaintiff filed a complaint against Catholic Charities of the Diocese of Raleigh, Inc. ("Catholic Charities") and the Roman Catholic Diocese of Raleigh ("Raleigh Diocese") (collectively "Defendants"), on 28 December 2021, alleging he was sexually abused as a child by two priests from 1967 until 1969. Plaintiff's claims were filed pursuant to S.L. 2019-245, 2019 N.C. Sess. Laws 1231 ("SAFE Child Act"). The Robeson County Clerk of Court issued a summons the same day the complaint was filed. Plaintiff did not attempt to serve Defendants. Plaintiff's suit also named the Foundation of the Roman Catholic Diocese of Raleigh, Inc. and the Roman Catholic Church as defendants. Plaintiff voluntarily dismissed his claims against the Foundation of the Roman Catholic Diocese of Raleigh, Inc. and the Roman Catholic Church on 26 August 2022.

Plaintiff sought an alias and pluries summons, which was issued on 8 March 2022. Plaintiff did not serve this alias and pluries summons or the complaint on Defendants. Plaintiff sought a second alias and pluries summons, which issued on 2 June 2022. Plaintiff served the second alias and pluries summons on Raleigh Diocese on 27 June 2022 and on Catholic Charities on 28 June 2022.

Plaintiff's counsel had previously and successfully served Defendants with summonses and complaints for other actions under the SAFE Child Act. Defendants filed a motion to dismiss pursuant to Rules 12(b)(6) and 41 of the North Carolina Rules of Civil Procedure on 25 July 2022. *See* N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 41 (2023).

Following a hearing, the trial court allowed Defendants' motion to dismiss with prejudice and entered an order on 12 September 2022. Plaintiff appeals.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issue

Plaintiff argues the trial court erred in granting Defendants' motion to dismiss for failure to prosecute under N.C. Gen. Stat. § 1A-1, Rule 41(b). N.C. Gen. Stat. § 1A-1, Rule 41(b) (2023).

IV. Standard of Review

"The standard of review for a Rule 41(b) dismissal is (1) whether the findings of fact by the trial court are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and its judgment." *Cohen v. McLawhorn*, 208 N.C. App. 492, 498, 704 S.E.2d 519, 524 (2010) (citation and internal quotation marks omitted). "Unchallenged findings of fact are presumed to be supported by competent evidence, and are binding on appeal." *Id.* (citations and internal quotation marks omitted). If competent evidence supports the findings, they are binding upon appeal. *Starco, Inc. v. AMG Bonding and Ins. Servs., Inc.*, 124 N.C. App. 332, 335, 477 S.E.2d 211, 214 (1996) (citation omitted).

"[I]n reviewing the appropriateness of the particular sanction imposed, an abuse of discretion standard is proper because the rule's provision that the court shall impose sanctions for motions abuses concentrates the court's discretion on the *selection* of an appropriate sanction rather than on the *decision* to impose sanctions." *Egelhof v. Szulik*, 193 N.C. App. 612, 619, 668 S.E.2d 367, 372 (2008) (quoting *Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989)). The trial court's "conclusions of law are reviewable *de novo* on appeal." *Starco*, 124 N.C. App. at 336, 477 S.E.2d at 215 (citation omitted).

V. Failure to Prosecute

Plaintiff argues the trial court erred in granting Defendants' motion to dismiss for failure to prosecute pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b). Rule 41(b) provides, in relevant part, "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him." N.C. Gen. Stat. § 1A-1, Rule 41(b).

Prior to dismissing a claim for failure to prosecute, the trial court is to determine three factors: "(1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter; (2) the amount of prejudice, if any, to the defendant; and[,] (3) the reason, if one exists, that sanctions short of dismissal would not suffice." *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001).

Plaintiff asserts no evidence tends to show he intended to thwart or delay service or prosecuting the matter, there was no unreasonable delay, Defendants would not be prejudiced, and the trial court did not consider other lesser sanctions.

A. Deliberate Delay

Plaintiff argues he did not deliberately delay the matter by failing to serve the complaint to Defendants for over six months after issuance of the complaint and issuance of three separate summons. N.C. Gen. Stat. § 1A-1, Rule 4(a) mandates: "The complaint and summons shall be delivered to some proper person for service." N.C. Gen. Stat. § 1A-1, Rule 4(a) (2023).

Plaintiff extended the time allowed for service twice by serving alias and pluries summonses until they served Defendants. Our Supreme Court has recognized alias and pluries summons are an appropriate tool for extending the time for service, yet also determined delays of service for less than a year have been deliberate and unreasonable. *See Smith v. Quinn*, 324 N.C. 316, 319, 378 S.E.2d 28, 30 (1989).

In *Smith*, our Supreme Court determined an eight-month delay by use of alias and pluries summons was a violation of the spirit of the rules of civil procedure for the purpose of delay or obtaining an unfair advantage. *Id.* The plaintiff filed a complaint for an alleged injury resulting from a fall on the defendant's property. *Id.* at 317, 378 S.E.2d at 29. She used alias and pluries summons to delay service for over eight months. *Id.*

Our Supreme Court reasoned the failure to serve the defendant for eight months prevented the defendant from critical knowledge of the alleged incident, which had occurred three years prior. *Id.* at 317, 378 S.E.2d at 30. The Court held dismissal "pursuant to Rule 41(b) based upon plaintiff's violation of Rule 4(a) for the purposes of delay and in order to gain an unfair advantage over the defendant" was appropriate. *Id.* at 319, 378 S.E.2d at 31.

This Court has also held a six-month unexplained delay in service also necessitates dismissal under Rule 41. *See Sellers v. High Point Mem. Hosp.*, 97 N.C. App. 299, 388 S.E.2d 197 (1990).

Plaintiff delayed service for over six months post-filing. The six-month delay prevented Defendants' knowledge of the pending suit on a nearly sixty-year-old claim. No attempt was made to serve the initial summons or complaint or the first alias and pluries summons.

Plaintiff did not have any issue locating Defendants. Plaintiff's counsel had served Defendants in four other actions under the SAFE Child Act, including one filed in the same county 32 minutes prior to this action. Sufficient evidence of intent to delay existed for the trial court to dismiss. Plaintiff's argument is overruled.

B. Unreasonable Delay

Plaintiff argues no unreasonable delay occurred, because the case would have been stayed while the constitutionality of the SAFE Child Act was decided. Other than a citation to *Wilder*, Plaintiff has not provided authority to support his argument, asserting no unreasonable delay occurred, because other pending SAFE Child Act cases were stayed pending constitutional challenge. Defendants assert they were not aware of this claim while preparing to defend against other pending cases brought under the SAFE Child Act. Plaintiff's argument is dismissed.

C. Prejudice to Defendants

Plaintiff argues the trial court erred in finding Defendants would be prejudiced by having to participate in the suit. Plaintiff contends prejudice cannot be presumed based on a lack of immediate notice of this claim.

While this assertion may be true, the trial court specifically found the delay had prejudiced Defendants. Plaintiff's delays increased Defendants' time to investigate the claims and preserve evidence on the nearly sixty-year-old time-barred, but statutorily revived claims. Plaintiff's delays increased Defendants' costs and ability to preserve and present their defenses to Plaintiff's revived claims. The trial court could properly conclude Plaintiff's unexplained delays in service prejudiced Defendants. *Sellers*, 97 N.C. App. at 302, 388 S.E.2d at 198.

D. Dismissal as the Appropriate Sanction

Plaintiff argues the trial court's conclusion of law, stating no other sanction short of dismissal with prejudice will suffice, is erroneous. Plaintiff does not offer any showing or support tending to show a lesser sanction would be appropriate under these circumstances.

"The trial court in its discretion found that no lesser sanction would better serve the interests of justice in this case. We find no basis for concluding that the trial court abused its discretion." *Id.* at 303, 388 S.E.2d at 199 (citation omitted). The trial court's discretionary choice of sanction was properly authorized and is not shown to be an abuse of discretion. *Id.*

VI. Conclusion

The trial court properly found Plaintiff's unexplained delays in service of the complaint was unreasonable, if not also deliberate. The trial court's conclusions are supported by findings based upon competent evidence.

The trial court correctly concluded Plaintiff had deliberately and unreasonably delayed service of process, and the unexplained delay had prejudiced Defendants. The trial court did not err nor abuse its discretion in concluding dismissal was the most appropriate sanction and granting Defendants' motion to dismiss for failure to prosecute under Rule 41(b). N.C. Gen. Stat. § 1A-1, Rule 41(b). The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges GORE and FLOOD concur.

