376 N.C.—No. 1 Pages 1-279

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

FEBRUARY 26, 2021

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OF
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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 18 DECEMBER 2020

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SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 11, 12, 13, 14
February 15, 16, 17, 18
March 22, 23, 24, 25
May 3, 4, 5, 6
August 30, 31
September 1, 2
October 4, 5, 6, 7
November 8, 9, 10

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

ASHE COUNTY, NORTH CAROLINA
v.
ASHE COUNTY PLANNING BOARD AND APPALACHIAN MATERIALS, LLC

No. 249PA19

Filed 18 December 2020

Zoning—planning permit application—preliminary letter of assessment—not binding or final

A county was not required to appeal from a letter issued by the county planning director, because the letter was not binding or final—despite containing a favorable recommendation regarding an application to operate an asphalt plant—where it did not contain determinative or authoritative language and did not affect the rights of the parties. Since the county was not precluded from challenging the trial court's order requiring the county to issue the permit, the matter was remanded to the Court of Appeals for reconsideration of the remaining issues on appeal.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 265 N.C. App. 384, 829 S.E.2d 224 (2019), affirming an order entered on 30 November 2017 by Judge Susan E. Bray in Superior Court, Ashe County. Heard in the Supreme Court on 1 September 2020.

Womble Bond Dickinson (US) LLP, by Amy C. O'Neal and John C. Cooke, for petitioner-appellant.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for respondent-appellee Appalachian Materials, LLC.

No brief for respondent-appellee Ashe County Planning Board.

Law Offices of F. Bryan Brice, Jr., by F. Bryan Brice, Jr., and David E. Sloan, for Blue Ridge Environmental Defense League and its chapter, Protect Our Fresh Air, amicus curiae.

Teague Campbell Dennis & Gorham, LLP, by Natalia K. Isenberg, for the North Carolina Association of County Commissioners, amicus curiae.

ERVIN, Justice.

This case involves a dispute between petitioner Ashe County Board of Commissioners (Ashe County) and respondents Ashe County Planning Board and Appalachian Materials, LLC, arising from Appalachian Materials' application for the issuance of a permit pursuant to Ashe County's Polluting Industries Development Ordinance authorizing Appalachian Materials to operate a portable asphalt production facility on a thirty-acre tract of property located in Ashe County. After careful consideration of the legal issues that have been presented for our consideration in light of the record and the applicable law, we reverse the decision of the Court of Appeals, in part, and remand this case to the Court of Appeals for further proceeding not inconsistent with this opinion.

I. Factual Background

In 1999, Ashe County adopted the Polluting Industries Development Ordinance (PID Ordinance), Chapter 159 of the Ashe County Code, for the purpose of "allow[ing] for the placement and growth of polluting industrial activities, while maintaining the health, safety and general welfare" "of its citizens and the peace and dignity of [Ashe County]." The PID Ordinance established a single permit system administered by the Ashe County Planning Department, which, following the submission of an application to the Planning Department, reviewed the application for the purpose of determining whether it satisfied the permitting requirements set out in PID Ordinance § 159.06(A)–(B). Among other things, the PID Ordinance required that: (1) the applicant pay a $500 uniform permit fee; (2) the applicant have obtained all necessary federal and state permits; (3) the polluting industry not be located within 1,000 feet of a residential dwelling unit or commercial building; and (4)

the polluting industry not be located within 1,320 feet of a school, day-care, hospital, or nursing home facility. PID Ordinance § 159.06(A)–(B). In its Planning Ordinance, Chapter 153 of the Ashe County Code of Ordinances, the Ashe County Commission vested the Planning Board with the authority to act as its Board of Adjustment pursuant to Planning Ordinance § 153.04(J) and to serve as the body responsible for handling administrative appeals from the Planning Director's decisions pursuant to N.C.G.S. § 160A-388(b1)(1) (stating that "[t]he board of adjustment . . . may hear appeals arising out of any . . . ordinance that regulates land use or development" and that "[a]ny person who has standing under [N.C.G.S. §] 160A-393(d) or the city may appeal a decision to the board of adjustment").

In early June 2015, Appalachian Materials submitted an application and the accompanying $500 application fee to the Planning Director for the purpose of seeking the issuance of a permit authorizing it to construct and operate an asphalt plant, as required by the PID Ordinance. At the time that it submitted its application, Appalachian Materials had not yet obtained an air quality permit from the North Carolina Department of Environmental Quality as required by the PID Ordinance. As a result, Appalachian Materials attached a copy of the air quality permit application that it had submitted to DEQ to its application and informed the Planning Director that, once it had obtained the required air quality permit from DEQ, it would forward a copy to the Planning Director. Ashe County deposited Appalachian Materials' check.

On 12 June 2015, the Planning Director informed Appalachian Materials that the requested permit could not be issued until Appalachian Materials had obtained its air quality permit and that Appalachian Materials would need to submit a request for the issuance of a permit as required by Ashe County's Watershed Protection Ordinance, Ashe County Code § 155.37. At that point, Appalachian Materials inquired if the Planning Director could "issue the permit with a condition that all other required permits need to be obtained prior to the start of operation." In response, the Planning Director stated that he lacked the authority to issue the requested permit without authorization from the Planning Board given that "[t]he language in the ordinance is pretty clear." On the other hand, the Planning Director stated that he could "write a favorable recommendation, or [a] letter stating that standards of our ordinance have been met for this site, with the one exception." Appalachian Materials accepted the Planning Director's offer to provide such a letter.

On 22 June 2015, the Planning Director sent Appalachian Materials a letter setting out the results of his evaluation of the permit application in

which he stated that "[t]he proposed site does meet[ ] the requirements of the Ashe County [PID Ordinance]" and that, "[o]nce we have received the [a]ir [q]uality [p]ermit," "our local permit can be issued for this site." Attached to the Planning Director's letter was a chart which set out the results of the Planning Director's review of Appalachian Materials' compliance with the remaining provisions of the PID Ordinance and which indicated that Appalachian Materials had satisfied all of the requirements of the PID Ordinance except for the provision requiring the obtaining of an air quality permit. As a result, Appalachian Materials continued to invest time, money, and resources in the proposed asphalt facility.

At some point after the transmission of the Planning Director's letter, various Ashe County citizens raised questions and expressed concerns about the appropriateness of the location for the proposed asphalt facility. On 19 October 2015, Ashe County adopted a temporary moratorium relating to the issuance of PID Ordinance permits which was to be in effect from 19 October 2015 to 19 April 2016, subject to the possibility of an extension for an additional six months.

On 28 August 2015, a staff report was released by the Ashe County Planning Department indicating that Appalachian Materials' application was incomplete. On 31 August 2015, Appalachian Materials contacted the Planning Director for the purpose of stating that the information contained in the staff report was "surpris[ing]" and asking what was missing from the application. At that time, Appalachian Materials referred to the 22 June 2015 letter as a "decision" that Appalachian Materials had satisfied the requirements of the PID Ordinance; stated that, "[a]t no point over the past two months [had the Planning Director] indicated to [Appalachian Materials] that the application was 'incomplete' "; and contended that "nothing in the [PID Ordinance] requires [that] the [air quality permit] be issued prior to a [PID Ordinance] application being submitted to [Ashe County]." In response, the Planning Director informed Appalachian Materials that, "[w]ithout the [air quality permit,] the application is incomplete" and that, while Appalachian Materials' application may have shown that it had satisfied "some of the requirements" of the PID Ordinance, "without [the air quality permit,] [the] application is still incomplete," citing PID Ordinance § 159.06.

On 29 February 2016, Appalachian Materials forwarded its newly issued air quality permit to the Planning Director and requested that Appalachian Materials' application be "issued immediately" given its "good faith . . . reli[ance]" upon the "decision" embodied in the 22 June 2015 letter. According to Appalachian Materials, Ashe County was required to review and decide the issues raised by its application in

accordance with the ordinances that were in effect at the time of filing, despite the existing moratorium, pursuant to N.C.G.S. § 153A-320.1 (providing that, "[i]f a rule or ordinance is amended . . . between the time a development permit application is submitted and a development permit decision is made . . . then [N.C.G.S. §] 143-755 shall apply") and N.C.G.S. § 143-755(a) (stating that, if an "applicant submits a permit application for any type of development and a rule or ordinance is amended . . . between the time [that] the development permit application was submitted and a development permit decision is made, the . . . applicant may choose which adopted version of the rule or ordinance will apply") (collectively, the permit choice statutes); that any changes to the applicable ordinances that had been adopted during the moratorium period would be "immaterial"; and that any failure to issue the requested permit would constitute "a violation of Chapter 159, North Carolina law and [Appalachian Materials'] constitutional rights and would subject [Ashe County] to claims for damages and attorneys' fees." In response, the Planning Director indicated that he would "take [this information] under consideration" and that Ashe County might need "additional information" before the permit could be issued. On two subsequent occasions, Appalachian Materials asked the Planning Director "what additional information [was] needed" without receiving an answer.

On 21 March 2016, Appalachian Materials informed Ashe County's counsel that, in the event that Ashe County did not issue the requested permit by 28 March 2016, Appalachian Materials would institute legal action against Ashe County. On 4 April 2016, Ashe County extended the existing moratorium for an additional six months.

On 20 April 2016, the Planning Director denied Appalachian Materials' permit application on the grounds that: (1) the proposed plant site was located within 1,000 feet of commercial and residential buildings in violation of the applicable setback requirements and that Appalachian Materials' application had falsely represented that the proposed asphalt operation would be contained within the "limits" as shown on certain plans attached to the application; (2) the application had been incomplete at the time that the moratorium went into effect given that "Appalachian Materials did not have all necessary permits" at that time, so that the application had "not [been] properly submitted for consideration" at that time; (3) the application "contained a number of false statements, misleading statements, and/or misrepresentations" pertaining to compliance with the setback requirements, the length of time that it would take Appalachian Materials to obtain the air quality permit, whether grading and terracing had occurred at the site in the absence of

the necessary watershed permit, and the amount of asphalt that would be produced at the proposed facility; and (4) the 22 June 2015 letter had not been "a decision of any kind," "did not make a definite statement about what action would be taken on the application," and "cannot be binding" given that "it was procured by Appalachian Materials based on false information and[/]or material misrepresentations."

On 26 April 2016, Appalachian Materials contacted the Planning Director in order to request, for the third time, that he clarify what additional information was needed given that the denial letter had "fail[ed] to identify with particularity what permits have not been issued." The Planning Director responded by directing Appalachian Materials' attention to the section of the denial letter that addressed the alleged deficiencies in the application. Subsequently, Appalachian Materials reiterated its request for a specification of "what [was] missing from [its] application or what additional information [was] needed" and asked "What are the appropriate [f]ederal and [s]tate permits that you are contending have not been issued?" In response, the Planning Director referenced the portion of the denial letter asserting that Appalachian Materials had conducted grading and terracing operations at the site without having obtained the issuance of the necessary watershed permit.

On 5 May 2016, Appalachian Materials asked the Planning Director to confirm that the missing permits mentioned in the denial letter only related to the watershed permit and requested that the Planning Director specify the portion of the proposed asphalt operation that violated the applicable setback requirements. In response, the Planning Director stated that "[t]he watershed permit was one permit of several required" and that "[n]either the watershed permit nor the air quality permit had been issued prior to the establishment of the moratorium" and listed the equipment that the Planning Director believed to have violated the applicable setback requirements and which he asserted had not been disclosed in the application.

On 16 May 2016, Appalachian Materials sent an e-mail to the Planning Director stating that it had obtained the necessary air quality permit; that watershed permits are locally issued, rather than federally-issued or state-issued permits; that Appalachian Materials had applied for a watershed permit; and that the Planning Director had previously advised Appalachian Materials that the watershed permit would not be issued until the PID Ordinance permit had been released. In light of this understanding, Appalachian Materials asserted that the Planning Director had "not identified any state or federal permits, which are required by the [PID Ordinance] and are lacking from

[Appalachian Materials'] [PID Ordinance] application." On the same day, Appalachian Materials noted an appeal from the denial of its permit application to the Ashe County Planning Board on the basis of a number of contentions, including the assertion that, "where there is an [i]nterpretation by an ordinance administrator, the decision is binding, unless appealed," citing *S.T. Wooten Corp. v. Board of Adjustment of Zebulon*, 210 N.C. App. 633, 711 S.E.2d 158 (2011), with the Planning Director's 22 June 2015 letter alleged to have constituted a binding "decision" upon which Appalachian Materials had relied and which was immediately appealable.

On 26 May 2016, Appalachian Materials informed the Planning Director that the basis for his claim that Appalachian Materials had made material misrepresentations relating to the applicable setback requirements stemmed from a scrivener's error made by DEQ and that DEQ had since corrected this error and issued a memo explaining its mistake. As a result, Appalachian Materials asserted that the alleged misrepresentations provided no "basis [for the Planning Director's] refusal to issue" the requested permit.

On 3 October 2016, following the lifting of the moratorium, Ashe County repealed the PID Ordinance and adopted the High Impact Land Use Ordinance, Chapter 166 of the Ashe County Code of Ordinances, which created additional requirements applicable to applications for the issuance of permits authorizing the construction and operation of asphalt plants. On 1 December 2016, the Planning Board filed a decision addressing the issues raised by Appalachian Materials' appeal in which it concluded that: (1) the application should have been reviewed pursuant to the ordinance that was in effect at the time that the application had been submitted in accordance with the permit choice statutes and that the moratorium had "no impact" upon the status of Appalachian Materials' application; (2) the 22 June 2015 letter constituted a "final, binding determination that [Appalachian Materials'] proposed plans for the asphalt plant met the requirements for issuance of the [PID Ordinance] permit, the one exception being receipt of [a DEQ] air quality permit," citing *Meier v. City of Charlotte*, 206 N.C. App. 471, 698 S.E.2d 704 (2010), and *S.T. Wooten Corp.*; and (3) that Appalachian Materials had, in fact, satisfied all of the requirements for the issuance of a PID Ordinance permit. The Planning Board added that, "[e]ven if the [22 June 2015 letter] was not a binding, final determination that [Appalachian Materials'] plans for a proposed asphalt plant met the requirements for a [PID Ordinance] permit," Appalachian Materials was "entitled to issuance of the [requested] permit, contrary to the grounds stated in the

[denial letter]." In concluding that the application satisfied the applicable setback requirements, the Planning Board noted that, "in the absence of a definition" of the term "commercial building," it had "look[ed] to the plain meaning of the language used in the [PID Ordinance]," citing *Four Seasons Management Services v. Town of Wrightsville Beach*, 205 N.C. App. 65, 77, 695 S.E.2d 456, 463 (2010); that the use of the term " 'building' . . . generally connotes some degree of permanence," citing *Kroger Ltd. Partnership I v. Guastello*, 177 N.C. App. 386, 390–91, 628 S.E.2d 841, 844 (2006); that the term " 'commercial' . . . generally includes activity 'connected with trade or commerce in general; occupied with business,' or having financial profit as its primary aim," quoting *Aetna Casualty & Surety Co. v. Fields*, 105 N.C. App. 563, 567, 414 S.E.2d 69, 72 (1992); and that the term "commercial building" as used in the PID Ordinance "means a permanent structure used with financial profit as a significant, if not primary, purpose." In view of the fact that neither of the buildings that the Planning Director had determined to be within 1,000 feet of the applicable setback requirements, which included a barn owned by an adjacent property owner and a shed owned by Appalachian Materials' parent company, satisfied this definition, the Planning Board determined that neither structure was protected by the PID Ordinance. Finally, the Planning Board noted that the watershed permit was "a local permit issued by [Ashe County], under [an Ashe County] ordinance" that was "not encompassed by the [PID Ordinance's] requirement that all appropriate federal and [s]tate permits be obtained," so that "[t]he lack of a [w]atershed [p]ermit [did] not provide grounds for denial of [the] permit [a]pplication." As a result, the Planning Board reversed the Planning Director's decision and ordered that a PID Ordinance permit be issued to Appalachian Materials.[1]

On 30 December 2016, Ashe County filed a petition seeking the issuance of a writ of certiorari in the Superior Court, Ashe County, for the purpose of obtaining judicial review of the Planning Board's decision. On 30 November 2017, the trial court entered an order determining, among other things, that: (1) the Planning Board had correctly determined that Appalachian Materials' application should be reviewed pursuant to the PID Ordinance as it existed at the time that the application had been submitted; (2) the Planning Board had correctly treated the 22 June 2015 letter as a binding determination that the application satisfied the

1. In early April 2016, Appalachian Materials filed a petition seeking the issuance of a writ of mandamus compelling the Planning Director to issue the requested permit accompanied by a request for declaratory judgment in its favor in the Superior Court, Ashe County. According to Ashe County's brief, Appalachian Materials voluntarily dismissed this petition following the entry of the Planning Board's 1 December 2016 order.

relevant ordinance requirements, with the exception of the issuance of required federal and state permits; (3) the Planning Board had correctly determined that the barn and shed that were within 1,000 feet of the proposed asphalt plant were not "commercial buildings" for purposes of the PID Ordinance; (4) the Planning Board's decision to order the issuance of the PID Ordinance permit had not been arbitrary or capricious; and (5) the Planning Board's order should be affirmed. As a result, the trial court ordered Ashe County to issue the requested permit within ten business days. Ashe County noted an appeal to the Court of Appeals from the trial court's order.

In seeking relief from the trial court's order before the Court of Appeals, Ashe County argued, in pertinent part, that: (1) the trial court had erred by determining that the moratorium did not provide a valid reason for refusing to issue the requested permit; (2) the permit choice statutes do not apply to situations in which a local government adopts a temporary moratorium and then modifies the applicable ordinance; (3) the 22 June 2015 letter did not constitute a binding decision given that Appalachian Materials had not submitted a complete permit application; (4) the Planning Board had exceeded its authority by reversing the Planning Director's denial decision and ordering the issuance of the requested permit; and (5) the Planning Board's determination that neither the barn nor the shed constituted commercial buildings pursuant to the PID Ordinance was erroneous.

In rejecting Ashe County's challenges to the trial court's decision, the Court of Appeals held that, in spite of the fact that the air quality permit application was still under review by DEQ at the time that the PID Ordinance permit application had been presented to the Planning Director, the PID Ordinance application had been sufficiently "submitted" for purposes of the permit choice statutes given that the issuance of an air quality permit was simply one of a number of prerequisites for the approval of the PID Ordinance application and that Ashe County had accepted and deposited Appalachian Materials' application fee. *Ashe Cnty. v. Ashe Cnty. Plan. Bd.*, 265 N.C. App. 384, 388, 829 S.E.2d 224, 227 (2019). In addition, the Court of Appeals determined that the moratorium did not "nullify" Appalachian Materials' rights under the permit choice statutes and did not provide the Planning Director with a valid basis to deny the permit application, citing *Robins v. Hillsborough*, 361 N.C. 193, 199, 639 S.E.2d 421, 425 (2007) (holding that, when a permit applicant submitted an application seeking authorization to construct an asphalt plant and the relevant municipality subsequently adopted a moratorium concerning the construction and operation of asphalt plants,

the "applicant [was] entitled to have his application reviewed under the ordinances and procedural rules in effect as of the time he filed his application"). *Ashe Cnty.*, 265 N.C. App. at 388, 829 S.E.2d at 227. In the Court of Appeals' view, the approach adopted in *Robins* had been codified by the General Assembly in the permit choice statutes, with nothing in N.C.G.S. § 153A-340(h) (providing that "counties may adopt temporary moratoria on any county development approval required by law")[2] serving to prevent the application of the permit choice statute following the lifting of any applicable moratorium. *Id.* at 389, 829 S.E.2d at 227. As a result, the Court of Appeals concluded that Appalachian Materials was entitled to have its application reviewed pursuant to the PID Ordinance, which was in effect at the time that its application had been submitted. *Id.* at 394, 829 S.E.2d at 231.

In concluding that the Planning Director did not intend for the 22 June 2015 letter to be a binding determination that the requested Ordinance permit would be issued once the necessary air quality permit had been received, the Court of Appeals utilized a test developed in *S.T. Wooten Corp.* for the purpose of determining whether a statement by a town official constituted a binding decision that was subject to further review:

> (1) Whether the decision was made at the request of a party, "with a clear interest in the outcome," . . . (2) Whether the decision was made "by an official with the authority to provide definitive interpretations" of the applicable local ordinance, such as a planning director; (3) whether the decision reflected the official's formal and definitive interpretation of a specific ordinance's application to "a specific set of facts," . . . and (4) whether the requesting party relied on the official's letter "as binding interpretations of the applicable . . . ordinance."