SHANA MARIE SIMPSON, PLAINTIFF
v.
TRAVIS RAY SILVER, DEFENDANT

No. COA23-1094

Filed 5 November 2024

1. Appeal and Error—preservation of issues—domestic violence proceeding—victim's testimony—no objection lodged

In a domestic violence protective order proceeding, defendant failed to preserve for appeal his argument that the plaintiff's testimony, in which she described having had panic attacks and an eating disorder, could not be the basis for the trial court's conclusion that defendant's actions had caused those conditions, where defendant did not object to plaintiff's testimony during trial.

2. Domestic Violence—protective order—threats—substantial emotional distress

The trial court did not err in issuing a domestic violence protective order against defendant upon findings of fact, which were supported by competent evidence, that defendant threatened to kill plaintiff numerous times and directed other abusive messages toward plaintiff; that plaintiff subsequently suffered anxiety, panic attacks, and an eating disorder, and; that defendant placed plaintiff in fear of continued harassment to a level which amounted to substantial emotional distress.

3. Appeal and Error—domestic violence protective order hearing—exclusion of messages from victim's son—no offer of proof

In a domestic violence protective order proceeding, defendant failed to preserve for appeal his argument that the trial court erred by excluding evidence of messages sent to defendant by plaintiff's son, where defendant failed to make an offer of proof.

Appeal by Defendant from order entered 29 June 2023 by Judge Jim Black in Wake County District Court. Heard in the Court of Appeals 17 April 2024.

Legal Aid of North Carolina, Inc., by Corey Frost, Spencer E. Schold, TeAndra H. Miller, James Battle Morgan, Jr., and Celia Pistolis, for plaintiff-appellee.

John M. Kirby for defendant-appellant.

MURPHY, Judge.

Defendant's arguments as to the admission and exclusion of evidence at trial are unpreserved and therefore dismissed. The trial court properly found, based on competent evidence, and concluded, based on its findings, that Defendant committed an act of domestic violence against Plaintiff. The trial court did not err in entering a domestic violence order of protection.

BACKGROUND

On 21 June 2023, Plaintiff filed a *Complaint and Motion for Domestic Violence Protective Order* against Defendant. Later on that date, the trial court entered an *Ex Parte Domestic Violence Order of Protection*, effective through 29 June 2023.

On 29 June 2023, the trial court conducted a hearing on Plaintiff's complaint and entered a *Domestic Violence Order of Protection*, effective through 29 June 2024, upon concluding that "[D]efendant committed an act of domestic violence against [Plaintiff]." Defendant appealed.

ANALYSIS

[1] On appeal, Defendant argues that the trial court "erroneously found that the Defendant's conduct caused the Plaintiff to suffer an eating disorder and panic attacks[]" because "[t]he record . . . contains no evidence whatsoever that the Defendant's conduct caused either of these conditions." Defendant first argues that "[n]umerous cases recognize that one cannot conclude that a given condition caused a result simply because the result occurred after (or contemporaneous with) the condition."

Defendant further argues that Plaintiff "did not in fact render" an opinion "that the Defendant's actions caused her panic attacks or eating disorder"; and, even if she had, "[s]he would not have been qualified to render such an opinion[]" because she is not a medical expert. These arguments constitute a belated attack on Plaintiff's testimony as to her panic attacks and eating disorder, where Defendant failed to object to this testimony during trial and failed to preserve this issue for appeal. *See* N.C. R. App. P. 10(a)(1) (2023). We dismiss Defendant's unpreserved argument as to whether Plaintiff was qualified to testify about her panic attacks and eating disorder.

[2] Defendant erroneously contends that "[t]he issues raised in this appeal are reviewed de novo." This Court has held that our standard of review

> [w]hen the trial court sits without a jury regarding a DVPO[] . . . is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.

Kennedy v. Morgan, 221 N.C. App. 219, 220-21 (2012) (quoting *Hensey v. Hennessy*, 201 N.C. App. 56, 59 (2009)). That is, we review the trial court's finding that "[due] to [Defendant's] threats as well as abusive messages[,] Plaintiff has suffered panic attacks and developed an eating disorder[]" only to determine whether it is supported by competent evidence. "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Real Time Resolutions, Inc. v. Cole*, 293 N.C. App. 632, 635, 902 S.E.2d 269, 272 (2024) (quoting *In re Adams*, 204 N.C. App. 318, 321 (2010)).

At trial, Plaintiff testified without objection that, during the relationship, Defendant threatened that he would kill her if she left him "[m]ore than a dozen times." Plaintiff testified that she was "[t]errified" of Defendant after he told her that he purchased a new black van "in case [he] wanted to stalk [her][.]" Afterwards, Plaintiff was "really scared[.]" Plaintiff testified that, after she first ended the relationship with Defendant and asked that he give her "time and space[,]" "he just refused to give it to" her and "would message [her] again and be really obsessive." Plaintiff then testified that she "was having panic attacks" and "developed an eating disorder over the duration of the relationship[.]" Plaintiff further testified that, during the relationship, she

developed "intense anxiety" and, at the time of the hearing, was "constantly looking around everywhere, afraid that [Defendant] is just going to be there[.]" After Plaintiff ceased contact with Defendant by blocking his ability to contact her, Defendant "kept creating phone numbers and messaging [Plaintiff][.]"

During trial, Plaintiff answered affirmatively that she was "facing a little bit away" from Defendant because she was "afraid to look at him[]" and "[didn't] want to see him in [her] peripheral[]" because "[h]e scares [her]." Plaintiff presented evidence of the messages sent by Defendant through various telephone numbers and social media accounts, and Defendant did not object. Plaintiff then testified that she felt

> [s]tressed out, overwhelmed, scared. I haven't been able to eat or sleep. I'm struggling to keep my job because I have to take so much time off because I can't even function. I've developed hypertension. I've been passing out because my blood pressure is so high.

Plaintiff's testimony constitutes "evidence that a reasonable mind might accept as adequate to support the finding[s][,]" *Real Time Resolutions, Inc.*, 293 N.C. App. at 635, 902 S.E.2d at 272, made by the trial court that, "[due] to [Defendant's] threats as well as abusive messages[,] Plaintiff has suffered panic attacks and developed an eating disorder[,]" and that Defendant placed Plaintiff "in fear of continued harassment that rises to such a level as to inflict substantial emotional distress[.]" The trial court's findings, in turn, support its conclusion that "[D]efendant committed an act of domestic violence against [Plaintiff]."

[3] Defendant also argues that the trial court erred in excluding evidence of messages he received from Plaintiff's son. Defendant failed to make an offer of proof as to this proferred evidence at trial, and we dismiss this unpreserved argument. *See State v. Ramirez*, 293 N.C. App. 757, 760-61, 901 S.E.2d 256, 259 (2024) (cleaned up) ("It is well settled that in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record.").

CONCLUSION

Defendant failed to preserve his objections to the trial court's admission of Plaintiff's testimony as to her panic attacks and eating disorder and to make an offer of proof after the trial court's exclusion of evidence of messages sent to Defendant by Plaintiff's son. Plaintiff's

testimony constituted competent evidence upon which the trial court could base its finding that Plaintiff suffered substantial emotional distress from Defendant's continued harassment, and the trial court properly concluded that Defendant committed an act of domestic violence against Plaintiff.

DISMISSED IN PART; AFFIRMED.

Judges ARROWOOD and THOMPSON concur.

STATE OF NORTH CAROLINA
v.
NOLAN KIEL GRAVES

No. COA24-308

Filed 5 November 2024

1. Evidence—hearsay—business records exception—authentication—signed under penalty of perjury rather than notarization

In a first-degree murder prosecution, the trial court did not err in admitting Facebook messages suggesting a motive for the killing pursuant to the business records exception to the general bar on hearsay evidence where the State offered a "Certificate of Authenticity of Domestic Records of Regularly Conducted Activity" signed under penalty of perjury, in lieu of an affidavit, to authenticate the messages for purposes of Evidence Rule 803(6), because a document signed under penalty of perjury conveys the same level of importance regarding the truth as one signed before a notary.

2. Evidence—hearsay—business records exception—Confrontation Clause—inapplicable

In a first-degree murder prosecution, defendant's constitutional right to confront witnesses against him was not implicated by the admission of Facebook messages suggesting a motive for the killing pursuant to the business records exception to the general bar on hearsay evidence where the State offered a "Certificate of Authenticity of Domestic Records of Regularly Conducted Activity" signed under penalty of perjury, in lieu of an affidavit, to authenticate the messages for purposes of Evidence Rule 803(6), because the Confrontation Clause does not apply to nontestimonial statements, such as business records.

Appeal by defendant from judgment entered 21 July 2023 by Judge Eric C. Morgan in Cabarrus County Superior Court. Heard in the Court of Appeals 9 October 2024.

Attorney General Joshua H. Stein, by Special Deputy Attorney General, Robert C. Montgomery, for the State.

Law Office of Christopher J. Heaney, by Christopher J. Heaney, for the defendant-appellant.

TYSON, Judge.

Nolan K. Graves ("Defendant") appeals from judgment entered upon a jury's verdict and conviction of first-degree murder. We discern no error.

I. Background

On 24 March 2021, law enforcement officers were looking for Lena Morgan ("Lena") and went to a hotel located in Kannapolis, North Carolina. The officers were seeking to serve a pending warrant on Lena's sister, Mackenzie Morgan ("Mackenzie"). While there, officers observed an SUV pull into the hotel parking lot. The driver of the SUV was drinking something from a brown paper bag. The driver was later identified as Defendant.

The officers approached the SUV, smelled marijuana, and asked the occupants inside of the SUV to exit. Defendant and a passenger, later identified as Frederick Baldwin ("Baldwin"), exited the vehicle. The Officers observed a firearm present inside the SUV. Defendant and Baldwin were arrested and handcuffed. Lena was not present when Defendant was arrested.

During the encounter, Mackenzie came out of the hotel room. Officers did not initially arrest Mackenzie because they mistakenly believed they were executing the arrest warrant for Lena instead of Mackenzie. After the officers realized the warrant was for Mackenzie, and not Lena, they arrested Mackenzie.

While watching Defendant for at least two hours, an officer heard him say once that Mackenzie, but not Lena, had set him up for arrest. The officer did not hear him say anything about Lena. The officer assured Defendant he had not been set up, but he had been in the wrong place at the wrong time. Defendant left jail on 9 April 2021, wearing a bondsman-required ankle monitor.

On 11 April 2021, someone with the username "Jpc Cartel" sent a Facebook social media message stating: "Got popped. Stay away from Mackenzie Morgan and [L]ena [M]organ." On 13 April 2021, the same user sent the message: "Lena [M]organ got me busted." The record does not identify the messages' recipients.

Lena was charging her phone outside a convenience store on 18 April 2021. Surveillance cameras captured someone ride by the store driving a red vehicle, shooting at and murdering Lena. The convenience store clerk believed Defendant was the shooter based upon the video footage and having seen Defendant come inside the convenience store several times a week in the year before the shooting.

After the shooting, a law enforcement officer reached Defendant's bondsman, who had access to Defendant's ankle monitor data. Later that afternoon, an officer arrested Defendant. Defendant possessed a key inside his pocket to a red Toyota Camry parked nearby.

At trial, the State introduced the Facebook messages regarding Lena and Mackenzie. The State offered a "Certificate of Authenticity of Domestic Records of Regularly Conducted Activity" from Facebook, instead of using an affidavit signed before a notary or a testifying witness, to authenticate the messages. An individual named "Adeline Ballard," signed the statement as Facebook's "Custodian of Records."

The certificate included a declaration "under penalty of perjury that the foregoing certification is true and correct to the best of [the signatory's] knowledge." Defense counsel objected to the Facebook messages on constitutional and evidentiary grounds and argued the documents were not properly authenticated and inadmissible hearsay. The trial court overruled Defendant's objections.

Testimony during the trial tended to show Defendant had another person rent a red car for him on 16 April 2021. Defendant was given the keys. The convenience store clerk also identified Defendant as the driver of the red vehicle, which drove by the convenience store. The clerk testified Defendant typically had a handgun when he came into the store. The State also offered evidence tending to show data from the ankle monitor Defendant was wearing placed Defendant at a street intersection adjacent to the convenience store at 12:52 p.m. on 18 April 2021, the approximate place and time when Lena was shot and murdered.

The jury found Defendant to be guilty of first-degree murder. The trial court sentenced him to life imprisonment without possibility of parole. Defendant orally tendered notice of appeal.

II. Hearsay

[1] Defendant argues trial court erred in admitting hearsay evidence of the Facebook messages under the business records exception without allowing Defendant to confront the person who had authenticated the evidence.

A. Standard of Review

Our caselaw is mixed regarding the proper standard of review to apply to the admission of evidence over a party's hearsay objections, particularly when the hearsay objection relates to the authenticity of the proffered evidence:

> Generally, we review trial court decisions to admit or exclude evidence for abuse of discretion. *Brown v. City of Winston-Salem*, 176 N.C. App. 497, 505, 626 S.E.2d 747, 753 (2006). But we review *de novo* a trial court's admission of evidence over a party's hearsay objection. *State v. Hicks*, 243 N.C. App. 628, 638, 777 S.E.2d 341, 348 (2015).
>
> However, there is an apparent conflict in our caselaw as to our standard of review when the hearsay objection is rooted in the authentication of the proffered evidence. Under one line of cases, we have reviewed authentication of documentary evidence under the same *de novo* standard as the trial court's admission of such evidence. *See State v. Crawley*, 217 N.C. App. 509, 515, 719 S.E.2d 632, 637 (2011) ("A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law.") (citing *State v. Owen*, 130 N.C. App. 505, 510, 503 S.E.2d 426, 430 (1998)); *State v. Watlington*, 234 N.C. App. 580, 590, 759 S.E.2d 116, 124 (2014) (citing *Crawley*). In other cases, we have reviewed similar rulings for abuse of discretion. *See In re Foreclosure by Goddard & Peterson, PLLC*, 248 N.C. App. 190, 198, 789 S.E.2d 835, 842 (2016); *State v. Mobley*, 206 N.C. App. 285, 696 S.E.2d 862 (2010) (reviewing for abuse of discretion trial court's admission of jailhouse phone call over authentication objection).

State v. Hollis, 295 N.C. App. 224, 226-27, 905 S.E.2d 265, 267-68 (2024).

As this Court noted in *Hollis*, "[a] trial court abuses its discretion when it acts under a misapprehension of law." *Id.* at 227, 905 S.E.2d at 268 (citing *Cash v. Cash*, 284 N.C. App. 1, 7, 874 S.E.2d 653, 658 (2022)).

Here, as in *Hollis*, the issue before us focuses upon whether the evidence was properly authenticated as a matter of law, and "our analysis is the same whether reviewing under a *de novo* standard or for abuse of discretion." *Id.*

"Preserved legal error is reviewed under the harmless error standard of review." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citations omitted). For rights not arising under the Constitution of the United States, "harmless error review requires the defendant to bear the burden of showing prejudice." *Id.* at 513, 723 S.E.2d at 331 (citing N.C. Gen. Stat. § 15A-1443(a)). A defendant is prejudiced under the harmless error standard of review "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached[.]" N.C. Gen. Stat. § 15A-1443(a) (2023).

If a defendant argues and shows a right arising under the Constitution of the United States has been violated, the violation "is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b) (2023). The State bears the burden of proving the error was harmless beyond a reasonable doubt. *Id.*

B. Analysis

Defendant argues the Facebook social media messages were not properly authenticated based upon an affidavit or other testimony to satisfy the business records exception and to be admitted into evidence. Defendant asserts without an affidavit sworn before a notary, the messages are insufficiently credible and should not have been admitted. Further, Defendant argues that he should have been able to cross-examine the custodian of the Facebook records under the Confrontation Clause, and these errors exceeded the level of being harmless. U.S. Const. amend. VI.

The State argues the certificate is valid and acceptable, despite not being sworn to in the presence of a notary. In the alternative, the State argues any error in the admission of the business record evidence was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b).

1. Business Records Exception to Hearsay

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2023). Generally, hearsay statements are inadmissible unless they fall within an enumerated exception in the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2023). One exception to the hearsay

rule is the business records exception, under which certain records of regularly-conducted activity are admissible whether or not the declarant is available as a witness. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2023).

A "memorandum, report, record, or data compilation" is only admissible under the business record exception to hearsay if "(i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation[.]" *Id.* The records must be "authenticated by a witness who is familiar with them and the system under which they are made." *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985) (citations omitted).

"There is no requirement that the records be authenticated by the person who made them." *Id.* (citations omitted). The witness also does not need to be present at trial. *In re S.D.J.*, 192 N.C. App. 478, 482-83, 665 S.E.2d 818, 821-22 (2008). The requirements of Rule 803(6) may be satisfied "by the testimony of the custodian or other qualified witness, or by affidavit or by document under seal under Rule 902 of the Rules of Evidence[.]" N.C. Gen. Stat. § 8C-1, Rule 803(6).