Ashe Cnty., 265 N.C. App. at 391–92, 829 S.E.2d at 229 (quoting *S.T. Wooten Corp.*, 210 N.C. App. at 641–42, 711 S.E.2d at 163). The Court of Appeals held that, given the language in which it was couched and

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2. The moratorium statute, in relevant part, expressly: (1) enables the adoption of a temporary moratorium for a "reasonable" amount of time; (2) establishes a uniform procedure for the adoption of a moratorium; (3) limits the scope of a moratorium to nonresidential development; (4) establishes exemptions from the effect of a moratorium; and (5) provides a specific remedy through which "any person aggrieved" by a moratorium can seek an expedited review of the "imposition of a moratorium." N.C.G.S. § 153A-340(h) (2019) (repealed 2020).

the circumstances under which it was written, the 22 June 2015 letter did not constitute a final determination. *Id.* at 392, 829 S.E.2d at 229. On the other hand, the Court of Appeals also held that the 22 June 2015 letter "did have *some* binding effect" with respect to the issue of whether the proposed asphalt plant violated the setback requirements contained in the existing version of the PID Ordinance and that, unless such a decision had been appealed within thirty days following the date upon which it had been made, that decision became binding upon the parties, including Ashe County, regardless of its interlocutory nature, with Ashe County being obligated to develop a process by virtue of which it could become aware of such decisions and appeal them. *Id.* at 394, 829 S.E.2d at 231.

Finally, the Court of Appeals determined that, despite the Planning Director's assertion that Appalachian Materials' application contained multiple misrepresentations, the Planning Board did not exceed its authority by overturning the Planning Director's denial decision. *Id.* As a result, for all of these reasons, the Court of Appeals affirmed the challenged trial court order.[3] *Id.* On 30 October 2019, this Court allowed Ashe County's petition for discretionary review of the Court of Appeals' decision.

II. Substantive Legal Analysis

A. Standard of Review

The General Assembly has provided that "[e]very quasi-judicial decision [of a board of adjustment] shall be subject to review by the superior court by proceedings in the nature of certiorari pursuant to [N.C.G.S. §] 160A-393." N.C.G.S. § 160A-388(e2)(2) (2019) (repealed 2020). In evaluating the lawfulness of such a decision, the trial court should: "(1) review the record for errors of law; (2) ensure that procedures specified by law in both statute and ordinance are followed; (3) ensure that appropriate due process rights of the petitioner are protected, including the right to offer evidence, cross-examine witnesses, and inspect documents; (4) ensure that the decision is supported by competent, material, and substantial evidence in the whole record; and (5) ensure that the decision is not arbitrary and capricious." *S.T. Wooten Corp.*, 210 N.C.

3. In a separate concurring opinion, Judge Berger asserted that Ashe County's failure to appeal from the "decision" embodied in the 22 June 2015 letter precluded Ashe County from challenging the Planning Board's decision to require the issuance of the requested permit to Appalachian Materials, so that neither the Planning Board nor the trial court had jurisdiction over the subject matter of this case. *Ashe Cnty. v. Ashe Cnty. Plan. Bd.*, 265 N.C. App. 384, 400–01, 829 S.E.2d 224, 234–35 (2019) (Berger, J., concurring).

App. at 637, 711 S.E.2d at 161 (quoting *Wright v. Town of Matthews*, 177 N.C. App. 1, 8, 627 S.E.2d 650, 656 (2006)). In the event that a litigant alleges that the Board's decision involves an error of law, that issue is subject to de novo review. *Sun Suites Holdings, LLC v. Bd. of Aldermen of Town of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527–28 (2000) (citing *JWL Invs., Inc. v. Guilford Cnty. Bd. of Adjustment*, 133 N.C. App. 426, 429, 515 S.E.2d 715, 717 (1999)). On the other hand, in the event that a petitioner alleges that the Board's decision lacked sufficient evidentiary support or was arbitrary or capricious, the trial court applies the "whole record" test. *Id.* The scope of appellate review in cases like this one is "the same as that of the trial court," *Fantasy World, Inc. v. Greensboro Board of Adjustment*, 162 N.C. App. 603, 609, 592 S.E.2d 205, 209 (2004), so we must evaluate "whether the trial court exercised the appropriate scope of review and, if appropriate, . . . whether the [trial court] did so properly." *Id.* (quoting *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 140 N.C. App. 99, 102–03, 535 S.E.2d 415, 417, (2000), *aff'd*, 354 N.C. 298, 554 S.E.2d 634 (2001)).

B. Interlocutory Appeals

In challenging the Court of Appeals' decision before this Court, Ashe County begins by arguing that the Court of Appeals created a "new system" of interlocutory appeals in the course of holding that Ashe County was partially bound by the 22 June 2015 letter. More specifically, Ashe County argues that the Court of Appeals' decision "ensures piecemeal litigation by creating *sua sponte* a new one-sided interlocutory appeals system without basis in precedent or regulatory law." According to Ashe County, the "system" created by the Court of Appeals ensures that "local governments are bound unless they appeal within thirty . . . days of the communication any portion of every preliminary communication or evaluation made by their own staff that might be relied upon by an applicant." In Ashe County's view, the Court of Appeals' decision "issues an unfunded mandate to restructure governmental operations" by imposing upon local governments the need to track staff determinations in order to preserve its right to challenge them on appeal, citing *Ashe County*, 265 N.C. App. at 394, 829 S.E.2d at 231.

Ashe County claims that the Court of Appeals' decision "nullifies" a number of this Court's "well-established rules of law." According to Ashe County, the first of these rules is that the government cannot be estopped from asserting the defense of ultra vires, citing *Bowers v. City of High Point*, 339 N.C. 413, 451 S.E.2d 284 (1994), with Ashe County contending that the 22 June 2015 letter was an ultra vires act given that the relevant application was incomplete, citing *Moody v. Transylvania*

County, 271 N.C. 384, 388, 156 S.E.2d 716, 719 (1967) (holding that "no recovery can be had" and "the municipality cannot be estopped to deny the validity of the contract" in the event that the contract is ultra vires). Moreover, unlike the circumstances at issue in *S.T. Wooten Corp.* and *Meier*—both of which, in Ashe County's view, "ar[o]se out of a statutory zoning remedy applicable to final staff decisions where parties, including local governments, possessed a regulatory duty to appeal a final staff decision applying a zoning ordinance within a definite time"—Ashe County claims that it had no duty to appeal a staff decision to the Planning Board in light of the fact that the Planning Board lacks the authority to make final decisions, which are committed to the County Commission in Ashe County's land usage ordinances.

In addition, Ashe County suggests that the Court of Appeals "fail[ed] to understand the [r]ecord" in this matter when it chose to "delv[e] into the factual complexity of the [Planning] Director's preliminary communications to discern whether Appalachian Materials reasonably relied upon [those communications]," with the Court of Appeals having ultimately concluded that Appalachian Materials was, in fact, prejudiced by the June 2015 letter on the theory that Appalachian Materials "could have sought a variance had the Planning Director not made the determination," quoting *Ashe County*, 265 N.C. App. at 393, 829 S.E.2d at 230. In Ashe County's view, this aspect of the Court of Appeals' decision was "arbitrary," "impractical," and "completely wrong" and validated "the wisdom of the no governmental estoppel rule." Moreover, Ashe County contends that Appalachian Materials "could not have reasonably relied upon and did not reasonably rely upon the 22 June 2015 [l]etter" given that, in response to Appalachian Material's request for the issuance of a conditional permit, the Planning Director responded by stating that he would issue a permit for a specific site "assuming the new plans meet the requirements." In view of the fact that the record fails to include a site plan showing the basic components of the proposed plant, such as parking areas, truck areas, and employee bathrooms, or a survey delineating the legal boundaries of the proposed plant, Ashe County contends that the Planning Director could not have objectively determined whether the plant complied with the applicable setback requirements. Finally, Ashe County contends that it would have been an ultra vires act for the Planning Director to issue a PID Ordinance permit when the application disclosed the existence of a violation of the ordinance's setback requirements.

The second rule of law that Ashe County contends that the Court of Appeals nullified is the fact that "administrative final decisions,

including issuance of permits, are routine, nondiscretionary ordinance implementation matters carried out by local government staff," citing *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 507–08, 434 S.E.2d 604, 612 (1993), who possess "limited authority." According to Ashe County, local government staff perform "a purely administrative or ministerial [capacity] following the literal provisions" of ordinances enacted by elected local government officials, citing *Lee v. Board of Adjustment of City of Rocky Mount*, 226 N.C. 107, 110, 37 S.E.2d 128, 131 (1946). More specifically, Ashe County argues that this Court has established a two-step process that local government staff should use in approving permits: the staff member "review[s] an application to determine . . . 'if it is complete' " and then determines "whether it complies with objective standards set forth in the . . . ordinance," quoting *County of Lancaster*, 334 N.C. at 508, 434 S.E.2d at 612. Ashe County asserts that, in this instance, the Planning Director applied this two-step process by initially recognizing that the application was incomplete and then denying the application once it had been completed on the grounds that it violated the ordinance's setback requirements. Ashe County contends that, unless the Court of Appeals' decision is overturned, it will be "forever barred from enforcing [the PID Ordinance's] protective buffer" provisions.

Thirdly, Ashe County argues that the Court of Appeals' decision nullifies this Court's "legal presumptions that private parties voluntarily interacting with local government officials know the law and the limits of local government officials' authority," citing *Moody*, 271 N.C. at 389, 156 S.E.2d at 720. In "grant[ing] Appalachian Materials a special exemption from [these presumptions]," Ashe County asserts that the Court of Appeals' decision "taxes non-participating citizens with . . . paying for a [n]ew [s]ystem of interlocutory appeals that protects applicants claiming ignorance of both the law and the limited authority of local government officials" and requires them to pay "to restructure local governments to establish an entirely new tracking system of preliminary communications" for the benefit of "applicants, like Appalachian Materials."

Finally, Ashe County argues that "the State's political subdivisions are exempt from . . . time limitations" unless the deadline in question "expressly applies to the government," citing *Rowan County Board of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 8, 418 S.E.2d 648, 653 (1992). According to Ashe County, the Court of Appeals' decision leads to an "unwarranted tax on innocent North Carolina citizens" given that the "most cost-efficient means to protect public coffers [in the aftermath of the Court of Appeals' decision] is to impose a gag order on government

officials' communications with citizens," with any such limitation upon the ability of citizens to communicate with local governmental officials being likely to have the most significant impact upon those who lack the resources to seek independent legal advice.

In urging us to uphold the Court of Appeals' decision, Appalachian Materials denies that the Court of Appeals' opinion created any sort of "new system" for the handling of permit applications and contends that Ashe County's brief "does not accurately reflect the Court of Appeals' [o]pinion," which involves nothing more than the "application of existing precedent" to the facts of this case. Appalachian Materials asserts that the Court of Appeals simply held "(i) that the nature of the buildings . . . shown in the [a]pplication was determined by the Planning Director in [the 22 June 2015 letter]" and that, "(ii) where a county's planning department official has made an interlocutory determination that is relied upon by an applicant, to its detriment, such determination must be appealed by the county to its board of adjustments within thirty . . . days, otherwise it becomes binding." As a result, Appalachian Materials claims that the Court of Appeals' opinion "created nothing new" and did nothing more than utilize "the practical realities of the rules set forth in the *Meier* and *S.T. Wooten Corp.* decisions (i.e., that local governments are responsible for handling their own planning departments' decision-making processes)" in concluding that the 22 June 2015 letter was binding upon Ashe County given Appalachian Materials' detrimental reliance upon that letter.

According to Appalachian Materials, Ashe County is the party that actually seeks to create a "new system" by diverging from existing precedent. In Appalachian Materials' view, the "Planning Director is the sole person charged with making interpretations of [the PID Ordinance] and making initial determinations as to whether applications meet [its] objective requirements." For that reason, Appalachian Materials argues that permit applicants are left with "no protections" if they "cannot rely on written determinations from those charged with interpreting and enforcing local land use regulations" and that the adoption of Ashe County's view would enable Planning Directors to reverse prior written determinations "based on the whims of political or community pressure."

In rejecting Ashe County's contention that the Court of Appeals had "nullified" certain basic legal principles, Appalachian Materials begins by disclaiming any suggestion that it is "arguing that [Ashe County] is or should be estopped from enforcing [the PID Ordinance]"; on the contrary, Appalachian Materials claims that it is "arguing, based upon the *S.T. Wooten Corp.* case, that [Ashe County] made a prior determination

through its Planning Director" and "should not now be allowed to reverse course and enforce a new interpretation of the same [o]rdinance." Appalachian Materials argues that Ashe County is "attempt[ing] to avoid the clear guidance in *Meier* and *S.T. Wooten Corp.*, by asserting that these cases are distinguishable because [the PID Ordinance] is neither a zoning ordinance nor a unified development ordinance" and contends that such an argument "should be summarily rejected" on the grounds that, "regardless of what an ordinance is called or under what power it is purportedly enacted, if an ordinance 'substantially affects land use,' it is subject to all requirements and standards regulating planning and land use," citing *Thrash Ltd. Partnership v. County of Buncombe*, 195 N.C. App. 727, 733, 673 S.E.2d 689, 693 (2009), with the PID Ordinance "clearly substantially affect[ing] land use." Appalachian Materials asserts that "[Ashe County] cannot have it both ways—either principles of zoning, development and land use apply to the PID Ordinance, as it argues in support of its argument on the [m]oratorium, or these principles are irrelevant, as it argues in asking this Court to ignore the clear precedent of *Meier* and *S.T. Wooten*."

After noting that Ashe County had made no mention of the last two legal principles that it claimed that the Court of Appeals had "nullified" in its discretionary review petition, citing N.C. R. App. P. 16(a) and *Estate of Fennell v. Stephenson*, 354 N.C. 327, 331–32, 554 S.E.2d 629, 632 (2001), Appalachian Materials contends that it had never "argued or taken the position that it does not know the law or understand the authority of government officials" and that "[Ashe County's] argument regarding the running of time limitations is without merit" given that it "has not offered any explanation for why . . . it could not have appealed the [22 June 2015 letter] pursuant to [N.C.G.S.] § 160A-388(b1)(1)" or pursuant to Planning Ordinance § 153.04(J)(3) as a "person who is directly affected" by a staff decision.

A careful review of the Planning Director's 22 June 2015 letter establishes that it is not, in whole or in part, any sort of final determination. For that reason, we believe that this case, rather than being controlled by *Meier* and *S.T. Wooten Corp.*, more closely resembles *Raleigh Rescue Mission, Inc. v. Board of Adjustment of City of Raleigh* (*In re Historic Oakwood*), 153 N.C. App. 737, 571 S.E.2d 588 (2002). As a result, we hold that the Court of Appeals erred by holding that Ashe County lost its right to challenge the issuance of the permit to Appalachian Materials because it failed to appeal the 22 June 2015 letter to the Planning Board.

In *In re Historic Oakwood*, "[i]n response to an inquiry from [the City of Raleigh's] Deputy City Attorney," the zoning inspector supervisor,

having reviewed the necessary materials, issued a memorandum stating his opinion that, while the "proposed multi-family building proposed by the [petitioner] is permitted[,] [t]he overall operation of the [petitioner] on this site, based on the implication of the Board of Adjustment case, may not be." *Id.* at 739–42, 571 S.E.2d at 589–91 (emphases omitted). In concluding that the memorandum did not constitute an appealable final decision, the Court of Appeals noted that, for there to be a right of appeal under [N.C.G.S. §] 160A-388(b)," "the order, decision, or determination of the administrative official must have some binding force or effect" and that, "[w]here the decision has no binding effect, or is not 'authoritative' or 'a conclusion as to future action,' it is merely the view, opinion, or belief of the administrative official," citing *Midgette v. Pate*, 94 N.C. App. 498, 502–03, 380 S.E.2d 572, 575 (1989). *In re Historic Oakwood*, 153 N.C. App. at 742–43, 571 S.E.2d at 591. In light of the fact that the zoning inspector supervisor "had no decision-making power at the time he issued his memorandum," the Court of Appeals determined that "the memorandum itself affect[ed] no rights" and that the memorandum "was merely advisory in response to a request by [the Deputy City Attorney]." *Id.* at 743, 571 S.E.2d at 591–92.

In *Meier*, on the other hand, the petitioner requested that the Planning Department of the City of Charlotte provide an interpretation of a zoning ordinance as it applied to an adjacent structure that was, at the time, under construction. *Meier*, 206 N.C. at 472, 698 S.E.2d at 706. In response to this request, the interim Zoning Administrator and the successor Zoning Administrator each conducted separate visits to the construction site for the purpose of attempting to respond to the petitioner's question and informed both the petitioner and the owner that they would each receive a letter describing "the manner in which the zoning ordinance would be interpreted and the extent to which additional documentation would be needed so that the builder could obtain a certificate of occupancy." *Id.* Shortly thereafter, the interim Zoning Administrator sent the parties a letter which stated that "[t]he Planning Department is providing the following interpretation of [the zoning ordinance at issue]"; that, since the necessary adjustments had been made by the owner to ensure that the structure "[did] not violate the [applicable zoning ordinance]," the owner merely needed to submit a sealed survey for the purposes of "verify[ing] that the site measurement[s] [the owner] [had] provided [were] accurate" in order for a certificate of occupancy to be released. *Id.* at 474, 698 S.E.2d at 707. In determining that this letter constituted a final, binding decision by the Planning Department, the Court of Appeals noted that, "[b]y his own admission, [the petitioner] sought an interpretation of the [z]oning [o]rdinance as applied

to" the structure in question, that the interim Zoning Administrator possessed "the authority to render an official interpretation of the relevant provisions of the zoning ordinance," and that the interim Zoning Administrator's letter "explicitly dealt with the issue of whether the structure complied with the [zoning ordinance at issue] by explaining the methodology utilized to determine the structure's compliance." *Id.* at 477, 698 S.E.2d at 708–09. As a result, the Court of Appeals determined that the letter "amounted to an evaluation of the extent to which the structure as proposed and as described in the site plans and architectural plans submitted for review by the interim Zoning Administrator complied with the relevant provisions of the Charlotte zoning ordinance" and that the "effect of the . . . letter was to inform [the owner] that, in the event that the structure was built as outlined in the site plans and architectural drawings, it would pass muster for zoning compliance purposes—a determination which "clearly affected the rights of both parties." *Id.* at 477–79, 698 S.E.2d at 709–10. In reaching this conclusion, the Court of Appeals determined that the letter was "clearly couched in determinative" and "authoritative," "rather than advisory" or "tentative" terms. *Id.* at 478–79, 698 S.E.2d at 709–10.

Similarly, in *S.T. Wooten Corp.*, the petitioner requested a zoning determination letter from the Town of Zebulon's Planning Director concerning whether the petitioner's property, which was zoned "Heavy Industrial," could be used for the construction and operation of an asphalt plant. *S.T. Wooten Corp.*, 210 N.C. App. at 634, 711 S.E.2d at 159. The Planning Director responded by sending a letter stating that it was his "interpretation . . . that asphalt plants fall within [the list of permitted uses in the relevant zoning category] or are similar enough to be grouped together and are therefore also permitted" and that, "prior to any construction a site plan must be reviewed by the Zebulon Technical Review Committee and construction plans must be submitted along with an application in pursuit of a building permit." *Id.* at 635, 711 S.E.2d at 159. The Planning Director reiterated this conclusion in a subsequent "Zoning Consistency Determination" and in a letter to the North Carolina Department of Environment and Natural Resources. *Id.* at 635, 711 S.E.2d at 159–60. In light of the fact that the petitioner had "specifically requested that the Planning Director interpret the Zebulon Ordinance and determine whether an asphalt plant was a permitted use," the fact that the Planning Director "was expressly empowered by . . . the Zebulon Ordinance to provide formal interpretations of the zoning provisions therein," and the fact that the Zebulon Ordinance provided that "such zoning interpretations by the [Planning Director] may be binding," the Court of Appeals determined that the initial letter that

the Planning Director sent to the petitioner constituted "a clear exercise of the [Planning Director's] authority to evaluate and determine to what extent a proposed use complied with the ordinance" and served as "a formal interpretation of the zoning ordinance to a landowner seeking such interpretation as it related specifically to its property." *Id.* at 641–42, 711 S.E.2d at 163. "Because that . . . determination was lawful and not in violation of the ordinance," the Court of Appeals concluded that "the Town should not now be allowed to enforce a new interpretation of the same ordinance by injunction or otherwise." *Id.* at 644, 711 S.E.2d at 165.