Instead of a witness, the evidence may be submitted by "[a]n affidavit from the custodian of the records . . . that states that the records are true and correct . . . by persons having knowledge of the information set forth, during the regular course of business at or near the time of the acts, events or conditions recorded[.]" *In re S.W.*, 175 N.C. App. 719, 725, 625 S.E.2d 594, 598 (2006); N.C. Gen. Stat. § 8C-1, Rule 803(6).

2. Records without Notary Attestation

The State laid the foundation for the Facebook messages by presenting a "Certificate of Authenticity of Domestic Records of Regularly Conducted Activity," signed by Adaline Ballard, who is identified as a custodian of records at Facebook. A specific identifier number (100012076592150) indicates these messages are regularly kept in the course of Facebook's business and were stored at the time they occurred.

The Certificate of Authentication also indicates it was made under the penalty of perjury, but the document was not notarized or otherwise contained any indication it was sworn before a public official. Defendant argues a certificate of authentication, acting as an affidavit in this case, verifying the authenticity of business records, must be signed in the presence of a notary or public official for the records to be admissible. Defendant argues the evidence was inadmissible because the Certificate of Authentication was not notarized.

An affidavit traditionally requires it be sworn to before a notary public and subscribed. *Gyger v. Clement*, 375 N.C. 80, 83, 846 S.E.2d 496, 499 (2020) ("Our case law, however, generally expects affidavits to be notarized if they are to be admissible." (citing *Alford v. McCormac*, 90 N.C. 151, 152-53 (1884))).

Recent legislative changes have led our courts to recognize circumstances in which affidavits are valid without having been witnessed before a notary. *Hollis*, 295 N.C. App. at 232, 905 S.E.2d at 270-71. "Not only does Rule 803(6) contain no such explicit [affidavit] requirement, but the legislature has subsequently modified the statute to explicitly allow authentication via statements made under penalty of perjury, in accord with 28 U.S.C. § 1746. S.L. 2023-151; N.C. Gen. Stat. 8C-1, Rule 803(6) (2024)." *Id.*

The revised statute recognizes an oath before a notary and an explicit acknowledgment of the penalty of perjury carry the same level of legal weight. *Id.* at 226 n.1, 905 S.E.2d at 268 n.1. Our General Assembly has explicitly required certain affidavits be made under oath before an official, and it has done so when necessary. *Gyger*, 375 N.C. at 85, 846 S.E.2d at 500 (2020) (citing N.C. Gen. Stat. § 52C-3-311 (2019)).

That an affidavit is valid and authenticated when it is submitted under penalty of perjury was confirmed in *State v. Hollis*, in which this Court found records from a bank were properly authenticated under the business records exception because they were "made under penalty of perjury and . . . in the course of a regularly conducted business activity, made at or near the time of the activity by a person with knowledge of it, and that it was the regular practice of the business to make such a record[.]" *Hollis*, 295 N.C. App. at 232, 905 S.E.2d at 271.

Authentication serves to demonstrate "the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2023). Likewise, documents made and confirmed under penalty of perjury convey the same level of importance regarding the truth as those signed before a notary. *Gyger*, 375 N.C. at 85, 846 S.E.2d at 500 ("When a statement is given under penalty of perjury, it alerts the witness of the duty to tell the truth and the possible punishment that could result if she does not.").

The record of the Facebook messages were certified under penalty of perjury and the attestor communicated the records were made in the course of a regularly conducted business activity, made at or near the time of the activity by a person with knowledge of it, and that it was the regular practice of Facebook's business to make such a record. The certificate under penalty of perjury fulfills the purpose of authentication. *Id.*

3. Confrontation Clause

[2] Defendant argues he had a right to confront the custodian of the Facebook messages before they were admitted into evidence.

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Supreme Court of the United States in *Crawford v. Washington* established "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004).

"The Confrontation Clause does not, however, apply to nontestimonial statements." *State v. McKiver*, 369 N.C. 652, 655, 799 S.E.2d 851, 854 (2017) (citing *Whorton v. Bockting*, 549 U.S. 406, 420, 167 L. Ed. 2d 1, 13 (2007)). Business records, in general, are nontestimonial in nature. *See Crawford*, 541 U.S. at 56, 158 L. Ed. 2d at 195-96 ("Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of a conspiracy."); *State v. Melton*, 175 N.C. App. 733, 737, 625 S.E.2d 609, 612 (2006).

"[B]usiness records are neutral, are created to serve a number of purposes important to the creating organization, and are not inherently subject to manipulation or abuse." *State v. Forte*, 360 N.C. 427, 435, 629 S.E.2d 137, 143 (2006).

Our Court has held the admission of a 911 event report was nontestimonial, because the report was not made for prosecutorial purposes but rather to document actions taken in an ongoing emergency as part of a regular business operation. *State v. Hewson*, 182 N.C. App. 196, 205-07, 642 S.E.2d 459, 466-67 (2007).

Likewise, the Supreme Court of the United States clarified, while certificates of analysis prepared for trial are testimonial, routine business records authenticated by custodians do not fall into this category and are admissible without triggering a defendant's right to confrontation. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322-23, 174 L. Ed. 2d 314, 329 (2009). Justice Scalia, writing for the majority, expressly differentiated between an activity and affidavit created to provide evidence against a defendant and an affidavit created to authenticate an admissible record: "A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not do what the analysts did

here: create a record for the sole purpose of providing evidence against a defendant." *Id.*

Here, the trial court provided the following explanation when deciding to admit the Facebook messages pursuant to the business record exception:

> In this matter then coming on before the Court upon objection, the Court is going to overrule the objection. The Court notes, finds, and concludes that the certificate of authenticity of domestic records of regularly conducted activity is signed in Paragraph 4 in the declaration under penalty of perjury that the foregoing certification is true and correct that is signed by the custodian of records, lays out that the individual signing is the duly authorized custodian of records for Facebook and is qualified to certify Facebook's domestic records of regularly conducted activity. The Court in the exercise of discretion based on the other matters set out in the certificate of authority overrules the objection. The Court is going to grant the defendant's request to redact all but the posts that were referenced. The Court having heard this matter and with relation to the discovery issues is going to grant the defendant's request to redact all other posts except the post on pages 134 and 279 that the State had indicated they were going to place in evidence in the exercise of its discretion.

The trial court's decision comports with the general rule that business records are nontestimonial in nature. *Crawford*, 541 U.S. at 56, 158 L. Ed. 2d at 195-96; *Melton*, 175 N.C. App. at 737, 625 S.E.2d at 612. "[B]usiness records are neutral" because they "are created to serve a number of purposes important to the creating organization, and are not inherently subject to manipulation or abuse." *Forte*, 360 N.C. at 435, 629 S.E.2d at 143.

As explained in *Melendez-Diaz v. Massachusetts*, an affidavit created to authenticate "an otherwise admissible record" is different from an analyst creating "a record for the sole purpose of providing evidence against a defendant." *Melendez-Diaz*, 557 U.S. at 322-23, 174 L. Ed. 2d at 329. Further, "[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or

proving some fact at trial—they are not testimonial." *Id.* at 324, 174 L. Ed. 2d at 329.

The Certificate of Authenticity provided by Adeline Ballard, Facebook's Custodian of Records, stated "[t]he records provided are an exact copy of the records that were made and kept by the automated systems of Facebook in the course of regularly conducted activity as a regular practice of Facebook." The Facebook social media messages are nontestimonial because they were "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial." *Id.* at 324, 174 L. Ed. 2d at 329.

The Confrontation Clause does not apply. *Id.*; *McKiver*, 369 N.C. at 655, 799 S.E.2d at 854. Defendant's constitutional right of confrontation was not violated by the admission of the messages. *Melendez-Diaz*, 557 U.S. at 322-23, 174 L. Ed. 2d at 329; *Melton*, 175 N.C. App. at 737, 625 S.E.2d at 612; *McKiver*, 369 N.C. at 655, 799 S.E.2d at 854; *Forte*, 360 N.C. at 435, 629 S.E.2d at 143; *Hewson*, 182 N.C. App. at 205-07, 642 S.E.2d at 466-67. *See also Crawford*, 541 U.S. at 56, 158 L. Ed. 2d at 195-96. This argument is without merit.

III. Conclusion

The trial court properly admitted and the jury properly considered the Facebook messages business records in reaching its verdict. N.C. Gen. Stat. § 8C-1, Rule 803(6). Defendant was not denied his constitutional right to confrontation. *Melendez-Diaz*, 557 U.S. at 322-23, 174 L. Ed. 2d at 329; *Melton*, 175 N.C. App. at 737, 625 S.E.2d at 612; *McKiver*, 369 N.C. at 655, 799 S.E.2d at 854; *Forte*, 360 N.C. at 435, 629 S.E.2d at 143; *Hewson*, 182 N.C. App. at 205-07, 642 S.E.2d at 466-67.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. We find no error in the jury's verdict or in the judgment entered thereon. *It is so ordered.*

NO ERROR.

Judges GORE and FLOOD concur.

STATE OF NORTH CAROLINA
v.
DERRICK LAVONTA LITTLE

No. COA23-1067

Filed 5 November 2024

1. Firearms and Other Weapons—possession by a felon—constructive possession—other incriminating circumstances—sufficiency of the evidence

The trial court properly denied defendant's motion to dismiss a charge of possession of a firearm by a felon, where the State presented sufficient evidence that defendant had constructive possession of a gun found under a couch in his apartment while a Child Protection Services (CPS) worker was conducting a child abuse investigation. Although defendant neither had exclusive possession of the place where the gun was found nor was present during its discovery, evidence of other incriminating circumstances supported a finding of constructive possession, including evidence that: when the CPS worker informed defendant's niece that police were on their way to secure the gun, the niece immediately called defendant, who then immediately returned home; when police asked defendant where he got the gun, he responded "I found it," which was interpreted as an acknowledgment of possession; the gun was not registered; and no one else claimed any knowledge of the gun.

2. Indictment and Information—misdemeanor child abuse—jury instructions—theory not charged in the indictment

After his arrest for using a pair of needle-nose pliers to inflict pain on his teenaged son, defendant was entitled to a new trial on the charge of misdemeanor child abuse where the trial court's jury instructions improperly allowed for a conviction based on a theory not mentioned in the indictment. Specifically, the trial court instructed the jury that it could find defendant guilty under either of two theories: (1) that defendant "inflicted physical injury" upon his son, or (2) that defendant created a "substantial risk" of physical injury to his son. Although the evidence may have supported the second theory, the indictment mentioned only the first; thus, the trial court's instructions amounted to prejudicial error.

Judge CARPENTER concurring by separate opinion.

Appeal by Defendant from judgments entered 21 April 2023 by Judge Lori I. Hamilton in Davidson County Superior Court. Heard in the Court of Appeals 13 August 2024.

Attorney General Joshua H. Stein, by Assistant Attorney General Kellie E. Army, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for the Defendant.

WOOD, Judge.

Derrick Lavonta Little ("Defendant") appeals from judgments entered following a jury verdict of guilty for possession of a firearm by felon and misdemeanor child abuse and his guilty plea to having obtained habitual felon status. On appeal, Defendant challenges the sufficiency of the evidence for a conviction of possession of a firearm by felon, the use of jury instructions on a theory that was not charged in the indictment, and that the jury instructions created a fatally ambiguous verdict. After careful review, we find no error in Defendant's conviction of possession of a firearm by felon; however, we remand this matter for a new trial on the charge of misdemeanor child abuse.

I. Factual and Procedural Background

In August 2022, Defendant, Jennifer Crook and their fifteen-year-old son, Trey[1], were living in an apartment on Burgin Street in Lexington with Defendant's niece, Keyasha Kirkland, the "main renter" of the apartment, her boyfriend and their five children.

Trey often visited his girlfriend and her family. He had previously stayed with them for a few weeks when he ran away from home. On 10 August 2022, Trey was invited to accompany his girlfriend's family to the trampoline park for the younger son's birthday. He attended with his parents' permission and at the end of the event Trey's parents came to his girlfriend's home to pick him up.

When Defendant and Ms. Crook arrived at the home, Trey, his girlfriend, and the girlfriend's father, Mr. Eggleston, went out to meet them. Initially the greeting was friendly but then Defendant noticed that Trey was wearing his shirt. Defendant walked back to his car and returned

1. Pseudonyms have been used to protect the juvenile's identity.

with a pair of needle-nose pliers. Upon returning to the group, Defendant used the pliers to grab and twist the top of Trey's chest for approximately a minute. Trey began to cry and said it hurt. Defendant quietly responded, "It can't hurt because I can't feel it." Mr. Eggleston reported that he was too shocked to intervene immediately before Defendant and his family got in their car and left.

The following day, two police officers knocked on Mr. Eggleston's door looking for Trey who had been reported missing by Defendant. Mr. Eggleston told the police that Trey had not been there that morning, but then he reported to the officers the incident from the night before. He also provided a written statement about his recollections.

Officers Dean and Lang were eventually able to locate Trey in Washington Park sleeping on a picnic table. The officers reported that it looked like Trey had not slept all night and had a "pretty tough time." Trey showed the officers his chest and back. Officer Lang recalled that it looked like he had been in some type of altercation with marks in several different locations that looked recent, but he could not recall if there were marks consistent with pliers being used on his chest.

The officers took Trey to the Lexington Police Department and contacted the Department of Social Services ("DSS"). The officers charged Defendant and Ms. Crook with child abuse. The officers then called Defendant and Ms. Crook, and they came to the police department where they were arrested. Defendant made a statement:

> I, Derrick Little, want to make the following statement. Because of [Trey's] size, he thinks he can buck up and push people around. I grabbed my multi-tool pair of pliers and grabbed [Trey's] shirt as a joke. I did not touch any skin and I did not make any contact with [Trey]. [Trey] did not yelp or scream when I grabbed his T-shirt so I know I did not touch any skin. We passed [Trey] this morning as we were taking my niece to work. We did not turn around or stop because my niece was going to be late for work. When we came back through where he was walking, we did not see him and we called the police. [Trey] is always calling me weak and small and tells me to fight him like a man. I've never laid my hand on [Trey].

Following Defendant's arrest for child abuse, Child Protective Services ("CPS") conducted a visit to the home. According to the CPS worker Ms. Kirkland, Defendant's niece and the "main renter" lived on the second floor with her boyfriend and five children while Defendant,

Ms. Crook, and Trey lived on the first floor. The CPS worker interviewed two of Ms. Kirkland's children downstairs in the large open living room. During the interview Ms. Kirkland's six-year-old daughter Kayley[2] pulled a silver gun out from under the couch and pointed it at her brother laughing. The CPS worker sternly told her to put the gun away, which she did for a short time before pulling it back out. The CPS worker told her again to put it back, then called the police to come and secure the weapon. The CPS worker informed Ms. Kirkland that the police were on the way to secure the gun. The CPS worker then heard Ms. Kirkland call Defendant on speaker phone and say, "a gun was just found" and police were coming to check if it was real. Defendant responded "okay."

The police officers removed a .32-caliber Smith and Wesson revolver from under the couch, verified that it was real but unloaded, and placed it in an evidence bag in their vehicle. Shortly after the officers arrived, Defendant arrived at the home as well. An officer approached Defendant and asked, "Where did you get the firearm?" Defendant responded, "I found it." No other occupant of the home claimed ownership of the gun. The officers confirmed that Defendant was a convicted felon and placed him under arrest for being a felon in possession of a firearm. The gun was not tested for fingerprints or DNA because, according to the officers, it was not "standard practice;" however it was determined that the gun was not stolen nor was it registered to anyone.

Defendant's matter came on for trial in Davidson County Superior Court on 17 April 2023 for one count of possession of a firearm by felon and two counts of misdemeanor child abuse. The first count of misdemeanor child abuse was for inflicting physical injury on Trey. The second count was for creating and allowing a substantial risk of physical injury to Kaley by leaving a gun unsecured and under a sofa where children had access. At trial, in addition to the testimony recounted above, the State also introduced evidence of Defendant's 2011 guilty plea to felony possession with intent to sell and deliver cocaine in Davidson County.

On 20 April 2023, the jury found Defendant guilty of possession of firearm by felon and misdemeanor child abuse of Trey, and not guilty of misdemeanor child abuse of Kayley. Defendant pleaded guilty to having attained habitual felon status and was sentenced to two consecutive sentences of 67-93 months of imprisonment in the Department of Adult Correction and 150 days in the custody of the Misdemeanor Confinement Program. Defendant gave oral notice of appeal at sentencing on 20 April 2022.

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2. Pseudonyms have been used to protect the juvenile's identity.

II. Analysis

Defendant raises three issues on appeal: (1) whether the evidence is sufficient to support a conviction of possession of a firearm by felon; (2) whether the jury instructions for misdemeanor child abuse permitted the jury to convict Defendant on a theory not supported by the indictment; and (3) whether there was jury unanimity for the conviction on misdemeanor child abuse.