Unlike the communications at issue in *Meier* or *S.T. Wooten Corp.*, the letter that the Planning Director sent to Appalachian Materials on 22 June 2015 was not couched in anything resembling "determinative" or "authoritative" terms. On the contrary, the record that is before us in this case reflects that the Planning Director explicitly stated that he *did not* possess the authority to issue a PID Ordinance permit until all of the necessary conditions had been met and that, as of 22 June 2015, all necessary conditions *had not* been met. In this sense, the Planning Director's 22 June 2015 letter was nothing more than a "recommendation" that was being provided at that preliminary stage of the review process and constituted something *less than* a decision in Appalachian Materials' favor in light of the Planning Director's inability to make such a decision. In addition, the 22 June 2015 letter did not affect the rights of the parties given that no permit was issued or denied and no action was authorized or prohibited because of the transmission of that communication. As a result, the facts of this case are much more similar to those at issue in *In re Historic Oakwood* than either *Meier* or *S.T. Wooten Corp.*, all of which we believe to have been correctly decided.

In addition, we also conclude that *no part* of the 22 June 2015 letter constituted a final, binding decision that Ashe County had to appeal to the Planning Board in order to preclude any part of that letter from having a binding effect. We agree with Ashe County that the Court of Appeals' determination that the chart attached to the 22 June 2015 letter constituted a final and binding decision with respect to the setback requirements suggests that an interlocutory appeal must be taken from any staff assessment addressing the extent to which an applicant has satisfied any particular ordinance requirement regardless of whether that staff assessment was otherwise appealable in order to avoid being bound by it. Any such decision would invite the prosecution of multiple, piecemeal appeals from land-use decisions made by local government staff, a practice that this Court has repeatedly discouraged at the appellate level. *See, e.g.*, *Veazey v. City of Durham*, 231 N.C. 357, 363–64, 57

S.E.2d 377, 382 (1950) (stating that "[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders" and that "[t]he rules regulating [interlocutory appeals] are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, i.e., to administer 'right and justice . . . without sale, denial, or delay' " (quoting N.C. Const. art. I, § 35)). As is the case at the appellate level, the adoption of a requirement that parties take interlocutory appeals in order to avoid the risk of being precluded from taking action at a later time risks the introduction of unnecessary delay, confusion, and expense into the land-use regulation process. Nothing in either *Meier* or *S.T. Wooten Corp.*, both of which involved determinations that were final, rather than interlocutory, in nature, requires such a result, and we disclaim any suggestion that existing law makes the taking of interlocutory, land-use-related appeals necessary in order to avoid giving such interlocutory determinations binding effect or that interlocutory land-use decisions may never be changed regardless of the nature of the relevant circumstances. *See Russ v. Woodard*, 232 N.C. 36, 41, 59 S.E.2d 351, 355 (1950) (stating that "[a]n interlocutory order or judgment differs from a final judgment in that an interlocutory order or judgment is subject to change by the court during the pendency of the action to meet the exigencies of the case") (cleaned up). As a result, for all of these reasons, we reverse the Court of Appeals' decision with respect to the issue of whether Ashe County was precluded from challenging the issuance of the PID Ordinance permit to Appalachian Materials on the grounds that it failed to seek review of the statements that the Planning Director made in the 22 June 2015 letter.

C. Other Issues

The Court of Appeals addressed a number of additional issues in its opinion, including whether Appalachian Materials' application was sufficiently complete at the time that it was submitted to the Planning Director to trigger the application of the permit choice statutes, whether the Planning Director was authorized to deny Appalachian Materials' permit application on the basis of the moratorium statute, whether the proposed asphalt plant was located within 1,000 feet of a commercial building, and whether the Planning Board erred by rejecting the Planning Director's determination that Appalachian Materials' application contained material misrepresentations. Each of these issues was discussed in detail in the briefs that the parties filed with this Court and, in view of our determination that Ashe County's failure to appeal

to the Planning Board from the 22 June 2015 letter did not preclude the Planning Director from revisiting the issue of whether Appalachian Materials was entitled to the issuance of the requested permit following the issuance of the air quality permit, each of these issues must be resolved in order to fully address Ashe County's appellate challenge to the lawfulness of the trial court's order. In view of the fact that the Court of Appeals expressly relied upon Ashe County's failure to appeal from the 22 June 2015 letter to the Planning Board in rejecting its contention that the proposed asphalt plant violated the setback requirements of the PID Ordinance and the fact that all of these additional issues appear to us to be, to a greater or lesser extent, interrelated with the appeal-related issue that we have resolved earlier in this opinion, we conclude that the Court of Appeals should revisit each of these additional issues and decide them anew without reference to the fact that Ashe County did not appeal the 22 June 2015 letter. Although the 22 June 2015 letter did not constitute a final decision triggering the necessity for an appeal, we do not hold that that letter is irrelevant to the making of the necessary determinations on remand, with the parties remaining free to argue any legal significance that the letter may or may not, in their view, have. As a result, we hold that this case should be remanded to the Court of Appeals for reconsideration of each of these additional issues in light of our decision today.

III. Conclusion

Thus, for all of these reasons, we conclude that the Court of Appeals erred by determining that Ashe County's failure to appeal the Planning Director's 22 June 2015 letter gave that letter partially binding effect and reverse the portion of the Court of Appeals' decision that reached a contrary conclusion. In addition, in view of the interrelationship between the proper resolution of the remaining issues that are before us in this case and the Court of Appeals' erroneous determination that Ashe County was bound by the opinions that the Planning Director expressed in the 22 June 2015 letter, we remand this case to the Court of Appeals for reconsideration of the remaining issues in light of our decision that the 22 June 2015 letter is not entitled to preclusive effect. As a result, the Court of Appeals' decision is reversed, in part, and remanded to the Court of Appeals for further proceedings not inconsistent with this opinion.

REVERSED, IN PART, AND REMANDED.

ROY A. COOPER, III, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; CHARLTON L. ALLEN, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE NORTH CAROLINA INDUSTRIAL COMMISSION; AND YOLANDA K. STITH, IN HER OFFICIAL CAPACITY AS VICE-CHAIR OF THE NORTH CAROLINA INDUSTRIAL COMMISSION

No. 315PA18-2

Filed 18 December 2020

Constitutional Law—state budget process—federal block grants —legislative appropriation

Where the state constitution grants to the General Assembly exclusive power over the state's expenditures, the General Assembly's appropriation of federal block grants as part of the state budget process was a proper exercise of its constitutional authority and was not a violation of the separation of powers provision in Art. I, Section 6. Contrary to the Governor's contention, the block grant funds were not "custodial funds" (as defined in the State Budget Act, Ch. 143C) exempt from legislative control and were subject to allocation by the legislature as part of the State treasury.

Justice EARLS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-30 and § 7A-31 of a unanimous, published decision of the Court of Appeals, 837 S.E.2d 7 (N.C. Ct. App. 2019), affirming a final judgment entered on 9 April 2018 by Judge Henry W. Hight, Jr., in Superior Court, Wake County. Heard in the Supreme Court on 31 August 2020.

Daniel F. E. Smith, Jim W. Phillips, Jr., and Eric M. David, for plaintiff-appellant Roy Cooper, Governor of the State of North Carolina.

Nelson Mullins Riley & Scarborough LLP, by D. Martin Warf and Noah H. Huffstetler, III, for defendants-appellee Philip E. Berger and Timothy K. Moore.

K&L Gates LLP, by Matthew T. Houston and Zachary S. Buckheit, for amicus curiae North Carolina Chamber Legal Institute.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General; James W. Doggett, Deputy Solicitor General; and Daniel P. Mosteller, Special Deputy Attorney General, for amicus curiae State of North Carolina.

ERVIN, Justice.

The issue before us in this case is the extent to which the Governor of the State of North Carolina, as compared to the North Carolina General Assembly, has the authority to determine the manner in which monies derived from three specific federal block grant programs should be distributed to specific programs. After careful consideration of the record in light of the applicable law, we hold that the General Assembly did not overstep its constitutional authority by appropriating the relevant federal block grant money in a manner that differs from the Governor's preferred method for distributing the funds in question. As a result, the Court of Appeals' decision upholding the trial court's decision to grant judgment on the pleadings in favor of the legislative defendants and against the Governor in this case is affirmed.

I. Factual Background

A. Substantive Facts

In March of 2017, plaintiff-appellant Roy A. Cooper, III, acting in his capacity as the duly-elected Governor, submitted a recommended budget to the General Assembly in which he suggested that funds derived from three specific federal block grant programs be spent in a particular manner. More specifically, the Governor recommended (1) that monies received from the Community Development Block Grant (CDBG) program be spent in such a manner that $10,000,000 would be allocated to "Scattered Site Housing" projects, $13,737,500 would be allocated to "Economic Development" projects, and $18,725,000 would be allocated to "Infrastructure" projects; that monies received from the Substance Abuse Block Grant (SABG) program be spent in such a manner that $29,322,717 would be allocated to projects related to "Substance Abuse Treatment for Children and Adults"; and that monies received from the Maternal and Child Health Block Grant (MCHBG) program be spent in such a manner that $14,070,680 would be allocated to projects related to "Women and Children's Health Services."

On 22 June 2017, the General Assembly adopted Senate Bill 257, which approved a state budget for the 2017–2019 biennium. Although the Governor vetoed Senate Bill 257, the General Assembly overrode

the Governor's veto, so that the legislation in question became law as Session Law 2017-57. In its approved budget, the General Assembly redirected approximately $13,000,000 in funds derived from the CDBG program, $2,200,000 in funds derived from the SABG program, and $2,300,000 in funds derived from the MCHBG program to projects selected by the General Assembly. More specifically, Session Law 2017-57 redirected funds derived from the CDBG program to "Neighborhood Revitalization" projects and away from "Scattered Site Housing," "Economic Development," and "Infrastructure" projects; redirected funds derived from the SABG program to "Competitive Block Grant" projects and away from "Substance Abuse Treatment Services for Children and Adults" projects; and redirected funds derived from the MCHBG program to a "Perinatal Strategic Plan Support Position" project and the "Every Week Counts" project and away from "Women and Children's Health Services" projects. 2017 N.C. Sess. Laws 57 §§ 11A.14.(a), 11L.1.(a), 11L.1.(y)–(z), 11L.1.(aa)–(ee), 15.1.(a), 15.1.(d).

B. Procedural History

1. Trial Court Proceedings

On 26 May 2017 the Governor filed a complaint against defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his official capacity as the Speaker of the North Carolina House of Representatives; and two additional defendants, in their capacities as officials of the North Carolina Industrial Commission.[1] In his original complaint, the Governor challenged the constitutionality of two state session laws and six state statutes that had been enacted by the General Assembly in late 2016 and early 2017 immediately prior to and shortly after the Governor took office on the grounds that the challenged legislation unconstitutionally curtailed the Governor's authority as defined in the North Carolina State Constitution. On 8 August 2017, the Governor filed an amended complaint in which he added claims challenging the constitutionality of the 2017–19 state budget as enacted in Session Law 2017-57. On 14 September 2017, the legislative defendants filed a responsive pleading in which they moved for dismissal of the Governor's amended complaint, denied the material allegations set out in the amended complaint, and asserted various affirmative defenses.

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1. In view of the fact that the issues that led to the naming of these two Industrial Commission officials as defendants are not before the Court in this appeal, we will refrain from discussing the claims that the Governor asserted relating to those defendants any further in this opinion.

On 16 March 2018, the Governor filed a motion seeking the entry of summary judgment in his favor with respect to two of the claims asserted in his amended complaint, including his challenge to the constitutionality of the enacted state budget and the reallocation of the monies derived from the CDBG program, the SABG program, and the MCHBG program. On 19 March 2018, the legislative defendants filed a motion seeking the entry of judgment on the pleadings in their favor with respect to the same claims.

On 4 April 2018, the pending motions came on for hearing before the trial court. On 9 April 2018, the trial court entered an order granting the legislative defendants' motion for judgment on the pleadings and dismissing the relevant claims as set forth in the amended complaint on the grounds that the disputed block grant funds were "designated for the State of North Carolina [to] be paid into the State treasury" and that, in accordance with N.C. Const. art., V, § 7, "no money can be drawn from the State treasury without an appropriation" by the General Assembly. The Governor noted an appeal to the Court of Appeals from the trial court's order.

2. Appellate Proceedings

In seeking relief from the order before the Court of Appeals, the Governor argued that the General Assembly did not have the authority to appropriate the relevant block grant funds by passing Session law 2017-57 on the theory that the funds in question were not contained "within" the State treasury. After conceding that, in accordance with the North Carolina State Constitution, money entering the State treasury can only be appropriated in accordance with legislation adopted by the General Assembly, such as the state budget, the Governor argued that the block grant funds at issue in this case never entered the State treasury. As support for this contention, the Governor relied upon this Court's decision in *Gardner v. Bd. of Trustees of N.C. Local Governmental Employees' Ret. Sys.*, 226 N.C. 465, 468, 38 S.E.2d 314, 316 (1946), which described the "State treasury" as "[m]onies paid into the hands of the state treasurer *by virtue of a state law*" (emphasis added). According to the Governor, the block grant funds at issue in this case were raised and appropriated by federal, rather than state, law and should, for that reason, be treated as "custodial funds" that are "beyond the legislative power of appropriation." Arguing in reliance upon the Colorado Supreme Court's decision in *Colo. Gen. Assembly v. Lamm*, 700 P.2d 508, 524–25 (Colo. 1985) (*Lamm I*), the Governor asserts that custodial funds are monies that are "not generated by tax revenues" and have been "given to the state for particular purposes," a set of circumstances that places

them outside the reach of the General Assembly's appropriation power and makes them subject to executive branch, rather than legislative branch, control.

On the other hand, the legislative defendants argued that the named recipient of the relevant block grant funds was "the State of North Carolina" and that, "[a]s such, the funds come into the State treasury and are properly subject to legislative appropriation, pursuant to Article V, Section 7(1) of the North Carolina Constitution," which provides that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law." As a result, the legislative defendants urged the Court of Appeals to affirm the trial court's order.

In affirming the trial court's order, the Court of Appeals began by analyzing the history and purpose of federal block grant programs. According to the Court of Appeals, the federal government had expanded the number of block grants over time on the theory that they "provided state and local governments additional flexibility in project selection" as compared to other types of grants. *Cooper v. Berger*, 837 S.E.2d 7, 13 (N.C. Ct. App. 2019) (*Cooper II*) (quoting Robert Jay Dilger & Michael H. Cecire, Cong. Research Serv., R40638, *Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues* 39 (2019)). In addition, the Court of Appeals noted that, in the statutory provisions governing the relevant block grant programs, Congress had elected to refrain from including statutory language "that would have required state legislative appropriation of the . . . block grants" and to remain "silent regarding the authority of state legislatures to appropriate federal block grant funds." *Id.* at 14. Although the relevant block grant statutes "impose certain restrictions and criteria" upon their recipients, the Court of Appeals acknowledged that they afford "significant discretion to the recipient states on how that money is ultimately spent." *Id.* at 15.

The Court of Appeals rejected the Governor's contention that the relevant block grant monies were not part of the State treasury on the theory that *Gardner* actually expanded the types of funds deemed to be held within the State treasury rather than limiting the contents of the State treasury to monies stemming from "taxes, fines, or penalties" raised pursuant to state law. *See Gardner*, 226 N.C. at 467, 38 S.E.2d at 316. In addition, the Court of Appeals noted that the block grant funds at issue in this case did, as a technical matter, "enter into the hands of the State Treasurer by virtue of a State Law" given the statutory mandate that:

> [a]ll funds belonging to the State of North Carolina, in the hands of any head of any department of the State which collects revenue for the State in any form whatsoever, and every institution, agency, officer, employee, or representative of the State or any agency, department, division or commission thereof . . . collecting or receiving any funds or money belonging to the State of North Carolina, shall daily deposit the same in some bank, or trust company, selected or designated by the State Treasurer, in the name of the State Treasurer.

N.C.G.S. § 147-77 (2019). Similarly, the Court of Appeals rejected the Governor's argument that Congress had intended for the executive branch in each state government to control the manner in which the relevant block grant monies were spent on the grounds that *Lamm II* had not persuaded it of the merits of that contention. *See Colorado General Assembly v. Lamm*, 738 P.2d 1156, 1169 (Colo. 1987) (*Lamm II*) (reviewing a number of block grant statutes, including those at issue in this case, and finding that "Congress has left the issue of state legislative appropriation of federal block grants for each state to determine").

The Court of Appeals agreed with the legislative defendants that the named recipient for the block grants was "the State of North Carolina" rather than the Governor or any state executive agency and concluded that "[t]he fact that specific State agencies are tasked with administering each Block Grant does not render those agencies the sole beneficiaries or allocators to the exclusion of the rest of the State." *Cooper II*, 837 S.E.2d at 20. Finally, the Court of Appeals declined to hold that the relevant block grant funds constituted "custodial funds" or "agency funds" for purposes of N.C.G.S. §§ 143C-1-1, noting that the "General Assembly has been appropriating block grants . . . without challenge through the budgetary appropriations process since 1981." *Id.* at 21 (citing 1981 N.C. Sess. Laws Ch. 1282 § 6). As a result, since the Court of Appeals could not identify any constitutional support for the Governor's argument that the relevant block grant funds were outside the scope of the General Assembly's appropriation authority, it affirmed the trial court's order.

On 7 January 2020, the Governor filed a notice of appeal from the Court of Appeals' decision pursuant to N.C.G.S. § 7A-30(1) on the grounds that this case involves a substantial question arising under the North Carolina State Constitution and, in the alternative, a petition seeking discretionary review of the Court of Appeals' decision pursuant to N.C.G.S. § 7A-31(c). On 26 February 2020, this Court retained jurisdiction

over the Governor's appeal and allowed the Governor's discretionary review petition.

II. Substantive Legal Issues

A. Positions of the Parties

1. Governor's Arguments

In seeking to persuade us to reverse the Court of Appeals decision, the Governor begins by contending that the Court of Appeals erred by determining that the block grant funds at issue in this case were "within the State treasury" and rejecting his assertion that N.C. Const. art. V, § 7, does not authorize the General Assembly to appropriate these federal block grant funds. In support of this assertion, the Governor places substantial reliance upon *Gardner*'s description of the "State treasury" as money that is "paid into the hands of the state treasurer by virtue of a state law," arguing that, in order for money to be within the State treasury, it must be "[1] obtained under the power of the state to enforce collection" and "[2] placed in the hands of the state treasurer to be handled by him in accordance with the provisions of a state law." 226 N.C. at 467, 38 S.E.2d at 316. As a result, the Governor contends that only money that is raised as the result of state taxation or some other state revenue-generating activity should be deemed to be part of the State treasury. *Id.* at 467, 38 S.E.2d at 316; *see also Garner v. Worth*, 122 N.C. 250, 29 S.E. 364 (1898) (defining the State treasurer as "the officer in whose hands the legislative department has placed the *funds it has raised and appropriated*") (emphasis added).

As additional support for this argument, the Governor relies upon N.C. Const. art. IX, § 6, which defines the "State school fund" and provides that:

> The proceeds of all lands that have been or hereafter may be granted by the United States to this State, and not otherwise appropriated by this State or the United States; all moneys, stocks, bonds, and other property belonging to the State for purposes of public education; the net proceeds of all sales of the swamp lands belonging to the State; and *all other grants, gifts, and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise*, shall be paid into the State Treasury and, together with so much of the revenue of the State as may be set apart for that purpose, shall be faithfully

> appropriated and used exclusively for establishing and maintaining a uniform system of free public schools.

N.C. Const. art. IX, § 6 (emphasis added). In the Governor's view, monies derived from the relevant block grant programs constitute funds that are "otherwise appropriated . . . by the terms of the grant" and should not, for that reason, be deemed to have been paid into the State treasury.

The Governor further contends that the Court of Appeals erred by interpreting *Gardner* in such a manner as to find that funds enter the State treasury by virtue of N.C.G.S. § 147-77. In the Governor's view, the reasoning upon which the Court of Appeals relied impermissibly "allows a statutory enactment to determine a constitutional meaning." On the contrary, the Governor argues that, since the relevant federal block grant funds are not encompassed within the State treasury in light of the test articulated in *Gardner*, they constitute a separate category of "custodial funds" that are not subject to appropriation by the General Assembly. In support of this proposition, the Governor cites decisions from other jurisdictions, such as Colorado, Oklahoma, and Massachusetts, in which the highest court in the states in question recognized the existence of a category of funds that was not subject to legislative appropriation. *See Lamm I*, 700 P.2d 508, 524–25 (Colo. 1985); *Opinion of the Justices to the Senate*, 378 N.E.2d 433, 436 (Mass. 1978); *In re Okla. ex rel. Dep't of Transp.*, 646 P.2d 605, 609–10 (Okla. 1982). According to the Governor, the concept of a "custodial fund" is explicitly recognized in N.C. Const. art. IX, § 6. In addition, the Governor claims that the relevant block grant funds constitute custodial funds given that they are "trust fund[s] or agency fund[s]" as described in N.C.G.S. § 143C-1-1 (defining state funds as "[a]ny moneys including federal funds deposited in the State treasury except moneys deposited in a trust fund or agency fund as described in G.S. 143C-1-3").

The Governor argues that the absence of any federal statutory language allowing state legislatures to appropriate the block grant funds indicates that Congress did not intend for state legislatures to exercise such authority. *See Alcoa S.S. Co. v. Fed. Mar. Comm'n*, 348 F.2d 756, 758 (D.C. Cir. 1965) (stating that, "[w]here Congress has consistently made express its delegation of a particular power, its silence is strong evidence that it did not intend to grant the power"). In addition, the Governor directs our attention to *In re Separation of Powers*, 305 N.C. 767, 772, 295 S.E.2d 589, 592 (1982), which he describes as recognizing that the 1982 General Assembly was uncertain as to whether it had the authority to enact legislation that would delegate decision-making authority relating to federal block grant monies to a twelve-member

legislative committee. In an advisory opinion provided by this Court, its members suggested that the enactment of such a statute would likely be unconstitutional before declining to decide whether the General Assembly was authorized "to determine how the [block grant] funds will be spent" given that the briefs and the other materials submitted for the Court's consideration "contain[ed] very little, if any, information about the grants, their purposes, for whom they are intended, and the conditions placed on them by Congress." 305 N.C. at 778, 295 S.E.2d at 595.

Secondly, the Governor argues that the General Assembly's appropriation of the relevant federal block grant funds violates the separation of powers provision of the State constitution, N.C. Const. art. I, § 6 (providing that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other"), and interferes with his constitutional duty to see that the laws are faithfully executed, N.C. Const. art. III, § 5(4) (providing that "[t]he Governor shall take care that the laws be faithfully executed."). In support of this assertion, the Governor directs our attention to this Court's decision in *State ex rel. McCrory v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016), which holds that a separation of powers violation occurs "when one branch exercises power that the constitution vests exclusively in another branch" or when "the actions of one branch prevent another branch from performing its constitutional duties." According to the Governor, his duty to ensure that the laws are faithfully executed includes "the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed . . . to make," citing *Cooper v. Berger*, 370 N.C. 392, 414–15, 809 S.E.2d 98, 111–12 (2018) (*Cooper I*). In the Governor's view, his duty to ensure that the laws are faithfully executed encompasses the responsibility to determine the distribution and administration of the block grant funds that become available to the State of North Carolina. In essence, the Governor claims that, since the relevant block grant funds have already been appropriated "(by Congressional action), the only way for the General Assembly to coerce gubernatorial action is through (unconstitutional) interference with the Governor's spending of federal funds" by reappropriating those funds.

Thirdly, the Governor cites decisions from six other jurisdictions holding that the state executive branch exercises control of monies provided by the federal government to the exclusion of the state legislative branch and urges this Court to find that the relevant block grant funds are "custodial funds" not subject to state legislative appropriation. According to the Governor, "custodial funds" are those which have been

appropriated by a federal statute specifying (1) "the purposes the state is directed to accomplish with the money," (2) "the manner in which the purposes are to be accomplished," and (3) "the restrictions placed on use of the funds by the federal government." *Lamm II*, 738 P.2d at 1173. Although the Governor acknowledges that decisions from the highest state courts in four other jurisdictions have held that monies derived from the federal government are subject to legislative appropriation, he argues that we should not find these decisions to be persuasive on the grounds that "[a]pplication of the overly broad constitutional rules" applied in those cases "would distort North Carolina law."

2. Legislative Defendants' Arguments

In seeking to persuade us to affirm the Court of Appeals' decision, the legislative defendants begin by arguing that Congress, rather than making the relevant federal block grant monies subject to state executive branch control, "left the issue of state legislative appropriation of federal block grants for each state to determine," *citing Cooper II*, 837 S.E.2d 7, 19 (quoting *Lamm II*, 738 P.2d at 1169), and that the relevant federal statutes make the State, rather than any executive branch agency or official, the named recipient of the relevant grant funds, citing 42 U.S.C. §§ 5302, 5303 (defining a "State" as "any State of the United States, or any instrumentality thereof approved by the Governor" and authorizing the making of grants to "States, units of general local government, and Indian tribes"); 42 U.S.C. § 300x-64(b)(2) (defining "State" as "each of the several States, the District of Columbia, and each of the territories of the United States"); 42 U.S.C. §§ 701(c)(5)(b), 702(c) (defining "State" as "each of the 50 States and the District of Columbia" and providing that the federal government "shall allot to each State which has transmitted an application [for the funds] . . . an amount determined" by statute). As a result, the legislative defendants contend that the Court of Appeals correctly held that, as a constitutional matter, the relevant block grant funds "pass through the constitutional and codified budgetary process."

In addition, the legislative defendants contend that the Court of Appeals correctly interpreted *Gardner* as expanding, rather than limiting, the definition of the funds that are contained within the State treasury. According to the legislative defendants, this Court held in *Gardner* "that general funds derived from general taxation *and* funds coming into the hands of the State Treasurer by virtue of a State law . . . can be disbursed only in accordance with legislative authority," with *Gardner* providing no support for any contention that there is a category of state funds that is outside the General Assembly's appropriation authority. Similarly, the legislative defendants argue that N.C. Const. art. IX, § 6,

does not create a category of funds that is outside legislative control given that the categories of funds to which it refers "*are* paid into the State Treasury and are then to be used exclusively for the public schools."

In the legislative defendants' view, the State constitution provides that the State Treasurer's duties "shall be prescribed by law," N.C. Const. art. III, § 7(2), with the General Assembly having directed the State Treasurer to "receive[ ] all moneys which shall from time to time be paid into the treasury of this state." *Gardner*, 226 N.C. at 468, 38 S.E.2d at 316 (citing N.C.G.S. § 147-68(a)). According to the legislative defendants, "it is not clear that the Governor (as opposed to the State) could even 'receive' the block grant funds at issue" given that N.C.G.S. § 143C-7-2(a) provides no support for such a proposition.

The legislative defendants also argue that the General Assembly is the policy-making branch of government, with the appropriation of funds ultimately being a policy decision, citing *Rhyme v. K-Mart Corp.*, 358 N.C. 160, 169–70, 594 S.E.2d 1, 8–9 (2004) (stating that "the General Assembly is the policy-making agency because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws"). Although this Court did hold in *Cooper I* that the Governor should be free to "implement the policy decisions that executive branch agencies subject to his or her control are allowed, through delegation from the General Assembly, to make," this holding does not allow the Governor to make policy decisions that are outside of "the guardrails set by the General Assembly" in delegating its policy-making authority. *Cooper I*, 370 N.C. at 415 n.11, 809 S.E.2d at 112 n.11 (noting that the use of the phrase "the Governor's policy preferences" should "not be understood as suggesting that [a state executive agency] has the authority to make any policy decision that conflicts with or is not authorized by the General Assembly, subject to applicable constitutional limitations").

Finally, the defendants argue that the cases from other jurisdictions upon which the Governor relies that posit the existence of a category of "custodial" funds should not be deemed controlling in this case given that "each state constitution has its own unique history of development, both in terms of the constitutional text itself and of the judiciary's interpretation of that text." *Cooper v. Berger*, 371 N.C. 799, 813, 822 S.E.2d 286, 297 (2018). As a result, the legislative defendants urge us to affirm the Court of Appeals' decision.

B. Analysis of the Parties' Positions

1. Standard of Review

According to well-established North Carolina law, this Court reviews constitutional questions using a de novo standard of review. *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252 (citing *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001)). "In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Id.* (citing *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 287–88 (2015)). "All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448–49, 385 S.E.2d 473, 478 (1989). "The presumption of constitutionality is not, however, and should not be, conclusive," with an act of the General Assembly being subject to invalidation if it offends a specific constitutional provision beyond a reasonable doubt. *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 4, 413 S.E.2d 541, 543 (1992). On the other hand, if a statute passed by the General Assembly complies with the requirements of the state and federal constitutions, it must be upheld. *See Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016) (noting that the North Carolina constitution "is in no matter a grant of power" and that "all power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it") (quoting *Lassiter v. Northampton Cty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958)).

2. Federal Block Grant Programs

As an initial matter, we note that the federal block grant programs at issue in this case constitute "allocations of sums of money from the United States Government to the various states," the use of which "is largely left to the discretion of the recipient state" as long as that use falls within the broad statutory requirements of each grant.[2] *Legislative*

2. We are unable to discern anything in the relevant federal statutory provisions that prescribes the manner in which the funds derived from the federal block grants at issue in the case must be distributed to the actual payees. As the Governor conceded at oral argument, this case must be decided on the basis of state law rather than upon the basis of a determination that the relevant federal statutes require that the identification of the payees of the proceeds of the federal grant programs at issue in this case be made by either the executive or legislative branches of state government.

Research Comm'n By & Through Prather v. Brown, 664 S.W.2d 907, 928 (Ky. 1984). The three block grants at issue in this case were created by means of the Omnibus Budget and Reconciliation Act of 1981 (OBRA), Pub.L. 97–35, in which Congress consolidated approximately seventy-five "categorical grants" into nine new block grant programs. *Lamm II*, 738 P.2d at 1160. At that time, block grants were viewed as a "midpoint in the continuum of recipient discretion" on the grounds that they afforded recipient states more control over the spending of federal funds than had been the case with monies derived from federal categorical grant programs, while giving the recipient states less control over the relevant grant funds than was afforded in connection with federal "revenue-sharing" funds.[3] *Cooper II*, 837 S.E.2d at 13 (quoting Robert Jay Dilger & Eugene Boyd, Cong. Research Serv., R40486, *Block Grants: Perspectives and Controversies* 3 (2014)); *see also Lamm II*, 738 P.2d at 1159. As a result, block grants were intended to give recipient states "substantial discretion in identifying problems and designing programs to meet those problems." *Lamm II*, 738 P.2d at 1159 (citing Advisory Commission on Intergovernmental Relations, *Safe Streets Reconsidered: The Block Grant Experience 1968–1975* 1 (1977)).

In advising Congress with respect to the enactment of OBRA, the United States Comptroller General opined that the categorical grant system inhibited the involvement of state legislatures in administering the monies in question and recommended that "these Federal constraints on state legislative involvement be removed." Report to the Congress by the Comptroller General of the United States, GGD–81–3 (Dec. 15, 1980), https://www.gao.gov/products/GGD-81-3. In addition, the Comptroller General found that "the absence of [state] legislative involvement adversely affect[ed] federal interests" by diminishing the recipient state's accountability to the federal government given the absence of legislative oversight of state executive actions and recommended that OBRA "not be construed as limiting or negating the powers of the state legislatures under State law to appropriate federal funds." *Id.* at iii. However, Congress declined to "include in OBRA the comptroller general's recommendation that would have required state legislative appropriation of the OBRA block grants" and, instead, left "OBRA [ ]

3. According to the Colorado Supreme Court, categorical grants "involve a high degree of federal regulation and often have gone to local governments or independent single-purpose agencies such as urban renewal authorities or housing authorities," while revenue sharing is a "general support payment program designed to provide financial resources to state and local governments to spend for local priorities." *Lamm II*, 738 P.2d at 1159.

silent regarding the authority of state legislatures to appropriate federal block grant funds." *Lamm II*, 738 P.2d at 1160.

As the record reflects, North Carolina has been receiving funds pursuant to the three relevant federal block grants at issue in this case since those programs were created in 1981. Throughout that time, the General Assembly has appropriated the funds on an annual basis through the enactment of state budget legislation. *See*, *e.g.*, 1981 N.C. Sess. Laws Ch. 1282 § 6. In 2017, the proceeds made available by block grant programs and other federal grants made up 28.4% of North Carolina's total budget. Federal Aid to State and Local Governments, Center on Budget and Policy Priorities (Apr. 19, 2018), https://www.cbpp.org/research/state-budget-and-tax/federal-aid-to-state-and-local-governments.

The CDBG program is administered at the federal level by the United States Department of Housing and Urban Development (HUD), with its stated purpose being, among other things, "to eliminate blight, to conserve and renew older urban areas, to improve the living environment of low- and moderate-income families, . . . to develop new centers of population growth and economic activity," and to provide "decent housing and a suitable living environment and expanding economic opportunities" for persons of low and moderate income. 42 U.S.C. § 5301. At least seventy percent of the federal funds awarded to the states pursuant to the CDBG program must be used to support persons of low and moderate income. *Id.* § 5301(c). According to the relevant federal statutory provisions, the term "State" is defined to mean "any State of the United States, or any instrumentality thereof approved by the Governor; and the Commonwealth of Puerto Rico." 42 U.S.C. §§ 5302, 5303.

At the state level, the CDBG program is administered by the North Carolina Department of Commerce, which applies to HUD for an award of CDBG funds, with the State's application being required to include "Consolidated Plans," "Annual Action Plans," and "Analyses of Impediments to Fair Housing Choice" which detail how the monies awarded pursuant to the program will be spent in compliance with federal law. After HUD has reviewed and approved the State's application and the accompanying plans submitted by the Department of Commerce, the Department of Commerce is required to submit a disbursement request to HUD associated with a specific project expenditure, at which point HUD remits the relevant funds to a "[Department of Commerce] account held by the Department of [the] State Treasurer."

The MCHBG program is administered at the federal level by the Department of Health and Human Services (DHHS), with its stated

purposes being, among other things, to provide access to quality health services for mothers and children, "to reduce infant mortality and the incidence of preventable diseases and handicapping conditions among children," to increase immunizations among children, and to "promote the health of mothers and infants by providing prenatal, delivery, and postpartum care for low income, at-risk pregnant women." 42 U.S.C. § 701. According to the relevant federal statutory provisions, the "State maternal and child health agency" of each recipient state must "prepare and submit to the Secretary [of DHHS] annual reports on its activities under this subchapter." *Id.* § 706.

In North Carolina, the MCBHG program is administered by the North Carolina Department of Health and Human Services, which applies to the federal DHHS for an award of block grant funds. After the federal DHHS has approved the State's application, the North Carolina DHHS submits a "draw down" request for funds, which are then deposited by the federal DHHS into an account held by the State Treasurer. After the North Carolina DHHS obtains access to the MCBHG funds, it disburses the funds in question to a subdivision within the agency or to a third party for use in compliance with the governing statute. The federal DHHS conducts regular audits to ensure that the North Carolina DHHS is administering the MCBHG program in accordance with the applicable provisions of federal law.

The SABG program is also administered at the federal level by the federal DHHS, with its stated purpose being to provide "community mental health services for adults with a serious mental illness and children with a serious emotional disturbance." 42 U.S.C. § 300x(b)(1). As a precondition for being eligible to receive funds pursuant to the SABG program, recipient states must submit reports detailing the efforts that they are making to ensure that tobacco products are not sold to persons under twenty-one years of age. *Id.* § 300x-26. The SABG program, like the MCHBG program, is administered at the state level by the North Carolina DHHS, with the process for disbursing funds mirroring the process that is used in connection with the operation of the MCHBG program.

3. Specific Legal Claims

a. State Constitutional Spending Rules

The appropriations clause of the North Carolina State Constitution provides that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published

annually." N.C. Const. art. V, § 7(1). In light of this constitutional provision, "[t]he power of the purse is the exclusive prerogative of the General Assembly," with the origin of the appropriations clause dating back to the time that the original state constitution was ratified in 1776.[4] John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 154 (2d ed. 2013) (Orth). In drafting the appropriations clause, the framers sought to ensure that the people, through their elected representatives in the General Assembly, had full and exclusive control over the allocation of the state's expenditures. *See Id.* at 154 (noting that early Americans were "acutely aware of the long struggle between the English Parliament and the Crown over the control of public finance and were determined to secure the power of the purse for their elected representatives"); *see also White v. Worth*, 126 N.C. 570, 599–600, 36 S.E. 132, 141 (1900) (Clark, J., dissenting) (stating that "[t]his power of the legislature over the public purse is the most essential one in the system of a government of the people by the people, and its abandonment under any pretext whatever can never with safety be allowed"). As a result,, the appropriations clause "states in language no man can misunderstand that the legislative power is supreme over the public purse." *State v. Davis*, 270 N.C. 1, 14, 153 S.E.2d 749, 758 (1967).

As has already been noted, the North Carolina Constitution specifically provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other," N.C. Const. art. I, § 6, and defines the manner in which this three-branch governmental structure should operate in the budgetary context by providing that "[t]he Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period," and that "[t]he budget as enacted by the General Assembly shall be administered by the Governor." N.C. Const. art. III, § 5(3). In accordance with this constitutionally derived budgetary process, "the governor must recommend a 'comprehensive budget,' although the legislature has no duty to adopt it as recommended," with the Governor being required to administer "[w]hatever budget is adopted." Orth at 118. As a result, while the Governor is required to make budgetary recommendations to the General Assembly and is entitled to veto budget legislation, he has no ultimate say about the contents

4. The North Carolina Constitution of 1776 provided that "the Governor, for the time beings shall have power to draw for and apply such sums of money as shall be voted by the general assembly, for the contingencies of government, and be accountable to them for the same." N.C. Const. of 1776, § XIX.

of the final budget as adopted by the General Assembly and must faithfully administer the budget adopted by the General Assembly once it has been enacted.

The North Carolina budgetary process is further outlined in the State Budget Act, which defines "state funds" as "[a]ny moneys including federal funds deposited in the State treasury except moneys deposited in a trust fund or agency fund as described in [N.C.]G.S. [§] 143C-1-3" and directs that "[n]o State agency or non-State entity shall expend any State funds except in accordance with an act of appropriation and the requirements of the Chapter." N.C.G.S. § 143C-1-1(b), (d)(25) (2019). In addition, the State Budget Act addresses the manner in which monies derived from federal block grant programs should be handled for budgetary purposes by placing them squarely within the category of "state funds" that must be administered in accordance with the State Budget Act:

> The Secretary of each State agency that receives and administers federal Block Grant funds shall prepare and submit the agency's Block Grant plans to the Director of the Budget. The Director of the Budget shall submit the Block Grant plans to the General Assembly as part of the Recommended State Budget.

N.C.G.S. § 143C-7-2(a). Federal grant funds, including block grant funds, have long been an important part of the state budget, as the Governor points out in his brief.[5] As the Court of Appeals noted, block grant funds have been appropriated by the General Assembly as a part of the state's constitutional budget process since at least 1981, which was the year in which the federal block grants programs at issue in this case were created. *Cooper II*, 837 S.E.2d at 16 (citing 1981 N.C. Sess. Laws Ch. 1282 § 6). And, as has already been noted, the General Statutes provide that "[a]ll funds belonging to the State of North Carolina, in the hands of any head of any department of the State which collects revenue for the State in any form whatsoever . . . shall daily deposit the same in some bank . . . in the name of the State Treasurer." N.C.G.S. § 147-77 (2019).

While noting that federal grant money has long comprised a substantial portion of North Carolina's budget, the Governor attempts to

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5. According to the Governor, "federal grant funds have been an important part of the state budget since as early as the 1920s. For example, the State Treasurer's report for the fiscal year ending June 30, 1922 showed nearly $400,000 in 'Special Fund Receipts' attributable to 'Federal Funds,' " citing Report of the Treasurer of North Carolina for Seven Months—December 1, 1920–June 20, 1921, and for Fiscal Year—July 1, 1921–June 30, 1992 at 12–14 , 24–25 (under "Federal Funds" headings).

distinguish the block grant funds at issue in this case by categorizing them as "custodial funds." In support of this contention, the Governor directs our attention N.C. Const. art. IX, § 6, with his argument focusing upon that portion of the constitutional language which provides that "all other grants, gifts and devises that have been or hereafter may be made to the State, and not otherwise appropriated by the State or by the terms of the grant, gift, or devise shall be paid into the State Treasury." The Governor argues that, based upon this language, all other grants, gifts and devises that *are* otherwise appropriated by their own terms should not be paid into the State treasury.

A careful examination of the relevant constitutional language in the context in which it appears persuades us that it does not, contrary to the position espoused by the Governor, create a separate category of "custodial funds" that is not subject to legislative control. Instead, N.C. Const. art. IX, § 6, delineates four categories of monies that are contained within the "State school fund" and provides that each of these four types of funds "shall be paid into the State Treasury" and "shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools." For this reason, we conclude that the relevant constitutional provision is intended to ensure that any general grants, gifts, and devises that are received by the State and are not intended for any other purpose shall be spent for educational purposes rather than explicitly or implicitly creating a category of "custodial funds" which are subject to executive, rather than legislative, control.