A. Sufficiency of the Evidence

[1] Defendant first argues the trial court erred by denying his motion to dismiss, alleging that the State did not present sufficient evidence showing Defendant had actual or constructive possession of the firearm found under the couch. When considering a motion to dismiss for insufficient evidence, the trial court determines "whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (internal citation and quotations omitted).

> Whether evidence presented constitutes substantial evidence is a question of law for the court and is reviewed *de novo*. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. In reviewing the denial of a motion to dismiss for insufficiency of the evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences.

State v. Glisson, 251 N.C. App. 844, 847-48, 796 S.E.2d 124, 127-28 (2017) (internal citations and quotations omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Any contradictions or discrepancies in the evidence are for the jury to resolve and do not warrant dismissal." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citation omitted).

Defendant was charged pursuant to N.C. Gen. Stat. § 14-415.1(a), possession of a firearm by a convicted felon, which states, it is "unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm[.]" Therefore, to establish the crime of possession of a firearm by felon, the State must prove: "(1) defendant was previously convicted of a felony; and (2) thereafter possessed a firearm." *State v. Wood*, 185 N.C. App. 227, 235, 647 S.E.2d 679, 686 (2007).

Defendant's status as a felon is undisputed. Therefore, the issue here is whether Defendant had 'possession' of the firearm in question.

> Possession of a firearm may be actual or constructive. Actual possession requires that the defendant have physical or personal custody of the firearm. In contrast, the defendant has constructive possession of the firearm when the weapon is not in the defendant's physical custody, but the defendant is aware of its presence and has both the power and intent to control its disposition or use. When the defendant does not have exclusive possession of the location where the firearm is found, the State is required to show other incriminating circumstances in order to establish constructive possession. Constructive possession depends on the totality of the circumstances in each case.

State v. Taylor, 203 N.C. App. 448, 459, 691 S.E.2d 755, 764 (2010) (internal citations and quotations omitted). When reviewing the "totality of the circumstances," constructive possession cases often include evidence that the defendant had a specific or unique connection to the place where the items were found and evidence that the defendant behaved suspiciously or made incriminating statements admitting involvement. *State v. Ferguson*, 204 N.C. App. 451, 460, 694 S.E.2d 470, 477 (2010). Unless the accused has exclusive possession of the place where the contraband is located, the State must show "other incriminating circumstances before constructive possession may be inferred." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989).

In this case, Defendant was not present when the gun was found. However, it was found in his home on the floor of the home where he and his family resided. When the adult present in the home at the time the gun was found was told of its presence, she immediately called Defendant, her uncle, rather than her boyfriend or Defendant's girlfriend who also resided on that floor. Immediately after the call, Defendant returned to the home. When asked by police where he got the gun, he responded, "I found it." The officer testified that the exchange led him to believe that Defendant owned the gun. The gun was not registered and no one else in the home claimed any knowledge of it.

While the location of the gun gives rise to access and the phone calls concerning the gun may be regarded as suspicious behavior, those in isolation would not support a finding of constructive possession. However, Defendant's statement "I found it" may be interpreted as an acknowledgement of possession and this Court has held that "acknowledg[ing]

his possession of the gun in [a] statement, [ ] effectively disposes of his argument that there is no evidence of possession." *State v. Jones*, 161 N.C. App. 615, 624, 589 S.E.2d 374, 379 (2003). Considering the evidence in the light most favorable to the State, we conclude the evidence is sufficient to permit a reasonable jury to infer that Defendant possessed the firearm in violation of N.C. Gen. Stat. § 14-415.1(a).

B. Jury Instructions

[2] Defendant's argument that the jury instructions for misdemeanor child abuse permitted the jury to convict Defendant on a theory not supported by the indictment is also reviewed *de novo*, as our Court reviews a trial court's decisions regarding jury instructions *de novo*. " 'The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence.' " *State v. Smith*, 206 N.C. App. 404, 416, 696 S.E.2d 904, 911 (2010) (internal citations and quotations omitted).

According to our Supreme Court:

> It is clearly the rule in this jurisdiction that the trial court should not give instructions which present to the jury possible theories of conviction which are either not supported by the evidence or not charged in the bill of indictment. . . . [W]here the indictment for a crime alleges a theory of the crime, the State is held to proof of that theory and the jury is only allowed to convict on that theory. Prejudicial error occurs when . . . the judge's instructions allow the jury to convict upon some abstract theory supported by the evidence but not alleged in the bill of indictment.

State v. Taylor, 304 N.C. 249, 274-75, 283 S.E.2d 761, 777-78 (1981).

The Supreme Court reiterated this holding in *State v. Tucker* saying "It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment." *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417, 420 (1986). The Supreme Court expressly reaffirmed this holding in *Lucas*: "[W]e reaffirm our holding in *Tucker*, and we again adjure the trial courts to take particular care to ensure that the jury instructions are consistent with the theory presented in the indictment and with the evidence presented at trial." *State v. Lucas*, 353 N.C. 568, 590, 548 S.E.2d 712, 727 (2001) (rev'd on other grounds).

Following the precedent set forth in *Tucker*, this Court has determined error occurred when jury instructions were inconsistent with the charges in the indictment even if the instructions were consistent with evidence. *State v. Smith*, 162 N.C. App. 46, 50, 589 S.E.2d 739, 742 (2004); *see also State v. Dominie*, 134 N.C. App. 445, 449, 518 S.E.2d 32, 34 (1999).

In the case at hand, Defendant was charged under N.C. Gen. Stat. § 14-318.2(a), which reads in its entirety:

> [a]ny parent of a child less than 16 years 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.

Our Supreme Court has set clear precedent concerning N.C. Gen. Stat. § 14-318.2 that we must follow. The Court has stated that the statute sets forth separate offenses stating N.C. Gen. Stat.14-318.2(a) "provides for three separate offenses: If the parent by other than accidental means (1) inflicts physical injury upon the child, (2) allows physical injury to be inflicted upon the child, or (3) creates or allows to be created a substantial risk of physical injury." *State v. Fredell*, 283 N.C. 242, 244, 195 S.E.2d 300, 302 (1973). "Clearly, by the enactment of [N.C. Gen. Stat.] § 14-318.2 the General Assembly intended to provide for three separate and independent offenses, none dependent on the other." *Id.* at 247, 195 S.E.2d at 303.

Defendant was properly indicted for misdemeanor child abuse, and the indictment is facially valid. In Count I of the indictment, Defendant was charged with misdemeanor child abuse of Trey as follows:

> THE JURORS FOR THE STATE upon their oath present that . . . the defendant named above unlawfully and willfully did, being the parent of [Trey], who was a child less than 16 years of age, ***inflict physical injury***, bruising and abrasions, on that child. The physical injury was inflicted by other than accidental means[.]

(Emphasis added). There is no mention, in the first indictment concerning Trey, of the other two separate offenses of allowing physical injury to be inflicted upon the child or creating or allowing to be created a substantial risk of physical injury. Defendant was indicted for creating

a substantial risk in regard to Kaley but the prosecutor chose not to include that count in regard to Trey.

At the end of the second day of the trial, the State asked the trial court for a jury instruction that would "include all of the ways, all of the specific injury language there. So specifically that . . . the defendant 'inflicted physical injury upon or allowed physical injury to be inflicted upon or created or allowed substantial risk of physical injury.' " The State requested the "substantial risk" language because Trey was not going to testify and the State "d[id]n't know [if it was] going to put on any direct evidence of physical injury[.]"

Defense counsel objected and argued the instructions should match the indictment. "The defense was put on notice to defend against allegations specifically that he inflicted physical injuries, specifically bruising and abrasions on that child. We don't get to move the goal posts mid trial because the evidence doesn't support what's on [the prosecutor's] indictment."

The trial court initially stated it would grant Defendant's request and deny the State's request for the jury instruction. However, prior to closing arguments the trial court changed course and granted the State's jury instruction request stating, "I'm inclined to grant the State's request to leave in . . . the legal theory that the defendant also created a substantial risk of injury. And we will note your exception to the Court's ruling."

During closing arguments, the prosecutor informed the jury that on the charge of misdemeanor child abuse the State had to prove "that the defendant inflicted physical injury or created a substantial risk of inflicting physical injury." In its charge to the jury, the trial court instructed the jury that on the misdemeanor charge of child abuse against Trey the State had to prove "the defendant inflicted physical injury upon the child and/or created a substantial risk of physical injury to the child other than by accidental means." The trial court provided the jury with the directive that they could find Defendant guilty of misdemeanor child abuse of Trey on two separate and distinct theories: (1) if they found 'physical injury' which was the charge included in the indictment or also (2) if they found only that Defendant created 'substantial risk' of physical injury, a separate offense that was not charged in the original indictment.