Admittedly, some categories of funds are exempt from the state budgetary process as a statutory matter, including educational funds described in N.C.G.S. § 143C-1-3(c) (providing that "funds established for The University of North Carolina and its constituent institutions pursuant to the following statutes are exempt from Chapter 143C of the General Statutes and shall be accounted for as provided by those statutes") and the "trust funds or agency funds" mentioned in N.C.G.S. § 143C-1-1(d)(25). N.C.G.S. § 143C-1-3 defines a number of such funds including governmental, proprietary, and fiduciary and trust funds, with fiduciary funds consisting of "custodial funds" that are defined as "[a]ccounts for resources held by the reporting government in a purely custodial capacity" and that include "fiduciary activities that are not required to be reported in investment trust funds, pensions and other employee benefit trust funds, and private-purpose trust funds, as described in this section." *Id.* at § 143C-1-3(a)(8). In essence, the funds contained in this category are legally held by the state

government in a fiduciary capacity while being equitably owned by the beneficiaries of the trusts or the employees who earned the funds. *Id.* at § 143C-1-3(a)(9)–(11).

According to the Governor, the block grant funds at issue in this case are "custodial funds" as defined in N.C.G.S. § 143C-1-3(a)(8). As the record clearly reflects, however, the block grant funds at issue in this case are not being held by the State in a fiduciary capacity for later distribution to their equitable owner. Instead, the relevant block grant monies have been paid by the federal government to the State to fund programs that will benefit North Carolina residents. As a result, we hold that the monies that the State derives from the relevant block grant programs are not "custodial funds" as that term is defined in N.C.G.S. § 143C-1-1(b).

In addition, the federal block grant monies at issue in this case are not custodial funds as was the case with respect to the lien against state funds that was before the Vermont Supreme Court in *Button's Estate v. Anderson*, 112 Vt. 531, 28 A.2d 404 (1942), which held that the payment of certain attorney's fees that were owed from the State of Vermont to the estate of a deceased lawyer did not require an appropriation from the state legislature given that the attorney's estate was the equitable owner of the funds and that a state statute "exempt[ed] funds held by the State in trust from the requirement that no moneys shall be paid out of the treasury except upon specific appropriation." *Id.* at 531, 28 A.2d at 409–10. In reaching this conclusion, the Vermont Supreme Court held that the monies owed to the attorney's estate were subject to the "trust fund exception" to the constitutional provision requiring state funds to be appropriated by the legislature, which

> appl[ies] only to such funds, the equitable as well as the legal rights to which are in the State. . . . That the Legislature has apparently recognized this intent is indicated by its exemptions of trust funds and rebates heretofore referred to from its acts requiring appropriations before payment. Although the legal title to the whole fund no doubt is in the State, the petitioners have equitable rights to that portion of the same which represents their fee. This part in all equity and good conscience belongs to them. They have earned it and should receive it. This portion of the fund never legally and equitably belonged to the State as part of its public funds for, at the latest, when received, the lien attached to it and remains upon it so that it is held by the State subject to the same.

Id. at 531, 28 A.2d at 410. Although the Governor argues in reliance upon this decision that "not all funds received by the State are part of the State treasury" and that the General Assembly should not be allowed to appropriate "custodial" funds as that term is used in *Button's Estate*, the federal block grant funds at issue in this case do not, in our opinion, implicate the "trust fund exception" given that the State holds the "equitable," as well as the "legal," rights to the block grant monies in question in this case.

In the same vein, we are not persuaded that this Court's decision in *Gardner* creates a category of funds that is owned by the State while remaining outside the State treasury and beyond the reach of the General Assembly. In reliance upon *Gardner*, the Governor argues that, in order to be part of the State treasury and subject to the General Assembly's appropriation authority, monies must be "obtained under the power of the state to enforce collection" and "placed in the hands of the state treasurer to be handled by him in accordance with the provisions of a state law." *Gardner*, 226 N.C. at 467, 38 S.E.2d at 316. In our view, the Governor's argument overlooks the fact that nothing in our decision in *Gardner* suggests that *only* money "obtained under the power of the state to enforce collection" ever enters the State treasury.

In *Gardner*, this Court considered a statute that precluded state employees from becoming members of the Local Governmental Employees' Retirement System in the event that they received benefits from another retirement system that drew its funds "wholly or partly . . . from the treasury of the State of North Carolina." *Id.* at 466, 38 S.E.2d at 315 (quoting N.C.G.S. § 128-24(2) (1946)). In seeking a determination that he was entitled to become a member of the Local Government Employees' Retirement System despite having participated in the Law Enforcement Officers' Benefit and Retirement Fund, which was financed, in part, by a $2.00 fee collected from every convicted state criminal defendant and "paid over to the treasurer of North Carolina," *id.* at 467, 38 S.E.2d at 315, the plaintiff argued that the $2.00 fee used to finance the Law Enforcement Officers' Benefit and Retirement Fund had not been drawn from the State treasury even though it had been paid to the State Treasurer and that such payments were, instead, "held in a special fund" by the State Treasurer for later distribution to law enforcement officers. *Id.* at 467–68, 38 S.E.2d at 316. In rejecting the plaintiff's attempt to distinguish between the "treasury" and "treasurer," this Court held that the source and purpose of the payments was not controlling, "since it is the duty of the state treasurer 'to receive all moneys which shall from time to time be paid into the treasury of this state.' " *Id.* at

468, 38 S.E.2d at 316 (quoting N.C.G.S. § 147-68 (1946)). Contrary to the plaintiff's contention, the Court held that the $2.00 fees paid to the State Treasurer for the purpose of funding the Law Enforcement Officers' Retirement and Benefit Fund were, in fact, contained within the State treasury on the grounds that

> [m]onies paid into the hands of the state treasurer by virtue of a state law become public funds for which the treasurer is responsible and may be disbursed only in accordance with legislative authority. A treasurer is one in charge of a treasury, and a treasury is a place where public funds are deposited, kept and disbursed.

Id. As a result, rather than limiting the definition of "state treasury" to a location in which the public funds raised by the state's own tax and other revenue-generating measures are collected and maintained, our decision in *Gardner* expanded the definition of the State treasury to include any funds received by the State Treasurer in accordance with a state law regardless of the capacity in which those funds are being held.

In addition, we are not persuaded by the Governor's contention that the Court of Appeals' reference to N.C.G.S. § 147-77 impermissibly allows the General Assembly to define the meaning of the constitution. Although he has not challenged the constitutionality of N.C.G.S. § 147-77, the Governor does contend that the Court of Appeals erroneously held that the General Assembly's decision to appropriate funds derived from the relevant block grant programs was consistent with the principles enunciated in *Gardner* on the theory that those funds had entered the State treasury pursuant to N.C.G.S. § 147-77, which provides that all funds "belonging to the state of North Carolina" must be deposited in the name of the State Treasurer. We do not find this argument to be persuasive for several reasons.

As an initial matter, we do not, for the reasons set forth above, read *Gardner* as holding that the State treasury consists of nothing more than the proceeds of state taxes, penalties, fines, and other revenue-generating devices. In addition, we do not believe that N.C.G.S. § 147-77 allows the General Assembly to define the "State treasury" or the "State Treasurer" as a constitutional matter and acknowledge that the terms and expressions used in the State constitution must necessarily have a meaning separate and apart from the manner in which the General Assembly seeks to construe them. On the other hand, an act of the General Assembly is constitutional if "the Constitution contains no prohibition against it." *Town of Boone*, 369 N.C. at 130, 794 S.E.2d

at 714. In our view, rather than conflicting with the relevant constitutional provisions, N.C.G.S. § 147-77 is consistent with the constitutional mandate that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law" by directing that all funds "belonging to the State of North Carolina" must be deposited into the State treasury. In other words, rather than being repugnant to any provision of the State constitution, N.C.G.S. § 147-77 builds upon and implements the definitions of the State treasury and the State Treasurer found in the State constitution. *See Baker v. Martin*, 330 N.C. at 337, 410 S.E.2d at 890 (concluding that this Court "will find acts of the legislature repugnant to the Constitution only 'if the repugnance does really exist and is plain' ") (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989)).

After a careful review of the relevant legal authorities, we have been unable to find any provision of the North Carolina State Constitution that creates a category of money that might possibly include the federal block grant monies that lies outside the State treasury or the General Assembly's appropriation authority. The General Assembly enacted the state budget embodied in Session Law 2017-57 in accordance with N.C. Const. art. III, § 5, as it was required to do so. In enacting the annual State budget, the General Assembly was fully entitled to disagree with the recommendations relating to the manner in which the funds derived from the relevant federal block grant programs should be spent set out in the Governor's recommended budget given that "the legislature has no duty to adopt [the budget] as recommended." Orth at 118. Although the General Assembly did not, as a matter of federal law, have the authority to appropriate the federal block grant monies at issue in this case for a purpose that was not authorized under the relevant block grant statutes, the remedy for any such conduct would be for the federal government to stop payment of block grant monies to the State. *See* 42 U.S.C. § 5311 (providing that, "[i]f the Secretary finds . . . that a recipient of assistance under this chapter has failed to comply substantially with any provision of this chapter, the Secretary, until he is satisfied that there is no longer any such failure to comply, shall terminate payments to the recipient under this chapter."); *see also* 42 U.S.C. § 706(b)(2) (providing that "[t]he Secretary may, after notice and opportunity for a hearing, withhold payment of funds to any State which is not using its allotment under this subchapter in accordance with this subchapter.").[6] As a result, we hold

6. The Governor does not argue that the General Assembly appropriated the relevant block grant monies in a manner that violated the underlying federal statutes.

that the block grant funds at issue in this case are contained in the State treasury and subject to the General Assembly's appropriations authority.

b. Separation of Powers

As we have already noted, the North Carolina State Constitution contains an explicit separation of powers clause, N.C. Const. art. I, § 6, and directs the Governor to "take care that the laws be faithfully executed," N.C. Const art. III, § 5(4). "[T]he separation of powers doctrine is well established under North Carolina law." *Bacon v. Lee*, 353 N.C. 696, 715, 549 S.E.2d 840, 853 (2001) (citing, *inter alia*, *State ex rel. Wallace v. Bone*, 304 N.C. 591, 609, 286 S.E.2d 79, 89 (1982)). A violation of the separation of powers clause occurs when one branch of government attempts to exercise the constitutional powers of another or when "the actions of one branch prevent another branch from performing its constitutional duties." *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256. In determining whether a separation of powers violation has occurred, this Court must "examine the text of the constitution, our constitutional history, and this Court's separation of powers precedents." *Id.* at 644, 781 S.E.2d at 255. More specifically, when analyzing a claim that the legislative branch has attempted to usurp the executive branch's constitutional authority, we examine whether the legislature has "unreasonably disrupt[ed] a core power of the executive." *Id.* at 645, 781 S.E.2d 256 (quoting *Bacon*, 353 N.C. at 715, 549 S.E.2d at 853).

We have examined whether the General Assembly has unconstitutionally attempted to interfere with the authority of the executive branch to faithfully execute the law in several relatively recent cases. In *State ex rel. McCrory v. Berger*, this Court held that the General Assembly had violated the separation of powers clause when it enacted a statute giving itself the authority to appoint a majority of voting members to three state commissions, each of which were determined to be "executive in character," given that they were responsible for executing various state environmental laws by promulgating oil and gas rules, issuing mining permits, and deciding whether surface coal ash impoundments should be closed. 368 N.C. at 645–47, 781 S.E.2d at 256–257. In reaching this result, we reasoned that the Governor needed to have "enough control" over these executive commissions in order to fulfill his constitutional duty to faithfully execute the laws and that the relevant statutory provisions impermissibly impaired his ability to do so by preventing him from appointing a majority of the commissions' members, restricting him from removing any of the members in the absence of a showing of cause, and allowing the commissions to operate outside of his supervision and control. *Id.* at 646, 781 S.E.2d at 256–57. Similarly, in *State*

ex rel. Wallace v. Bone, this Court held that the enactment of a statute appointing sitting legislators to an executive agency charged with issuing permits and investigating issues arising from the administration of air and water pollution laws constituted an impermissible encroachment upon the Governor's authority to see that the laws were faithfully executed. 304 N.C. 591, 608–09, 286 S.E.2d 79, 88–89 (1982). In reaching this conclusion, the Court noted that the enforcement of environmental laws bore no relation "to the function of the legislative branch of government, which is to make laws." *Id.* at 608, 286 S.E.2d at 88. As a result, this Court has not hesitated to step in to preclude impermissible violations of the separation of powers and faithful execution clauses in appropriate instances.

In urging us to determine that this case involves a separation of powers violation, the Governor asserts that this Court's decision in *Cooper I* establishes that the "faithful execution" clause found in N.C. Const. art. III, § 5(4) "contemplate[s] that the Governor will have the ability to affirmatively implement the policy decisions" made by the "executive branch agencies subject to his or her control." 370 N.C. at 415, 809 S.E.2d at 112. In *Cooper I*, the Court held that legislation creating a Bipartisan State Board of Elections and Ethics Enforcement caused a separation of powers violation, *id.* at 422, 809 S.E.2d at 116, by requiring the Governor to appoint eight members to that board, with four appointments to be made from two lists prepared by "the State party chair[s] of the two political parties with the highest number of registered affiliates," none of whom could be removed in the absence of "misfeasance, malfeasance, or nonfeasance," *id.* at 396, 809 S.E.2d at 100–01, and precluding the appointment of a new Executive Director until approximately two years had elapsed. *Id.* at 416, 809 S.E.2d at 112. After concluding that the agency in question "clearly perform[ed] primarily executive, rather than legislative or judicial, functions," given its responsibility for executing laws relating to "elections, campaign finance, lobbying, and ethics," *id.* at 415, 809 S.E.2d at 112, we found that the General Assembly had unconstitutionally interfered with the Governor's duty to ensure that the laws were faithfully executed by requiring him to "appoint half of the commission members from a list of nominees consisting of individuals who are, in all likelihood, not supportive of, if not openly opposed to, his or her policy preferences" while limiting his ability to supervise the agency and remove its members. *Id.* at 418, 809 S.E.2d at 114.

Although the Court did refer to the Governor's "interstitial" policymaking authority in the course of invalidating the statutory provisions

governing the Bipartisan State Board, the authority to which we referred in *Cooper I* was delegated to, rather than inherently possessed by, the Governor. In other words, our decision in *Cooper I* held that, having delegated "interstitial" discretionary authority to make policy decisions to the executive branch rather than making those policy decisions itself, the General Assembly was not then entitled to "impermissibly interfere" with the manner in which the Governor opted to execute the authority that had been granted to the executive branch by the General Assembly. *Id.* at 422, 809 S.E.2d at 116. In the present instance, however, the General Assembly has not delegated the authority to determine how the relevant federal block money should be spent to anyone; instead, it made the underlying policy decisions itself by appropriating the monies made available to the State through the relevant federal block grant programs through the enactment of legislation establishing the annual state budget. As a result, nothing in *Cooper I* provides any support for the Governor's state constitutional separation of powers claim.

In addition, the Governor argues that his duty to faithfully execute the laws includes an obligation to ensure that the monies received by the State from the relevant federal block grant programs are spent appropriately on the theory that his duty to faithfully execute the laws "includes not only the execution of state laws, but also the responsibility to enforce *federal* laws and regulations." In other words, the Governor argues that his obligation to ensure that the distribution of federal block grant monies satisfies "the requirements and conditions" of the federal statutes leaves "no room" for appropriation of the funds in question by the General Assembly. Although the Governor's argument has some surface appeal, it overlooks the fact that nothing in the relevant federal statutory provisions prescribes the manner in which each individual state must determine how the relevant federal block grant monies are distributed. Instead, the applicable federal statutes leave that issue for determination under state law. And, as we have already established, the North Carolina State Constitution provides that the appropriation authority lies with the General Assembly rather than with the Governor. *See Rhyne*, 358 N.C. at 169–70, 594 S.E.2d at 8–9 (determining that the General Assembly was the "appropriate forum" for implementing policy changes given that it was "well equipped to weigh all the factors surrounding a particular problem, balance competing interests, provide an appropriate forum for a full and open debate, and address all of the issues at one time" (cleaned up)).

Finally, the Governor relies upon the decision of the Court of Appeals in *Richmond Cty. Bd. of Educ. v. Cowell*, 254 N.C. App. 42, 803

S.E.2d 27 (2017), in support of his separation of powers argument. In that case, the Court of Appeals held, as a general proposition, that the General Assembly is required to "appropriate funds" and the executive branch is responsible for implementing the relevant legislative decision by disbursing the money in accordance with the General Assembly's instructions. 254 N.C. App. 422, 423, 803 S.E.2d 27, 29 (2017). In addition, the Court of Appeals stated that "[a]ppropriating money from the State treasury is a power vested exclusively in the legislative branch" and that the judicial branch lacked the authority to "order State officials to draw money from the State treasury." *Id.* at 426–27, 803 S.E.2d at 31. Similarly, while the executive branch does have the authority under the relevant provisions of the North Carolina State Constitution to faithfully execute the laws by submitting disbursement requests to the federal government and paying out the block grant funds in a lawful way, nothing in either state or federal law makes the executive branch responsible for determining how the monies derived from the relevant federal block grant programs should be spent. As a result, for all of these reasons, we hold that the enactment of Session Law 2017-57 did not violate the separation of powers or faithful execution clauses of the North Carolina State Constitution.

c. "Custodial Funds"

Finally, the Governor urges us to adopt the "custodial fund" test that has been adopted in several other jurisdictions, citing six cases in which the appellate courts in other states have found that federal grant money was not subject to the state legislature's appropriation authority. *See Lamm I*, 700 P.2d at 524–25 (Colo. 1985); *Opinion of the Justices to the Senate*, 375 Mass. at 854, 378 N.E.2d at 436; *In re Okla. ex rel. Dep't of Transp.*, 646 P.2d at 609–10; *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 370, 524 P.2d 975, 986 (1974); *Navajo Tribe v. Ariz. Dep't of Admin.*, 111 Ariz. 279, 528 P.2d 623 (1974); *Tiger Stadium Fan Club v. Governor*, 217 Mich. App. 439, 553 N.W.2d 7 (1996). However, as the Governor candidly notes in his brief, there are other decisions around the country that reach a different result and the decisions upon which he relies were rendered under constitutional provisions and traditions that differ from those that exist in North Carolina. In light of our inability to find anything in the language or history of the North Carolina State Constitution that provides any basis for recognizing the existence of such a test, we decline to accept the Governor's invitation to adopt the "custodial funds" test or to hold that the executive branch, rather than the legislative branch, has the constitutional authority to determine the

manner in which the funds derived from the relevant block grant programs are distributed in North Carolina.

III. Conclusion

Thus, for the reasons set forth above, we hold that the Court of Appeals did not err by upholding the trial court's decision to grant the legislative defendants' motion for judgment on the pleadings and to dismiss the two claims that are at issue in this case. As a result, the Court of Appeals' decision is affirmed.

AFFIRMED.

Justice EARLS dissenting.

By this appeal, the Governor seeks to do something which should not be controversial: to ensure that funds applied for by state executive agencies and obtained through federal programs are spent consistently with the applications for those funds. The Governor, having obtained federal funds through three block grant programs, submitted a proposed budget which sought to direct those funds in compliance with the State Budget Act. *See* N.C.G.S. § 143C-7-2(a) (2019). However, the General Assembly passed a budget, over the Governor's veto, which redirected certain portions of those funds, as the majority has described. The General Assembly exceeded its authority when it did so. Because, in my view, the General Assembly encroached on the Governor's authority in violation of our constitution's separation of powers clause, I respectfully dissent.

The Governor, through state executive agencies, administers all three of the federal block grants at issue in this case. Those programs are the Community Development Block Grant (CDBG) program, the Substance Abuse Block Grant (SABG) program, and the Maternal and Child Health Block Grant (MCHBG) program. *Cooper v. Berger*, 837 S.E.2d 7, 10 (N.C. Ct. App. 2019) (*Cooper II*). Each program is administered at the state level by an executive agency. The CDBG program is administered by the North Carolina Department of Commerce (DOC). The MCHBG and SABG programs are both administered by the North Carolina Department of Health and Human Services (NC DHHS).

All three of the block grant programs work similarly. In each case, the state executive agency administering the program applies to its federal counterpart and requests funding. In each case, the funds are held by the federal government until they are ready to be used. In each case, the approved funds are transmitted from the federal agency to the state

agency, and then to the subgrantee. As a result, the federal block grant funds do not sit in state accounts ready to be used for the state's general purposes. Instead, they pass through state accounts on their way from the federal government to the specific subgrantees for which they are earmarked.

Significantly, in each case the executive agencies administer the federal block grant programs pursuant to either state or federal legislative enactment. For example, DOC's administration of the CDBG program is pursuant to discretionary authority laid out in the statute that describes its functions. *See* N.C.G.S. § 143B-431(d) ("The Department of Commerce, with the approval of the Governor, may apply for and accept grants from the federal government and its agencies . . . and may comply with the terms, conditions, and limitations of such grants in order to accomplish the Department's purposes."). Similarly, NC DHHS administers the MCHBG program pursuant to federal legislative authority. *See* 42 U.S.C. § 709(b). Likewise, NC DHHS administers the SABG program pursuant to federal legislative authority. *See* 42 U.S.C. § 300x-32(b)(1)(A)(i) (requiring a "single State agency" be responsible for administering the program); *see also* N.C.G.S. § 143C-7-2(a) (referring to "each State agency that receives and administers federal Block Grant funds").

Against this backdrop, the General Assembly's diversion of a portion of the block grant funds toward its own priorities was an unconstitutional encroachment on the Governor's authority, in violation of the separation of powers principles laid out in our constitution. "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. Where "one branch exercises power that the constitution vests exclusively in another branch," we have stated that it is "[t]he clearest violation of the separation of powers clause." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016).

Here, the disposition of the block grant funds is firmly within the Governor's authority to determine. The Governor is required by our constitution to "take care that the laws be faithfully executed." N.C. Const. art. III, § 5. This provision both "contemplat[es] that the Governor will have the ability to preclude others from forcing him or her to execute the laws in a manner to which he or she objects" and "that the Governor will have the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed, through delegation from the General Assembly to make." *Cooper v. Berger*, 370 N.C. 392, 415, 809 S.E.2d 98, 111–12 (2018) (*Cooper I*). As to the substance of the Governor's duty, it extends to upholding both

state and federal law. *See, e.g.*, N.C. Const. art. III, § 4 ("The Governor, before entering upon the duties of his office, shall, before any Justice of the Supreme Court, take an oath or affirmation that he will support the Constitution and laws of the United States and of the State of North Carolina, and that he will faithfully perform the duties pertaining to the office of Governor.").

The Governor, then, is required to give effect to the federal and state laws pertaining to the federal block grants, and the General Assembly violates the separation of powers when it either (a) attempts to usurp that role, or (b) prevents the Governor from implementing policy decisions which are granted to executive branch agencies by statute. The General Assembly has done both. For each of the federal block grants, discretionary spending decisions are delegated to the Governor. As to the CDBG program, DOC is explicitly authorized to "apply for and accept grants from the federal government" and to use those grants "in order to accomplish the Department's purposes." N.C.G.S. § 143B-431(d). As to the MCHBG program, NC DHHS is charged with submitting an application to the federal government which states how the block grant funds will be used. 42 U.S.C. § 705(a); *id.* § 709(b). The funds issued under the program must then be spent in accordance with that application. *Id.* § 704(a). Finally, as to the SABG program, NC DHHS, as North Carolina's dedicated agency, is charged with "administration of the program." *Id.* § 300x-32(b)(1)(A)(i). Furthermore, the statute requires that the "chief executive officer of the State" certify covenants between the state and the federal government regarding certain program requirements. *Id.* § 300x-32(a)(3).

For each program, it is the Governor's duty to ensure compliance with the law. However, by subverting the Governor's funding priorities where discretion is placed in the executive, and by obstructing the Governor's ability to ensure that expenditures match requests, inhibiting compliance with the reporting requirements of the federal programs, the General Assembly both frustrates the Governor's "ability to preclude others from forcing [him] to execute the laws in a manner to which [he] objects" and the Governor's "ability to affirmatively implement the policy decisions" allowed through statutory enactment. *See Cooper I*, 370 N.C. at 415, 809 S.E.2d at 112.

By contrast, the disposition of these funds is not within the General Assembly's authority. The General Assembly's supreme authority over the public purse derives from (current) Article V, Section 7, of the North Carolina State Constitution, which states that "[n]o money shall

be drawn from the State treasury but in consequence of appropriations made by law." N.C. Const. art. V, § 7(1); *see State v. Davis*, 270 N.C. 1, 14, 153 S.E.2d 749, 758 (1967). As a result, money must be in the state treasury to trigger the legislature's appropriations power. However, the federal block grants are not part of the state treasury.

The state treasury consists of funds obtained by the state pursuant to its collection powers. *Gardner v. Bd. of Trs.*, 226 N.C. 465, 467, 38 S.E.2d 314, 316 (1946) (stating that money is part of "the treasury of the state" where it "is obtained under the power of the State to enforce collection, and is placed in the hands of the State Treasurer to be handled by him in accordance with the provisions of a State law"). In *Gardner*, we considered whether a city policeman was eligible to join the Local Governmental Employees' Retirement System. *Id.* at 466, 38 S.E.2d at 315. At the time, state law excluded from that retirement system persons receiving retirement allowances from "funds drawn from the treasury of the State of North Carolina." *Id.* We concluded that the police officer, who was receiving retirement benefits funded partly by a two-dollar charge appended to every criminal conviction, *id.* at 467, 38 S.E.2d at 315, could not belong to both retirement systems. *Id.* at 468, 38 S.E.2d at 316. Central to our analysis was our observation, referring to the conviction-funded retirement system, that "[t]he money is obtained under the power of the State to enforce collection, and is placed in the hands of the State Treasurer to be handled by him in accordance with the provisions of a State law." *Id.* at 467, 38 S.E.2d at 316. It was of no moment, we determined, that the funds were not "derived from general taxation." *Id.* Instead, because the funds were collected "by virtue of a State law" and came "into the hands of the State Treasurer," they were part of the state treasury. *Id.*

The funds at issue in this case, of course, were not "obtained under the power of the State to enforce collection." *See id.* Instead, they were requested by state executive branch agencies and received directly from the federal government. As a result, they are outside of the General Assembly's appropriations power because they were not part of the state treasury. N.C. Const. art. V, § 7(1) ("No money shall be drawn from the State treasury but in consequence of appropriations made by law . . . ."); *see Davis*, 270 N.C. 1, 14, 153 S.E.2d 749, 758 (stating that the General Assembly's supreme legislative power over the public purse derives from this provision, formerly N.C. Const. art. XIV, § 3).

The majority fundamentally misunderstands our decision in *Gardner*, claiming that the decision expanded the definition of state treasury to include any funds held by the state. This interpretation

ignores that all of the funds in *Gardner*, which we held were part of the state treasury, were collected pursuant to state law. *Gardner*, 226 N.C. at 467, 38 S.E.2d at 315. The distinction in *Gardner* was between funds collected pursuant to the general taxing power and funds collected pursuant to other state law. *Id.* at 467, 38 S.E.2d at 315–16. All funds "obtained under the power of the State to enforce collection" and "placed in the hands of the State Treasurer to be handled by him in accordance with the provisions of a State law" are part of the state treasury. *Id.* at 467, 38 S.E.2d at 316. This is consistent with our observation that "[t]he power to appropriate money *from* the public treasury is no greater than the power to levy the tax which put the money in the treasury." *Maready v. City of Winston-Salem*, 342 N.C. 708, 714, 467 S.E.2d 615, 619 (1996) (quoting *Mitchell v. North Carolina Indus. Dev. Fin. Auth.*, 273 N.C. 137, 143, 159 S.E.2d 745, 749–50 (1968)). The General Assembly's power to appropriate funds is limited by its power to put funds into the treasury. As a result, the General Assembly has no power over funds that it did not collect.

The idea that some funds held by the state are not subject to the legislative appropriations power is enforced in our state constitution. For example, article IX, section 6 exempts from the General Assembly's appropriation power "grants, gifts, and devises" which have been "made to the State" and have been "appropriated . . . by the terms of the grant, gift, or devise." N.C. Const. art. IX, § 6. While the majority observes, correctly, that this section ensures that gifts not intended for another purpose are spent on education, the majority wholly fails to address the fact that our state constitution explicitly refers to funds held by the state in a custodial capacity, and excludes those funds from the power of legislative appropriations.

Moreover, the status of the block grant funds as "custodial funds" is affirmed by the "information about the grants, their purposes, for whom they are intended, and the conditions placed on them by Congress." *See In re Separation of Powers*, 305 N.C. 767, 295 S.E.2d 589 (1982). As noted previously, the block grant funds are held, not in state accounts, but by the federal government until they are ready to be used. The record evidence indicates that they then pass through the state executive agency on their way to their ultimate recipient, the subgrantee. Of particular significance is the fact that the federal government exercises substantial oversight over the block grant funds. For example, in February 2017, HUD wrote to DOC to express concern that CDBG funds were being spent in accordance with the plan that DOC had sent to HUD. Similarly, Congress requires that funds issued from the MCHBG program be

spent consistently with the funding application submitted by NC DHHS. 42 U.S.C. § 704(a). The ultimate purpose of the block grant funds, the insignificant amount of time spent in state accounts, and the federal oversight mandated by Congress all suggest that the funds are not generally for the benefit of the state, but are instead temporarily held by the state for the benefit of others, making them custodial funds not subject to the legislative power of appropriation.

Such a result does not give the executive branch unlimited authority over all federal funds. The majority notes that block grant programs and other federal grants made up 28.4% of the state budget in 2017. However, where Congress specifically delineates legislative authority over federal funds, the General Assembly has an independent basis for exercising power over them—the terms of the grant require it. In that case, there is no need for the legislature to resort to its constitutional authority over the treasury.

The conclusion that these particular funds are not part of the state treasury is consistent with the outcomes reached by a number of our sister courts. For example, the constitution of the State of Colorado provides that "[n]o moneys in the state treasury shall be disbursed therefrom by the treasurer except upon appropriations made by law, or otherwise authorized by law, and any amount disbursed shall be substantiated by vouchers signed and approved in the manner prescribed by law." Colo. Const. art. V, § 33. However, the Colorado Supreme Court determined that "[t]he power of the General Assembly to make appropriations relates to state funds" and that "federal contributions are not the subject of the appropriative power of the legislature. *MacManus v. Love*, 499 P.2d 609, 610 (Colo. 1972). In a later case involving federal block grants, that Court determined, after reviewing the structure of the federal block grant programs at issue, that the block grants not requiring matching funds from the state were subject to executive, not legislative authority. *Colo. Gen. Assembly v. Lamm*, 738 P.2d 1156, 1173 (Colo. 1987) (*Lamm II*).

Similarly, the constitution of New Mexico provides that "money shall be paid out of the treasury only upon appropriations made by the legislature." N.M. Const. art. IV, § 30. Even so, the New Mexico Supreme Court held that the legislature "has no power to appropriate and thereby endeavor to control the manner and extent of the use or expenditure of Federal funds" which had been granted to the state's universities. *State ex rel. Sego v. Kirkpatrick*, 1974-NMSC-059, ¶ 51, 86 N.M. 359, 370, 524 P.2d 975, 986.

The majority dismisses these precedents as not relevant on the ground that "these decisions were rendered under constitutional provisions and traditions that differ from those that exist in North Carolina." This facile rationale fails to explain why the statement in our constitution that "[n]o money shall be drawn from the State treasury but in consequence of appropriations made by law", N.C. Const. Art. V, §7, should mean something different from the statement that "money shall be paid out of the treasury only upon appropriations made by the legislature." N.M. Const. art. IV, §30. It further fails to explain what about our state traditions would mandate a different interpretation. At the end of the day, this is about whether this Court will honor the principles of separation of powers set out in our state constitution.

The particular federal block grants at issue in this case are appropriately subject to the discretion of the executive. In reaching the opposite conclusion, the majority ignores our precedent defining the extent of executive authority in the face of delegated authority from our state and federal legislatures, misinterprets our prior caselaw regarding the limits on legislative authority, and ignores the guidance of other courts who have faced this same issue. While doing so, the majority permits the legislature to upset settled expectations between this state and the federal government about how the block grant programs will be used and threatens the independence of the separate branches of government in this state. I therefore respectfully dissent.

CRESCENT UNIVERSITY CITY VENTURE, LLC

v.

TRUSSWAY MANUFACTURING, INC. AND TRUSSWAY MANUFACTURING, LLC

No. 407A19

Filed 18 December 2020

Construction Claims—commercial development—negligence in designing or manufacturing trusses—economic loss

In a negligence action brought by the developer of several apartment buildings alleging that subcontractor defendant supplied defective construction materials, the Business Court did not err by granting defendant's motion for summary judgment under the economic loss rule because the alleged damages were monetary, and the economic loss rule prohibits recovery in tort for purely economic losses in commercial transactions.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion granting summary judgment in favor of defendants entered on 14 August 2019 by Judge Louis A. Bledsoe III, Chief Business Court Judge, in Superior Court, Mecklenburg County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 16 June 2020.

Kiran H. Mehta and William J. Farley III for plaintiff-appellant.

Fox Rothschild LLP, by Elizabeth Brooks Scherer and Jeffrey P. MacHarg; and Martyn B. Hill and Michael A. Harris for defendant-appellees.

MORGAN, Justice.

In this case we must determine whether, under North Carolina law, a commercial property owner who contracts for the construction of a building, and thereby possesses a bargained-for means of recovery against a general contractor, may nevertheless seek to recover in tort for its economic loss from a subcontracted manufacturer of building materials with whom the property owner does not have contractual privity. The Business Court determined that North Carolina's economic loss rule requires negligence claims to be based upon the violation of an extra-contractual duty imposed by operation of law, simultaneously recognizing that parties generally do not owe each other a duty of care to prevent economic loss. We agree with the Business Court and therefore affirm the Business Court's order granting summary judgment in favor of defendants.

Factual and Procedural Background

Plaintiff Crescent University City Venture, LLC (Crescent) was the owner and developer of an initiative to build and lease several student apartment buildings near the campus of the University of North Carolina at Charlotte (the project). In 2012, Crescent entered into a contract with AP Atlantic, Inc. d/b/a Adolfson & Peterson Construction (AP Atlantic), a general contractor, whereby AP Atlantic agreed to construct a multi-building apartment complex on Crescent's property. As a matter of course, AP Atlantic entered into agreements with several subcontractors to facilitate the construction of the project, including a subcontract with Madison Construction Group, Inc. (Madison) for the provision and installation of wood framing for the buildings. The AP Atlantic-Madison subcontract required Madison to procure the floor and roof trusses at issue

in the present controversy. The trusses in this context were structures of wood members held together by metal plates bristling with teeth, which were pressed into the pieces of wood at points where they connected at angles, creating a cross-supporting web of triangles. The trusses were delivered premanufactured to the project site and were each installed as a single piece to make up the floor and roof portions of each apartment building. In order to procure trusses for the project, Madison executed a signed purchase order with Trussway Manufacturing, Inc. (Trussway). The purchase order included the specifications of the trusses required by the project and set forth further terms applicable to the sale of the trusses including an express warranty.

Students of the University of North Carolina at Charlotte began occupying the apartments for the 2014–2015 academic year. Following a party attended by 80–100 people hosted in one of the units of Building C—one of the student apartment buildings erected during the project—on 30 January 2015, the occupants of the unit below reported that their living room ceiling had cracked and was sagging. Crescent relocated the residents of both units in Building C, after which the residents of a unit in Building E reported similar problems on 1 May 2015. Initial inspections revealed that the floor trusses between the apartments in Buildings C and E were defective. Crescent hired an engineering firm, Simpson Gumpertz & Heger, Inc. (SGH), to conduct an investigation into both the identified failures as well as a random sampling of the remaining apartments to determine if the structural defects were isolated or systemic. After examining the apartments with noticeable defects and a wider sample of other apartments, SGH informed Crescent that it believed the floor-truss defects were systemic and pervasive throughout the project. The investigation revealed that 13.6% of the metal plates connecting the wood members of each truss that SGH inspected had failed or presented an unsafe defect, and reports produced by SGH detailed the repairs necessary to bring the project back to an acceptable standard. While having initially consulted AP Atlantic to conduct the necessary repairs, the parties to this action disagreed about the reasonableness of the proposed timeframe and repair plan Crescent developed with SGH. Crescent instead enlisted the assistance of a third party, Summit Contracting Group, Inc. to complete the planned repairs.

On 5 August 2015, AP Atlantic filed suit against Crescent for outstanding payments on the project, to which Crescent responded with a breach of contract counterclaim on multiple grounds including the defective trusses. Crescent initiated a separate action against AP Atlantic's parent company to enforce a performance guaranty while AP Atlantic

maintained multiple derivative claims against the subcontractors on the project, including Trussway. The matter was designated as a complex business case and assigned to the North Carolina Business Court for administration and resolution. The Business Court consolidated the actions on 10 October 2016. Following multiple rounds of pleadings, a lengthy discovery process, and several settlement agreements and voluntary dismissals, the resulting procedural posture led Crescent to move the Business Court to realign the parties, with Crescent as plaintiff, AP Atlantic and its parent company as defendants, and the subcontractors as third-party and fourth-party defendants. All parties to the consolidated proceedings agreed, and the Business Court granted Crescent's motion on 11 December 2017.

On 12 February 2018, the parties to the consolidated action filed motions for summary judgment, while Crescent filed a complaint asserting a single negligence claim against Trussway, along with a motion to consolidate the new claim with the ongoing matters. Crescent's new complaint alleged that Trussway's negligence in manufacturing the trusses resulted in almost eight million dollars in damages from a combination of the project-wide repairs and stipends to residents for temporary accommodations, transportation, and storage. After this new action was itself designated as a complex business case on 7 March 2018, Trussway filed a motion to dismiss Crescent's new negligence complaint, arguing that the "prior action pending" doctrine barred such a claim. The Business Court held a hearing on the summary judgment motions, Trussway's motion to dismiss the new Crescent action, deemed the "Trussway Action" by the Business Court, and Crescent's motion to consolidate the Trussway Action with the remaining cases on 30 May 2018. In an order dated 16 July 2018, the Business Court denied Trussway's motion to dismiss the Trussway Action and granted Crescent's motion to consolidate. Following this consolidation and denial of its motion to dismiss, Trussway filed an answer to the Trussway Action denying Crescent's negligence allegation and lodging several defenses.

After the conclusion of discovery in the Trussway Action, Trussway filed a motion for summary judgment, arguing that because the duties Trussway allegedly violated as stated in Crescent's newest complaint arose under a contractual relationship—and not by operation of law—Crescent's claims were barred by, *inter alia*, the economic loss rule. A hearing was held before the Business Court on 25 July 2019 during which Trussway specifically argued that Crescent had failed to present sufficient evidence showing the breach of any duty other than the contractual duties contained within the purchase order for the defective

trusses with Madison. The Business Court agreed, finding that "[b]ecause Crescent has not alleged or forecast evidence showing the breach of any separate or distinct extra-contractual duty imposed by law, . . . Crescent may not maintain a negligence claim against it." Applying the economic loss rule irrespective of the existence or lack of a contractual relationship between Crescent and Trussway, the court dismissed Crescent's negligence claim with prejudice. We agree with the Business Court's application of the economic loss rule and therefore affirm its order granting summary judgment in favor of Trussway.

Analysis

Applying the economic loss rule, North Carolina courts have long refused to recognize claims for breach of contract disguised as the type of negligence claim that Crescent asserted against Trussway in the case before us. *See generally N.C. State Ports Auth. v. Lloyd A. Fry Roofing Co.* (*Ports Authority*), 294 N.C. 73, 240 S.E.2d 345 (1978), *rejected in part on other grounds by Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 328 S.E.2d 274 (1985). Adopted by this Court in *Ports Authority*, the economic loss rule bars recovery in tort by a plaintiff "against a promisor for his simple failure to perform his contract, even though such failure was due to negligence or lack of skill." *Id.* at 83, 240 S.E.2d at 351. *Ports Authority* involved parties which had a relationship posture which is similar to the relationship between Crescent and Trussway in the instant case. In *Ports Authority*, the North Carolina State *Ports Authority* contracted with a general contractor for the construction of two storage buildings at a site owned and operated by the state agency. *Id.* at 75, 240 S.E.2d at 347. In turn, the general contractor entered into a subcontract with E.L. Scott Roofing Company (E.L. Scott) for the construction of the roofs on both buildings. *Id.* Almost four years after the buildings were completed and occupied by the State Ports Authority, leaks developed in both roofs that necessitated the expensive removal of the equipment and goods stored inside the affected buildings. *Id.* at 75–76, 240 S.E.2d at 347.