The jury charge here is analogous to those at issue in *Tucker* as well as its progeny. *See* 317 N.C. 532, 346 S.E.2d 417 (1986); *see also State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001)(rev'd on other grounds); *State v. Smith*, 162 N.C. App. 46, 589 S.E.2d 739 (2004); *State*

v. Dominie, 134 N.C. App. 445, 518 S.E.2d 32 (1999). The defendant in *Tucker* was indicted for kidnapping, which by statute applies to a person who "unlawfully confine[s], restrain[s], or remove[s] from one place to another . . . ." However, his indictment was for kidnapping "by unlawfully *removing her from one place to another*. . . ." *State v. Tucker*, 317 N.C. 532, 536, 346 S.E.2d 417, 420 (1986). When the judge instructed the jury that they could find defendant guilty if they found, "that the defendant unlawfully *restrained* [the victim]" the Supreme Court reversed the conviction stating "[a]lthough the state's evidence supported Judge['s] [ ] instruction, the indictment does not. 'It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment.' " *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417, 420 (1986) (internal citations omitted).

In this case the indictment was not facially invalid, it clearly stated the crime was committed by "inflict[ing] physical injury, bruising and abrasions, on that child . . . by other than accidental means." As soon as the prosecution moved to include jury instructions for another crime, one that our Supreme Court has previously held is a "completely separate offense," defense counsel objected. When the trial court allowed the additional instruction, it again noted defense counsel's objection. *State v. Fredell*, 283 N.C. 242, 247, 195 S.E.2d 300, 303 (1973). While the evidence in this case may have supported the trial court's instruction, as it did in *Tucker*, it was error for the trial court to instruct the jury on a theory clearly not support by the bill of indictment. *State v. Tucker*, 317 N.C. 532, 537-38, 346 S.E.2d 417, 420 (1986).

While inflicting physical injury to a child and creating or allowing to be created a substantial risk of physical injury to a child cannot be considered completely distinct from one another, our Supreme Court has created definitive precedent that they are two separate and independent charges to be indicted. *State v. Fredell*, 283 N.C. 242, 247, 195 S.E.2d 300, 303 (1973). The State did not include the offense of misdemeanor child abuse by creating a substantial risk of physical injury to the child in the indictment against Defendant. Although the evidence presented at trial alleged serious risk of harm to a minor and may have supported the offense, had the State desired to prosecute Defendant on the theory, it should have so alleged in the indictment. The onus is on the State to prove the elements necessary for the charge of misdemeanor child abuse. *State v. Watkins*, 247 N.C. App. 391, 395, 785 S.E.2d 175, 177 (2016). The State had the opportunity to include the offense of misdemeanor child abuse by creating a substantial risk of physical injury to

the child in the indictment or to have Trey testify at trial to any injury he received to provide direct evidence of physical injury as alleged in the indictment, but it did neither.

The trial judge committed prejudicial error when it instructed the jury that Defendant could be convicted upon a theory or charge not contained in the indictment. *State v. Dominie*, 134 N.C. App. 445, 449, 518 S.E.2d 32, 34 (1999). Under *State v. Taylor*, "Prejudicial error occurs when . . . the judge's instructions allow the jury to convict upon some abstract theory supported by the evidence but not alleged in the bill of indictment." *State v. Taylor*, 304 N.C. 249, 274-75, 283 S.E.2d 761, 777-78 (1981). Because Defendant was prejudiced by the trial court's error, Defendant is entitled to a new trial. We reverse Defendant's conviction for misdemeanor child abuse and remand for a new trial on this charge.

C. Jury Unanimity

Defendant next argues that the trial court's jury instruction on misdemeanor child abuse of Trey resulted in a fatally ambiguous verdict. Because we have ordered a new trial and as Defendant's remaining argument is directed to an issue which may not occur on retrial, we decline to address it. *State v. Tucker*, 317 N.C. 532, 545, 346 S.E.2d 417, 424 (1986).

III. Conclusion

For the foregoing reasons, we find no error in Defendant's conviction of possession of a firearm by felon. Because the trial court erred in instructing the jury on a theory of the crime not charged in the indictment, we reverse Defendant's conviction for misdemeanor child abuse and remand to the trial court for a new trial on the charge of misdemeanor child abuse.

NO ERROR IN PART; REVERSED IN PART AND REMANDED FOR NEW TRIAL.

Judge ZACHARY concurs.

Judge CARPENTER concurs by separate opinion.

CARPENTER, Judge, concurring.

I fully join my colleagues' analysis of the motion to dismiss the possession of a firearm by a felon charge. Concerning Defendant's

misdemeanor child abuse conviction as to Trey, I also concur because this Court lacks jurisdiction to rule contrary to a decision of the North Carolina Supreme Court.

Nonetheless, I am compelled to write separately because I believe the result on the child abuse issue turns on a matter of form rather than substance, which does not favor justice and allows a defendant to escape merited punishment. *See State v. Stewart*, 386 N.C. 237, 241, 900 S.E.2d 652, 656 (2024) (quoting *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981)).

Initially, I note that the majority's facts and procedural history are well-supported by the record, and I incorporate them herein. One passage, in particular, warrants repeating:

> When Defendant and Ms. Crook arrived at the home, Trey, his girlfriend, and the girlfriend's father, Mr. Eggleston, went out to meet them. Initially the greeting was friendly but then Defendant noticed that Trey was wearing his shirt. Defendant walked back to his car and returned with a pair of needle-nose pliers. Upon returning to the group, Defendant used the pliers to grab and twist the top of Trey's chest for approximately a minute. Trey began to cry and said it hurt. Defendant quietly responded, "It can't hurt because I can't feel it."

Additionally, the majority's misdemeanor child abuse analysis is well-supported by precedent which accurately reflected the law at the time those cases were decided by our appellate courts, and likely where it stands today.

Nevertheless, our state's highest court recently released two opinions clarifying our caselaw concerning sufficiency of indictments; I believe the new clarity in that area may signal a sea-change in how we evaluate indictment-related arguments moving forward. *See State v. Singleton*, 386 N.C. 183, 900 S.E.2d 802 (2024); *State v. Stewart*, 386 N.C. 237, 900 S.E.2d 652 (2024). I write separately to discuss my view of the ramifications of these recent decisions and how I would apply them in this case, but for an earlier decision, *State v. Fredell*, 283 N.C. 242, 195 S.E.2d 300 (1973).

In *Singleton*, the North Carolina Supreme Court held that so long as a crime against the laws and people of North Carolina was alleged, defects in indictments do not deprive the trial court of jurisdiction. 386 N.C. at 184–85, 900 S.E.2d at 805. Therefore, a defendant challenging

an indictment as defective must show that the indictment contained a statutory or constitutional defect and that such error was prejudicial. *Id.* at 185, 900 S.E.2d at 805. In reaching its decision, the Court dispensed with overly technical, common-law jurisprudence in favor of a "common sense approach to the law," *id.* at 185, 900 S.E.2d at 805, noting " '[t]he practical sense of the age demands' that technicalities should not carry the day for defendants who argue form over substance in our indictment jurisprudence, because defendants are seldom prejudiced by mistakes in pleadings." *Id.* at 214–15, 900 S.E.2d at 824 (quoting *State v. Hester*, 122 N.C. 1047, 1050, 29 S.E. 380 (1898)).

Similarly in *Stewart*, applying the rules clarified in *Singleton*, the Court determined that an indictment for sexual battery, which alleged the sexual contact was "without [victim's] consent" rather than "by force," was not fatally flawed because its language implied the use of force and adequately noticed the defendant of the charge against him. *Stewart*, 386 N.C. at 242, 900 S.E.2d at 656. The Court soundly rejected the defendant's argument that the trial court was deprived of subject-matter jurisdiction because the indictment omitted an essential element of sexual battery, observing that the "[d]efendant's argument here represents a regression to the era of technical pleading rules from which this State's jurisprudence has long since departed. As this Court has written time and again, such rules tend to emphasize form over substance, undermining justice." *Id.* at 242, 800 S.E.2d at 656.

Granted, the issue before us today is not identical to the issues in *Singleton* or *Stewart*—no party disputes the facial validity of Defendant's indictment. Although the holdings of *Singleton* and *Stewart* are limited to clarifying which indictment defects are jurisdictional, in my view, an assertion of instructional overreach based on the explicit inclusion or omission of indictment language is the flip side of the same coin.