The State Ports Authority sued the general contractor in *Ports Authority* for breach of contract based upon the contractor's alleged failure to construct the roofs "in accordance with the plans and specifications" of their agreement. The agency also included in its complaint a second claim that E.L. Scott negligently installed portions of the roof substructure under the supervision of the general contractor, resulting in the same damages as the general contractor's breach of contract. *Id.* at 81, 240 S.E.2d 350. In addressing the State Ports Authority's negligence claim against E.L. Scott, while the Court noted the existence of appellate

case precedent establishing that a promisor to a contract can be held liable in tort for personal or property damage caused by the promisor's negligence, such cases fit into one of four categories, with the common feature among them being the breach of an extra-contractual duty, relationship, or bailment. *Id.* at 81–82, 240 S.E.2d at 350–51. However, this Court recognized that it had never allowed a tort action against a party to a contract "for [its] simple failure to perform [its] contract." *Id.* at 83, 240 S.E.2d at 351. Since that time, North Carolina courts have endeavored to apply the economic-loss-rule instruction of *Ports Authority*. *See Beaufort Builders, Inc. v. White Plains Church Ministries, Inc.* (*Beaufort Builders*), 246 N.C. App. 27, 32–38, 783 S.E.2d 35, 39–42 (2016) (applying the economic loss rule to bar a negligence claim where the denial of a occupancy permit for the contract's subject matter—a church building—constituted the plaintiff's alleged injury); *Window Gang Ventures, Corp. v. Salinas* (*Window Gang*), 2019 NCBC LEXIS 24, at *23–33 (N.C. Super. Ct. Apr. 2, 2019) (analyzing one of four *Ports Authority* exception categories in denying negligence cause of action against defendant based on economic loss rule).

An examination of the Supreme Court of the United States' adoption of the economic loss rule within admiralty law reveals the utility of the rule within its original product-liability context. The Supreme Court of the United States emphasized in *East River S.S. Corp. v. Transamerica Delaval, Inc.* (*East River*), 476 U.S. 858, 866 (1986), that the purpose of the economic loss rule is to prevent "contract law [from] drown[ing] in a sea of tort." *Id.* at 866. In *East River*, a group of tanker ship operators sued the manufacturer of the turbines installed on ships that they had chartered from a shipbuilder after the turbines suffered multiple malfunctions, leading to costly delays in the ongoing businesses of the tanker ship operators. *Id.* at 859–61. In much the same relationship as exists between AP Atlantic and Madison in the case at bar, the shipbuilder had contracted with the manufacturer for the provision and installation of a single part of a larger design/build arrangement. *Id.*

The Supreme Court of the United States grappled with the question of "whether a commercial product injuring itself is the kind of harm against which public policy requires manufacturers to protect, *independent of any contractual obligation*." *Id.* at 866 (emphasis added). Applying what is now coined as the economic loss rule in denying the tanker ship operators' recovery from the turbine manufacturer, the Supreme Court of the United States held in *East River* that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from

injuring itself." *Id.* at 871. Recognizing that "a commercial situation generally does not involve large disparities in bargaining power," the nation's high court saw "no reason to intrude into the parties' allocation of risk" in reinforcing the operation of the economic loss rule in contractual disputes. *Id.* at 873. Instead, the Supreme Court pointed the tanker ship operators to remedies in warranty, where a plaintiff could enjoy the "full benefit of its bargain" by seeking compensation for expectation damages and "foregone business opportunities," similar to the damages Crescent now attempts to recover from Trussway. *Id.* The economic loss rule has since gained near universal acceptance, and nearly all other state and federal jurisdictions that have applied the rule to commercial transactions—like the transaction involved in the case sub judice—agree that purely economic losses are not recoverable under tort law. *See*, *e.g.*, *Chicopee*, *Inc. v. Sims Metal Works*, *Inc.*, 98 N.C. App. 423, 432, 391 S.E.2d 211, 217 (1990) (citing *2000 Watermark Ass'n*, *Inc. v. Celotex Corp.*, 784 F.2d 1183, 1185 (4th Cir. 1986)); *see also Kelly v. Georgia-Pacific LLC*, 671 F. Supp. 2d 785, 791 (E.D.N.C. 2009).

Crescent's argument, in construing the Court of Appeals decision in *Lord v. Customized Consulting Specialty*, *Inc.*, 182 N.C. App. 635, 643 S.E.2d 28 (2007), to represent that the application of the economic loss rule hinges on the existence of a contract between the plaintiff and defendant, is at odds with our holding in *Ports Authority* which is specific to the commercial-development context. To the extent that such cases as *Lord* spawn an argument against the application of the economic loss rule in commercial cases where a sophisticated commercial developer attempts to recover in tort against a subcontractor when the injury complained of concerns solely the subject matter of a valid contract between the developer and the general contractor, as is the case here, such an argument is unpersuasive. The lack of privity in the commercial context between a developer and a subcontractor, supplier, consultant, or other third party—the potential existence of which is readily known and assimilated in sophisticated construction contracts—is immaterial to the application of the economic loss rule. To this end, *Ports Authority* represents that a lack of contractual privity between 1) a plaintiff who engages in commercial development with a general contractor and 2) a subcontractor, supplier, or other third-party whose relevance to the plaintiff springs from the original contract between the plaintiff and the general contractor does not bar the application of the economic loss rule.

We are well aware of how the intersection between contract law and tort law in North Carolina has developed since *Ports Authority*, as

illustrated by Crescent's reliance on *Lord* and this Court's discussion of negligence as a cause of action against residential homebuilders in *Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E.2d 222 (1985). In *Oates*, this Court addressed the trial court's allowance of a defendant-homebuilder's motion to dismiss for failure to state a claim after the plaintiffs in the case, who were residential homebuyers who had purchased the subject home from a seller several degrees removed from the defendant builder, had discovered latent defects in the construction of the home. *Id.* at 277–78, 333 S.E.2d at 224. The trial court in *Oates* had granted the defendant-homebuilder's motion to dismiss on the sole ground that plaintiffs could not establish contractual privity with the defendant. *Id.* at 278, 333 S.E.2d at 224. The Court of Appeals affirmed the trial court's order, opining that because the implied warranty of fitness in the construction of homes in North Carolina protected only the initial purchaser in privity of contract with the homebuilder and since the plaintiff was a subsequent purchaser well-removed from contractual privity with the homebuilder, the traditional doctrine of *caveat emptor* applied to bar a cause of action against a homebuilder by a once-removed purchaser. *Id.* at 278–79, 333 S.E.2d at 224.

This Court in *Oates* reversed the decision of the Court of Appeals, determining instead that a subsequent home purchaser in the consumer context could recover against the builder of the home in negligence, even if the purchaser maintained no contractual privity with the builder. *Id.* at 281, 333 S.E.2d at 226. In so holding, this Court adopted the public policy considerations of two Florida intermediate appellate court decisions which both addressed the plight of residential homebuyers who had alleged that their residences suffered from negligent construction on the part of the defendant homebuilders. *Id.* at 279–81, 333 S.E.2d at 225–26 (first quoting *Navajo Circle, Inc. v. Development Concepts Corp.*, 373 So. 2d 689, 691 (Fla. Dist. Ct. App. 1979); then quoting *Simmons v. Owens*, 363 So. 2d 142, 143 (Fla. Dist. Ct. App. 1978)). Crescent cites only this Court's discussion of Florida's *Navajo Circle* case, in arguing that our holding in *Oates* remained consistent with *Ports Authority* in allowing "claims of negligence for those who suffer economic losses or damages from improper construction but who, because not in privity with the builder, have no basis for recovery in contract." *See Warfield v. Hicks*, 91 N.C. App. 1, 10, 370 S.E.2d 689, 694 (1988). We are not inclined to assign such an expansive reading to *Oates* as Crescent urges, especially in light of this Court's further discussion of the *Simmons* case from Florida in *Oates* which reveals the public policy consideration which undergirds the ability of residential homeowners to pursue recovery for deficient construction of their homes on the ground of negligence.

Our holding in *Oates* is a fact-specific response to a problem eloquently recognized by the Florida First District Court of Appeal in *Simmons*.

> We must be realistic. The ordinary purchaser of a home is not qualified to determine when or where a defect exists. Yet, the purchaser makes the biggest and most important investment in his or her life and, more times than not, on a limited budget. The purchaser can ill afford to suddenly find a latent defect in his or her home that completely destroys the family's budget and have no remedy for recourse. This happens too often. The careless work of contractors, who in the past have been insulated from liability, must cease or they must accept financial responsibility for their negligence.

Oates, 314 N.C. at 280–81, 333 S.E.2d at 225–26 (quoting *Simmons*, 363 So. 2d at 143). In recognizing the propriety of the Florida court's considerations in *Simmons*, this Court allowed a negligence cause of action in favor of residential homeowners against the distant homebuilders of their homes when the pleadings reflect that the homebuilder's negligent construction of the home constituted the proximate cause of the homeowner's damages. Whether characterized by the Court of Appeals as a refinement of our holdings in *Ports Authority* and *Lord* or as a public policy exception to the economic loss rule for the layperson homeowner, this Court's holding in *Oates* should not be read to disturb the applicability of the economic loss rule to commercial real-estate development transactions.

When a plaintiff asserts that the subject matter of a contract has, in its operation or mere existence, caused injury to itself or failed to perform as bargained for, the damages are merely economic, and a purchaser has no right to assert a claim for negligence against the seller or the product's manufacturer for those economic losses under the economic loss rule. *See East River*, 476 U.S. at 871 (concluding that the economic loss rule imposes no duty upon manufacturers "under either a negligence or strict products-liability theory to prevent a product from injuring itself"); *see also Moore v. Coachmen Indus., Inc.*, 129 N.C. App. 389, 401, 499 S.E.2d 772, 780 (1998). The plaintiff must instead look toward the breach of its contractual relationship with its supplier or general contractor to recover these purely economic losses. Here, Trussway occupies a position much more akin to the component-parts suppliers in *East River* and *Moore* and the roofing subcontractor in *Ports Authority* as compared to the residential homebuilders in *Oates*.

Crescent negotiated with AP Atlantic for the construction of a number of student apartment buildings with the full knowledge of and power to control the acquisition and engagement of subcontractors for the various roles within the greater construction scheme. We are constrained by the well-established origins and ongoing application of the economic loss rule in North Carolina from affording Crescent, a sophisticated, commercial developer, the same extra-contractual remedies afforded residential homeowners by reason of public policy.

Conclusion

North Carolina's state courts have consistently applied the economic loss rule to hold that purely economic losses are not recoverable under tort law, particularly in the context of commercial transactions. The Business Court was correct in its interpretation and application of this Court's decision in *Ports Authority.* Therefore, we affirm the Business Court's allowance of defendant's motion for summary judgment.

AFFIRMED.

CHRISTOPHER DiCESARE, JAMES LITTLE, AND DIANA STONE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

v.

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTUHORITY, D/B/A CAROLINAS HEALTHCARE SYSTEM

No. 156A17-2

Filed 18 December 2020

1. Unfair Trade Practices—antitrust claims against local hospital authority—Chapter 75—applicability to quasi-municipal corporations

In a class action suit brought by North Carolina residents against a local hospital authority, which had been including provisions in its contracts encouraging insurers to steer patients toward the hospital authority's services while forbidding insurers from allowing competitors to enforce similar contract provisions, the trial court properly granted the hospital authority's motion for judgment on the pleadings with respect to plaintiffs' antitrust claims (restraint of trade, unfair or deceptive practices, and monopolization) under Chapter 75 of the General Statutes. The hospital authority—as a

quasi-municipal, non-profit corporation—was not subject to liability under Chapter 75, which applies to actions of a "person, firm, or corporation."

2. Constitutional Law—North Carolina—Anti-Monopoly Clause—claim against local hospital authority—judgment on the pleadings

In a class action suit brought by North Carolina residents against a local hospital authority, which had been including provisions in its contracts encouraging insurers to steer patients toward the hospital authority's services while forbidding insurers from allowing competitors to enforce similar contract provisions, the trial court improperly denied the hospital authority's motion for judgment on the pleadings with respect to plaintiffs' monopolization claim under Article I, Section 34 of the North Carolina Constitution. Plaintiffs' complaint, which alleged that the hospital authority had only a fifty percent share of the local market for acute inpatient hospital services and faced formidable competitors within that market, failed to allege that the hospital authority had the ability to control prices in that market.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) and by writ of certiorari pursuant to N.C.G.S. § 7A-32(b) from an interlocutory order entered on 27 February 2019 by Special Superior Court Judge for Complex Business Cases Michael L. Robinson in Superior Court, Mecklenburg County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 45.4(b). Heard in the Supreme Court on 16 June 2020.

Elliott Morgan Parsonage, PLLC, by R. Michael Elliott; Lieff Cabraser Heimann & Bernstein, LLP, by Daniel Seitz, Adam Gitlin, and Brendan P. Glackin; Pearson Simon & Warshaw, LLP, by Alexander L. Simon and Benjamin E. Shiftan, for plaintiff-appellant Christopher DiCesare, et al.

Womble Bond Dickinson (US) LLP, by Russ Ferguson, James Cooney, III, Sarah Motley Stone, Debbie W. Harden, Matthew Tilley, Mark J. Horoschak, Bryan Hayles, and Michael P. Fischer; Boies Schiller & Flexner, LLP, by Hampton Y. Dellinger, Richard A. Feinstein, and Nicholas Widnell, for defendant-appellee The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System.

Attorney General Joshua H. Stein, by Deputy Solicitor General James W. Doggett, Special Deputy Attorneys General K.D. Sturgis Daniel P. Mosteller, and Assistant Attorney General Daniel T. Wilkes, for amicus State of North Carolina.

N.C. Department of State Treasurer, by Sam M. Hayes and Kendall M. Bourdon, for amicus N.C. State Health Plan.

ERVIN, Justice.

This case involves a dispute between plaintiffs, a group of current and former North Carolina residents who are covered under commercial health insurance obtained through an employer with fifty-one or more employees, and the Charlotte-Mecklenburg Hospital Authority, a non-profit corporation providing healthcare services with a principal place of business in Charlotte, in which plaintiffs seek reimbursement for healthcare costs based upon claims for restraint of trade and monopolization pursuant to Chapter 75 of the North Carolina General Statutes and Article I, Section 34 of the North Carolina Constitution. As will be discussed in greater detail below, this case requires us to determine whether the trial court correctly decided issues arising from the Hospital Authority's motion for judgment on the pleadings relating to the claims asserted in plaintiffs' third amended complaint. After careful consideration of the parties' challenges to the trial court's order in light of the allegations contained in the third amended complaint, we conclude that the challenged trial court order should be affirmed, in part, and reversed, in part.

I. Factual Background

A. Substantive Facts

The Hospital Authority was established in 1943 pursuant to the North Carolina Hospital Authorities Act,[1] N.C.G.S. §§ 131E-15 *et seq.*, and is jointly chartered by Mecklenburg County and the City of Charlotte. The Act states that "[t]he General Assembly finds and declares that in order to protect the public health, safety, and welfare, including that of low income persons, it is necessary that counties and cities be authorized to provide adequate hospital, medical, and health care and that the provision of such care is a public purpose." N.C.G.S. § 131E-1(b) (2019). The

1. The Hospital Authorities Act was initially known as the Hospital Authorities Law and was formerly codified at N.C.G.S. § 131-90 to -116 (1943).

Act is intended "to provide an alternate method for counties and cities to provide hospital, medical, and health care," *id.*, and defines a hospital authority as "a public body and a body corporate and politic organized under the provisions of [the Act]." N.C.G.S. § 131E-16(14). The Hospital Authority is governed by a Board of Commissioners, whose members are appointed by the mayor or chairman of the county commission. N.C.G.S. § 131E-17(b).

The Hospital Authority provides, among other things, a suite of general acute care inpatient hospital services, including a broad range of medical and surgical diagnostic and treatment services, to individuals insured under group, fully-insured, and self-funded healthcare plans. The Hospital Authority has a large general acute-care hospital located in downtown Charlotte and nine other general acute-care hospitals in the Charlotte area. There are at least two other inpatient hospitals or multi-hospital systems operating within the Charlotte area: Novant, which operates five inpatient hospitals in the Charlotte area, and CaroMont Regional Medical Center.

In 2013, the Hospital Authority began including restrictions in its contracts with the four insurers which provide coverage to more than eighty-five percent of the commercially-insured residents of the Charlotte area, with the effect of these restrictions being to prohibit the insurers from "steering" their insureds to lower cost providers of medical care services and to forbid the insurers from allowing the Hospital Authority's competitors to place similar restrictions in their contracts with the insurers.

B. Procedural History

On 9 September 2016, plaintiff Christopher DiCesare filed a complaint "individually and on behalf of a class of similarly situated individuals"[2] in Superior Court, Mecklenburg County, which he amended on three occasions for the primary purpose of adding additional parties plaintiff.[3] In their third amended complaint, plaintiffs asserted

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2. Although plaintiffs seek to represent a state-wide class in this lawsuit pursuant to Rule 23 of the North Carolina Rules of Civil Procedure, the trial court had not ruled on this request at the time it entered the orders which serve as the basis of this appeal.

3. On 14 October 2016, Mr. DiCesare filed a first amended complaint to add James Little and Johanna MacArthur as named plaintiffs. On 20 November 2017, plaintiffs filed a second amended complaint reflecting the fact that Mr. DiCesare had moved and was no longer a resident of North Carolina. On 21 May 2018, Ms. MacArthur voluntarily dismissed her claims against the Hospital Authority. On 8 August 2018, plaintiffs filed a third amended complaint adding Diana Stone and Kenneth Fries as named plaintiffs.

claims against the Hospital Authority for: (1) restraint of trade pursuant to N.C.G.S. § 75-1 (2019) (providing that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal") and N.C.G.S. § 75-2 (providing that "[a]ny act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of [N.C.G.S. §] 75-1") and (2) monopolization in violation of N.C. Const. art. I, § 34 (providing that "monopolies are contrary to the genius of a free state and shall not be allowed"), N.C.G.S. § 75-1.1 (providing that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful"), N.C.G.S. § 75-2, and N.C.G.S. § 75-2.1 (providing that "[i]t is unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of trade or commerce in the State of North Carolina"). In support of these claims, plaintiffs alleged that the Hospital Authority is "the dominant hospital system in the Charlotte area, with approximately a fifty percent share of the relevant market"; that the Hospital Authority had "leveraged its market power to . . . increase [its] billing rates"; and that its two largest competitors in the area—Novant and CaroMont Regional Medical Center—had "less than half" and "less than one tenth" of the Hospital Authority's annual revenue, respectively. According to plaintiffs, the Hospital Authority's market power allowed it "to profitably charge prices to insurers that are higher than competitive levels across a range of services, and to impose on insurers restrictions that reduce competition"; "to negotiate high prices (in the form of high 'reimbursement rates') for treating insured patients"; and to "demand[ ] reimbursement rates that are up to 150 percent more than other hospitals in the Charlotte area for providing the same services." Plaintiffs further alleged that "[the Hospital Authority] encourages insurers to steer patients toward itself by offering health insurers modest concessions on its market-power driven, premium prices" while "forbid[ding] insurers from allowing [the Hospital Authority's] competitors to do the same." In plaintiffs' view, the Hospital Authority's alleged conduct "prevent[s] [the Hospital Authority's] competitors from attracting more patients through lower prices," providing its competitors with a "less[ened] incentive to remain lower priced and to continue to become more efficient" and "reduc[ing]" the amount of competition faced by the Hospital Authority.

In light of these allegations, plaintiffs claimed that the steering restrictions contained in the Hospital Authority's contracts with insurers resulted in an unlawful restraint of trade and monopolization on

the grounds that "these steering restrictions have had, and will likely continue to have, . . . substantial anticompetitive effects in the relevant product and geographic market," including: (1) "protecting [the Hospital Authority's] market power and enabling [the Hospital Authority] to charge supracompetitive prices that increase payments for deductibles, copayments and insurance premiums"; (2) "substantially lessening competition among providers of acute inpatient hospital services"; (3) "restricting the introduction of innovative insurance products that are designed to achieve lower prices and improved quality for acute inpatient hospital services"; (4) "reducing consumers' incentives to seek acute inpatient hospital services from more cost-effective providers"; and (5) "depriving insurers and their enrollees of the benefits of a competitive market for their purchase of acute inpatient hospital services." In addition, plaintiffs claimed that "[e]ntry or expansion by other hospitals in the Charlotte area has not counteracted the actual and likely competitive harms resulting from" the steering restrictions; that any future "entry or expansion is unlikely to be rapid enough and sufficient in scope and scale to counteract these harms to competition"; and that "[the Hospital Authority] did not devise its strategy of using steering restrictions for any procompetitive purpose," "[n]or do the steering restrictions have any procompetitive effects," so that "[a]ny arguable benefits of [the Hospital Authority's] steering restrictions are outweighed by their actual and likely anticompetitive effects."