The thrust of *Singleton* and *Stewart* seems to be, indictment-related arguments which unduly elevate form over substance, thus undermining justice or merited punishment, will not stand, provided the defendant was sufficiently noticed of charges to prepare a defense. And by logical extension, if there is any perceived ambiguity in the indictment, the onus is on the defendant to move for a bill of particulars. But for a prior North Carolina Supreme Court opinion interpreting our misdemeanor child abuse statute, my vote would have been to affirm Defendant's misdemeanor child abuse conviction.

Turning to the instant case, Defendant was properly indicted for misdemeanor child abuse, and the indictment is facially valid. In Count

I of the indictment, Defendant was charged with misdemeanor child abuse of Trey as follows:

> THE JURORS FOR THE STATE upon their oath present that . . . the defendant named above unlawfully and willfully did, being the parent of [Trey], who was a child less than 16 years of age, inflict physical injury, bruising and abrasions, on that child. The physical injury was inflicted by other than accidental means[.]

My analysis begins with two premises: (1) "Generally, the purposes of an indictment 'are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.' " *Stewart*, 386 N.C. at 241, 900 S.E.2d at 655 (quoting *Sturdivant*, 304 N.C. at 311, 283 S.E.2d at 731); and (2), "[a] trial court is required to instruct on every substantive feature of the case, even in the absence of a request for such an instruction; however, the trial court need not instruct the jury with any greater particularity than is necessary to enable the jury to apply the law to the substantive features of the case arising on the evidence when . . . the defendant makes no request for additional instructions." *State v. Stough*, 233 N.C. App. 240, 758 S.E.2d 706 (2014) (cleaned up).

Next, I examine the plain language of the applicable statute. Defendant was charged under N.C. Gen. Stat. § 14-318.2(a), which reads:

> [a]ny parent of a child less than 16 years 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.

Based on a plain reading of the text, our misdemeanor child abuse statute provides three alternative theories by which one may commit the single crime of misdemeanor child abuse—not dissimilar in construction to our kidnapping or domestic violence statutes, for example.

Fifty years ago, however, our Supreme Court interpreted this statute as setting forth three distinct crimes: "Clearly, by the enactment of [Gen. Stat.] § 14-318.2 the General Assembly intended to provide for three separate and independent offenses, none dependent on the other." *Fredell*, 283 N.C. at 247, 195 S.E.2d at 303. Although not the holding of

Fredell, this statement is unambiguous and appears to remain in force. Bound by *Fredell*, then, I must join the majority's conclusion that the trial court erred "when it instructed the jury that Defendant could be convicted upon a theory or charge not supported by the bill of indictment," because the indictment only alleged infliction of physical injury.

But this result seems to turn on an elevation of form over substance so seemingly disfavored in the recent *Singleton* and *Stewart* decisions. Substantial evidence shows Defendant publicly used a pair of needle-nose pliers as a form of punishment on Trey in front of several witnesses. Such behavior is not only reprehensible, or "shocking" as Mr. Eggleston testified, it is illegal.

Here, the trial court chose to instruct the jury on the substantive features of the case arising on the evidence, as I likely would have. Even if the trial court erred, I struggle to envision prejudice given the close correlation between the two theories and the weight of the evidence. Absent contrary precedent, I would be inclined to agree with the prosecution and ultimately the trial court below, that a true bill of indictment for misdemeanor child abuse notices a defendant to prepare a defense against misdemeanor child abuse, by any of the three theories set forth in the statute.

Under this construction, a trial judge would never face the conundrum presented to the trial court here: Should I instruct on the narrow *theory* of the crime alleged in the indictment, even in the absence of a motion for a bill of particulars, or should I instruct on the substantive features of the *case* arising on the evidence? Furthermore, under this construction a trial court's decision to instruct on one or more theories of the crime arising from the evidence could hardly be said to be an "abstract theory not supported by the bill of indictment." *See State v. Tucker*, 317 N.C. 532, 537–38, 346 S.E.2d 417, 420 (1986) ("It is a well-established rule in this jurisdiction that it is error, generally prejudicial, for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment.").

In sum, I fully join the majority's analysis of the motion to dismiss. Nevertheless, it is difficult to rationalize how this bill of indictment noticed Defendant to prepare a misdemeanor child abuse defense against the infliction of physical injury theory, *without* placing him on notice to defend against the creation of a substantial risk of physical injury theory. *See* N.C. Gen. Stat. § 14-318.2(a). Bound by *Fredell*, however, I concur. *See* 283 N.C. at 247, 195 S.E.2d at 303.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(Filed 5 November 2024)

BONET v. COSTA No. 23-626	Nash (22CVS269)	Dismissed
BROWN v. RODRIGUEZ No. 24-449	Cabarrus (23CVD2969)	Affirmed
CAGLE v. CHARLOTTE-MECKLENBURG HOSP. AUTH. No. 24-242	Mecklenburg (20CVS12959)	Affirmed
EST. OF BUNCE v. REX HEALTHCARE, INC. No. 24-271	Wake (21CVS3912-910)	Affirmed
IN RE A.H. No. 24-157	Surry (22JA2) (22JA3)	Affirmed in part; Vacated in part and Remanded
IN RE E.H. No. 24-375	Yancey (23JA23)	Affirmed
IN RE J.M.T. No. 24-212	Forsyth (23J31) (23J32) (23J33)	Affirmed
IN RE L.W.G. No. 24-394	Orange (23JA66)	Affirmed
IN RE R.S.P. No. 24-170	McDowell (20JT101) (20JT102) (20JT103) (21JT23)	Affirmed
LEE v. LEE No. 24-202	Wake (23CV19622-910)	Affirmed in Part, Vacated in Part, and Remanded
LINEMAN v. McELHANEY No. 24-78	Wake (19CVD15091)	Dismissed
MURSHED v. HUFTON No. 23-627	Nash (22CVS1170)	Dismissed
POPE v. IVUECARS, LLC No. 23-1071	Gaston (20CVS3390)	Remanded.

ROORDA v. HUKILL No. 23-1055	Wake (19CVD4399)	Affirmed
SAHANA v. FISCUS No. 23-1068	Buncombe (16CVD1087)	Affirmed
STATE v. ARNOLD No. 24-189	Cleveland (21CRS52056)	No Error
STATE v. AYALA No. 22-1046	Stanly (19CRS51683-84) (19CRS51696)	No Error
STATE v. CHADWICK No. 24-6	Onslow (21CRS52722)	Dismissed.
STATE v. DANZY No. 24-607	Nash (21CRS052382)	Dismissed
STATE v. DEKEYSER No. 23-899	Johnston (19CRS1702) (19CRS1767) (19CRS56239)	No Error.
STATE v. FREEMAN No. 23-740	Duplin (20CRS50258-60)	No Error
STATE v. HAYES No. 24-325	Forsyth (23CRS224723)	No Error
STATE v. HILL No. 24-159	New Hanover (21CRS50509) (22CRS1345)	No Error
STATE v. HOPKINS No. 23-316	Wake (19CRS200588)	No error in part; sentence vacated and remanded for entry of corrected sentence
STATE v. ISENHOUR No. 24-8	Cabarrus (21CRS53130) (21CRS53131)	Affirmed in part; Dismissed without prejudice in part
STATE v. IVEY No. 24-250	Cleveland (17CRS56425)	Vacated and Remanded
STATE v. JEFFERSON No. 24-116	Montgomery (19CRS51170)	No Error

STATE v. KEYES No. 24-326	Beaufort (21CRS50699-700) (21CRS570)	No Error in Part & Remanded for Correction of Clerical Error in Part.
STATE v. LEWIS No. 24-401	Mecklenburg (21CR201994-590)	Dismissed
STATE v. MAY No. 24-137	Buncombe (19CRS84967)	Affirmed
STATE v. MILLS No. 23-1098	New Hanover (21CRS56776-77)	No Error
STATE v. TURNER No. 24-390	Alamance (22CRS322496) (23CRS51)	Dismissed
STATE v. WAHEED No. 24-87	Alamance (20CRS50127)	No Error
STUBBS & PERDUE, P.A. v. MacGREGOR No. 24-139	Craven (20CVS1497)	Affirmed
WEB 4 HALF LLC v. ROWLETTE No. 23-755	Durham (22CVS4558)	Affirmed
WILLIAMS v. HOOKS No. 22-671	Mecklenburg (18CRS238306)	Reversed and Remanded.
WILLIAMS v. SCHAEFER SYS., LLC No. 23-1035	Mecklenburg (21CVS10352)	Affirmed in Part, Reversed in Part.

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