On 14 August 2018, the Hospital Authority filed an answer to plaintiffs' third amended complaint in which it denied the material allegations set forth in plaintiffs' third amended complaint and asserted various affirmative defenses. On the same date, the Hospital Authority filed a motion seeking judgment on the pleadings in its favor pursuant to N.C.G.S. § 1A-1, Rule 12(c), on the grounds that (1) "quasi-municipal corporations such as the Hospital Authority are not subject to claims under Chapter 75" in accordance with the Court of Appeals' decision in *Badin Shores Resort Owners Ass'n, Inc. v. Handy*, 257 N.C. App. 542, 560, 811 S.E.2d 198, 210 (2018) (holding that, "as a quasi-municipal corporation," a sanitary district "cannot be sued for unfair and deceptive trade practices" pursuant to Chapter 75), and "[Chapter 75] therefore does not apply to the Hospital Authority"; and that (2) "[p]laintiffs [had] failed to allege facts sufficient to state a claim for violation of . . . [N.C. Const. art. I, § 34], and, indeed, [had] alleged facts that affirmatively defeat such a claim."

On 27 February 2019, the trial court entered an order in which it granted the Hospital Authority's motion for judgment on the pleadings

with respect to plaintiffs' restraint of trade and monopolization claims to the extent that those claims were predicated upon alleged violations of Chapter 75, given that: (1) "our legislature intended that hospital authorities organized under the [Hospital Authorities] Act were to be treated as quasi-governmental entities," so that, "consistent with *Badin Shores*, . . . [the Hospital Authority] is . . . exempt from liability pursuant to the provisions of Chapter 75" and that (2) our decision in *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989) (holding that, where the General Assembly had "specifically authorized [cities] . . . to own and operate cable systems and to prohibit others from doing so without a franchise" and where the General Assembly had not "required [the municipalities] to issue franchises," "the legislature cannot be presumed to have intended that conduct so clearly authorized could give rise to state antitrust liability"), "[did] not control the [trial court's] analysis" in this case, given the trial court's "belie[f] that *Madison Cablevision*, properly interpreted, stands for the limited proposition that, where the legislature has contemplated or authorized conduct that could be considered anticompetitive, the legislature did not intend those acting pursuant to their authorization to simultaneously be subject to potential liability under Chapter 75," despite the absence of any "indicat[ion] that [the Hospital Authority] was explicitly authorized . . . to include these restrictions in its contracts with insurers." On the other hand, the trial court denied the Hospital Authority's motion seeking judgment on the pleadings with respect to plaintiffs' monopolization claim given that N.C. Const. art. I, § 34, "covers [the Hospital Authority] as a quasi-municipal corporation" and given that plaintiffs had alleged that there are other small competitors in the Charlotte area, that the Hospital Authority's "sheer size gives it excessive market power to negotiate contracts with health insurers that restrain competition," and that services outside of the Charlotte area are not a reasonable substitute for equivalent services within the Charlotte area, with such allegations serving to demonstrate that competition had been "stifled" or that freedom of commerce had been "restricted" to such an extent as to state a monopolization claim pursuant to N.C. Const. art. I, § 34, and with the facts of this case being distinguishable from those at issue in *American Motors Sales*, 311 N.C. 311, 317 S.E.2d 351 (1984) (holding that a statute which enabled the Commissioner of Motor Vehicles to prohibit a manufacturer from granting more than one Jeep dealership within a specific county did not violate N.C. Const. art. I, § 34, given that the Commissioner's actions had lessened, but not "stifle[d]," competition), a case which the trial court did "not read . . . as requiring a plaintiff to plead that all competition has been eliminated." On

28 March 2019, plaintiffs noted an appeal to this Court from the trial court's order, which the trial court had certified for immediate review pursuant to N.C.G.S. § 1A-1, Rule 54(b). On 1 July 2019, the Hospital Authority filed a petition seeking the issuance of a writ of certiorari requesting that we review the trial court's order denying the Hospital Authority's motion for judgment on the pleadings with respect to plaintiffs' monopolization claim. On 30 October 2019, this Court allowed the Hospital Authority's certiorari petition.

II. Substantive Legal Analysis

A. Standard of Review

The purpose of N.C.G.S. § 1A-1, Rule 12(c) "is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit" and is appropriately employed where "all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). In deciding a motion for judgment on the pleadings, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party," with "[a]ll well pleaded factual allegations in the nonmoving party's pleadings [being] taken as true and all contravening assertions in the movant's pleadings [being] taken as false." *Id.* A party seeking judgment on the pleadings must show that "the complaint . . . fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar thereto." *Van Every v. Van Every*, 265 N.C. 506, 510, 144 S.E.2d 603, 606 (1965). According to well-established North Carolina law, we review the trial court's rulings granting or denying motions for judgment on the pleadings *de novo*. *Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.*, 369 N.C. 500, 507, 797 S.E.2d 264, 269 (2017) (citing *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51, 790 S.E.2d 657, 659 (2016)).

B. Chapter 75 Claims

[1] In seeking relief from the challenged trial court order, plaintiffs contend that the trial court erred by granting the Hospital Authority's motion for judgment on the pleadings with respect to its claims pursuant to Chapter 75 for essentially three reasons. First, plaintiffs assert that our decision in *Madison Cablevision* requires that the trial court's decision with respect to the applicability of Chapter 75 be reversed. In plaintiffs' view, *Madison Cablevision* "did not grant [the city] blanket immunity from antitrust liability under Chapter 75 because it was a municipality"; "[r]ather, the Court analyzed the entire statutory scheme governing cable television and found that antitrust liability did not lie

because the legislature had authorized the challenged conduct and clearly contemplated that such conduct could displace competition." In addition, plaintiffs assert that *Madison Cablevision* recognized the validity of "the analogy between exempting a city's conduct from [C]hapter 75 . . . and exempting certain municipal conduct under the 'state action' exemption of the Sherman Act,"[4] quoting *id.* at 656, 386 S.E.2d at 213, and ultimately concluded that, while "municipalities do not automatically enjoy immunity under the state action exemption," quoting *Madison Cablevision*, 325 N.C. at 656–57, 386 S.E.2d at 213, "[w]here the legislature has authorized a city to act, it is free to carry out *that act* without fear that it will later be held liable under state antitrust laws for doing *the very act* contemplated and authorized by the legislature," quoting *id.* at 657, 386 S.E.2d at 213 (emphasis added).

According to plaintiffs, "[r]ather than apply[ing] [the] straightforward analysis" set forth in *Madison Cablevision*, the trial court erroneously found that that decision was not controlling given that "the Hospital Authorities Act does not indicate that [the Hospital Authority] was explicitly authorized by the legislature to include these [anti-steering] restrictions in its contracts with insurers." Plaintiffs contend that "[i]t is precisely because the Hospital Authorities Act does not authorize the anticompetitive conduct alleged here that the *Madison Cablevision* standard" has not been met in this case, so that "[the Hospital Authority] cannot claim immunity from antitrust suit under Chapter 75." Plaintiffs claim that "the [trial] court's reading of *Madison Cablevision* turns this Court's decision on its head and effectively renders it a nullity," arguing that, "if cities, towns, and quasi-municipal corporations have blanket immunity from all claims under Chapter 75, this Court's statutory and policy-based analysis in *Madison Cablevision* was superfluous" given that "there is no mention in *Madison Cablevision*, even in *dicta*, that an entity other than the State could receive the blanket immunity from antitrust claims under Chapter 75 that [the Hospital Authority] seeks here."

Secondly, plaintiffs suggest that the state action immunity doctrine—which they describe as providing "immun[ity] from antitrust liability only if a court finds that the legislature intended to displace or

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4. The Sherman Antitrust Act was enacted by Congress in 1890 and prohibits "contract[s] . . . in restraint of trade or commerce among the several States," 15 U.S.C. § 1, and "monopoliz[ing], or attempt[s] to monopolize, . . . any part of the trade or commerce among the several States," 15 U.S.C. § 2. In 1914, the Sherman Act was modified by the Clayton Antitrust Act, which, in pertinent part, provides for the awarding of treble damages to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 17.

restrain competition as a matter of state policy, and actively supervised that policy," citing *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)—should apply here and that the Hospital Authority is not entitled to claim immunity under the state action doctrine. Plaintiffs suggest that "there is considerable confusion among the lower courts regarding the proper lens through which to consider municipal and quasi-municipal corporations' liability for state antitrust violations" and that "[this] Court can settle the law on this issue by formally adopting the federal state action immunity doctrine, as it has twice indicated it might do." Plaintiffs assert that "this Court explained in *Rose v. Vulcan Materials Co.*, [282 N.C. 643, 194 S.E.2d 521 (1973)] [that] Chapter 75 is based on the federal Sherman Act" and that "the body of law applying the Sherman Act, although not binding upon this Court, . . . is nonetheless instructive in determining the full reach of the statute," quoting id. at 655, 194 S.E.2d at 530, and citing *Johnson v. Phoenix Mutual Life Insurance Co.*, 300 N.C. 247, 262, 266 S.E.2d 610, 620 (1980) (stating that "it is appropriate for us to look to the federal decisions interpreting the [Federal Trade Commission] Act for guidance in construing the meaning of [N.C.G.S. §] 75-1.1"). More specifically, plaintiffs point out that "[N.C.G.S. §§] 75-1 and 75-2 mirror section 1 and section 2 of the Sherman Act, outlawing unreasonable restraints of trade and monopolization, respectively"; that "[N.C.G.S. §] 75-16 . . . offer[s] a treble damages remedy" just like its federal counterpart, the Clayton Act; and that [N.C.G.S. §] 75-1.1 "prohibit[s] . . . unfair and deceptive trade practices" and is, for that reason, comparable to the Federal Trade Commission Act of 1914. In addition, plaintiffs suggest that the Court of Appeals has previously utilized federal case law in construing Chapter 75, *see Hyde v. Abbott Laboratories, Inc.*, 123 N.C. App. 572, 578, 473 S.E.2d 680, 684 (1996) (stating that "[f]ederal case law interpretations of the federal antitrust laws are persuasive authority in construing our own antitrust statutes"), and state that "[t]his Court [and the Court of Appeals have] previously adopted federal antitrust doctrines . . . that benefit defendants like [the Hospital Authority] by immunizing certain forms of conduct from liability," citing *N.C. Steel, Inc. v. National Council on Compensation Insurance*, 347 N.C. 627, 632, 496 S.E.2d 369, 372 (adopting the federal filed rate doctrine), and *Good Hope Hospital, Inc. v. N.C. Department of Health & Human Services*, 174 N.C. App. 266, 275–78, 620 S.E.2d 873, 881–82 (2005) (adopting the federal *Noerr-Pennington* doctrine). Moreover, plaintiffs assert that we stated in *Madison Cablevision*, 325 N.C. at 657, 386 S.E.2d at 213, that our decision in that case was "fortified" by the reasoning of the United States Supreme Court in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713,

85 L. Ed. 2d 24 (1985), and that we "employed an analysis fully consistent with federal jurisprudence."

Plaintiffs emphasize that "[t]he federal state-action immunity doctrine is the product of seven decades of jurisprudence," beginning with *Parker*; that "[i]t is the best rubric available for understanding the circumstances under which government-related actors may and may not be liable under the antitrust laws"; and that "the doctrine grants immunity from suit under the Sherman Act to substate governmental entities like municipalities and hospital authorities *only if* the legislature intended to replace competition with regulation," with the ultimate goal of "seek[ing] to strike the appropriate balance between a State's sovereign ability to govern in ways that may run afoul of the antitrust laws without *ipso facto* immunizing actions that may not truly be those of the [S]tate," citing *Federal Trade Commission v. Ticor*, 504 U.S. 621, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992). Plaintiffs also point to *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, 568 U.S. 216, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013), in which the Supreme Court determined that, while a Georgia statute authorized hospital authorities to acquire additional facilities, that statute "[did] not clearly articulate and affirmatively express a state policy empowering [the defendant] to make acquisitions of existing hospitals that [would] substantially lessen competition" and, for that reason, reversed a judgment upholding the defendant's claim of state action immunity. *Id.* at 228, 133 S. Ct. at 1012, 185 L. Ed. 2d at 56. In light of the Supreme Court's conclusion that, "when a State's position 'is one of mere neutrality respecting the municipal actions challenged as anticompetitive,' the State cannot be said to have 'contemplated' those anticompetitive actions," *id.* at 228, 133 S. Ct. at 1012, 185 L. Ed. 2d at 55, quoting *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 55, 102 S. Ct. 835, 843, 70 L. Ed. 2d 810, 821 (1982), it is not sufficient, for purposes of a claim of state-action immunity, to show that the hospital authority was merely authorized to act; instead, the hospital authority must have been authorized to act in an anticompetitive manner in order to enjoy state-action immunity.

Plaintiffs argue that there is "no evidence" that the General Assembly has authorized the Hospital Authority "to employ anti-steering provisions that substantially lessen competition for hospital services or in any way even contemplated that such conduct would be a likely result of [the Hospital Authority's] delegation of authority by the Hospital Authorities Act." Instead, plaintiffs suggest that "this case demonstrates the dangers of extending immunity to a nominally public but largely unsupervised entity like [the Hospital Authority]" given its "clear institutional interest

in deterring competitors or mechanisms that might effectively serve to lower prices for its services." According to plaintiffs, "[w]ithout adoption of the state action doctrine, entities like [the Hospital Authority] will claim the right to flout the . . . State's antitrust law with impunity, and lower courts will struggle to reconcile the case law in assessing the anticompetitive conduct of any actor that is not strictly 'private.' " In plaintiffs' view, the fact that the Hospital Authority is a nonprofit corporation is of no moment given that nonprofit hospitals "seek to maximize their revenues and reimbursement rates just like their for-profit counterparts," citing *Federal Trade Commission v. University Health, Inc.*, 938 F.2d 1206, 1213–14 (11th Cir. 1991) (stating that the "assumption that University Hospital, as a nonprofit entity, would not act anticompetitively was improper"), and *Federal Trade Commission v. OSF Healthcare System*, 852 F. Supp. 2d 1069, 1081 (N.D. Ill. 2012) (stating that "the evidence in this case reflects that nonprofit hospitals do seek to maximize the reimbursement rates they receive"), and that "[t]he adoption of the nonprofit form does not change human nature," quoting *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381, 1390 (7th Cir. 1986) (citations omitted). Finally, plaintiffs note that "by preserving the functional approach articulated in *Madison Cablevision*, modeled on the state action doctrine, this Court would not merely align North Carolina with the federal jurisprudence; it would also join the majority of its sister states that have considered the issue," noting that eight states have judicially adopted the federal state action doctrine "outright"; fourteen states have laws that "expressly adopt federal antitrust exemptions or that immunize conduct either required by state law or taken under the express authorization of state law, to the extent of that authorization"; "[two] states [have] reject[ed] special immunity for state actors altogether"; and "[o]nly six states have more broadly limited the application of antitrust laws in the case of the state and municipalities," with "none of th[o]se decisions or statutes support[ing] extending blanket immunity by judicial fiat to a multi-billion dollar enterprise like [the Hospital Authority], accused of violating the North Carolina antitrust laws in ways not intended or foreseen by the legislature." According to plaintiffs, "[i]f this Court abandoned *Madison Cablevision* and granted [the Hospital Authority] the sweeping immunity it seeks, North Carolina would truly stand alone."

Thirdly, plaintiffs contend that *Badin Shores* was wrongly decided, that "*Badin Shores* must give way to *Madison Cablevision* in the antitrust context" given that "*Badin Shores* is at the very least inapplicable to antitrust claims," and that we should "leav[e] for another day the question of whether *Badin Shores* survives in the unfair and deceptive

trade practices context in which it originated." In plaintiffs' view, "*Badin Shores* represents the ultimate conclusion of a muddled body of Court of Appeals case law."

As support for this assertion, plaintiffs point to *Sperry Corp. v. Patterso*n, 73 N.C. App. 123, 325 S.E.2d 642 (1985), in which the Court of Appeals held that, regardless of whether sovereign immunity existed, the Secretary of the North Carolina Department of Administration was exempt from suit in light of the fact that Chapter 75 only applies to actions by and against a "person, firm, or corporation," with the State not falling within any of those categories. *Id.* at 125, 325 S.E.2d at 644–45. Plaintiffs further assert that, in *F. Ray Moore Oil Co. v. State*, 80 N.C. App. 139, 142–43, 341 S.E.2d 371, 374 (1986), the Court of Appeals held that the State could bring an unfair trade practices claim pursuant to Chapter 75 as a consumer against its fuel oil supplier on the grounds that the State was "engaged in business," and was acting in the same capacity as it had been acting in *Sperry*. Plaintiffs next direct our attention to the Court of Appeals' decisions in *Rea Construction Co. v. City of Charlotte*, 121 N.C. App. 369, 370, 465 S.E.2d 342, 343 (1996), and *Stephenson v. Town of Garner*, 136 N.C. App. 444, 448, 524 S.E.2d 608, 612 (2000), stating that "the Court of Appeals summarily extended the *Sperry* exemption to incorporated cities and towns in unfair trade practices cases" without "examin[ing] the language of Chapter 75" or "even mention[ing] *Madison Cablevision*, . . . from which [these] holdings deviated," and failed to "incorporate[ ] the *F. Ray Moore Oil* exemption for activities by state actor[s] engaged in business" (citation omitted). In addition, in *Badin Shores*, plaintiffs contend that the Court of Appeals erroneously determined that, since "[sanitary] districts have been defined as quasi-municipal corporations" and since Chapter 75 did not create a cause of action against the State, a sanitary district "cannot be sued for unfair and deceptive trade practices" "regardless of whether a sanitary district is entitled to sovereign immunity." 257 N.C. App. at 560, 811 S.E.2d at 210. According to plaintiffs, "the Court of Appeals failed to incorporate the limitation to the exemption imposed by *F. Ray Moore Oil Co.*, that a governmental entity can sue . . . under Chapter 75 if it is engaged in business" (quotation omitted), citing *F. Ray Moore Oil Co.*, 80 N.C. App. at 142, 341 S.E.2d at 374. Finally, plaintiffs contend that there are "significant differences between the statutes establishing hospital authorities and sanitary districts," including that sanitary districts—but not hospital authorities—possess or exercise powers: (1) "which pertain exclusively to a government"; (2) "to levy property taxes"; (3) to "make rules for the public—enforceable as Class 1 misdemeanors and via injunction"; (4) to "require its residents to use its services" given that it has

"no competitors"; and (5) to "establish a fire department—another core function of government."

In plaintiffs' view, "[t]he dramatic extension of *Sperry* ultimately worked in *Badin Shores* cannot stand as a matter of statutory interpretation." Plaintiffs argue that, since N.C.G.S. § 75-16 expressly states that a "person, firm, or corporation" can sue and be sued pursuant to Chapter 75, the fact that the Hospital Authority "claims to be a quasi-municipal 'corporation' " demonstrates that it falls within the ambit of Chapter 75. Moreover, plaintiffs note that N.C.G.S. § 12-3(6) "broadly define[s] 'person' " as encompassing "bodies politic and corporate, as well as . . . individuals, unless the context clearly shows to the contrary," quoting N.C.G.S. § 12-3(6). In light of their belief that "[t]he heart of [the Hospital Authority's] argument—and central to the [trial court's] decision—is that as a 'body corporate and politic' it qualifies as a public entity and 'quasi-municipal corporation,' " plaintiffs assert that the fact that N.C.G.S. § 12-3(6) defines "person" to include "bodies politic and corporate" ensures that the Hospital Authority "is therefore plainly a 'person' " for purposes of Chapter 75. Plaintiffs contend that this interpretation is "mandated" by our decision in *Jackson v. Housing Authority of City of High Point*, 316 N.C. 259, 341 S.E.2d 523 (1986), in which, according to plaintiffs, we "dutifully read [N.C.G.S. §] 12-3(6)'s definition of 'person,' and its inclusion of 'bodies politic,' into the wrongful death statute." For that reason, plaintiffs reason that "surely a *quasi*-municipal corporation, even further removed from the auspices of state action, may be sued under [N.C.G.S. §] 75-16, when the legislature has provided no limitation on its applicability to hospital authorities, or for that matter any bodies politic." In the event that the General Assembly had intended to limit the scope of the term "person" so as to exclude entities like the Hospital Authority, plaintiffs assert that it could have provided such a limitation in the statute, but chose not to.

Furthermore, plaintiffs note that "the General Assembly intended Chapter 75 'to establish an effective private cause of action for aggrieved consumers in this State,' " quoting *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E. 2d 397, 400 (1981), and that the Court of Appeals upheld this principle in *Hyde*, 123 N.C. App. at 578, 473 S.E.2d at 684 (stating that "the General Assembly intended to provide a recovery for all consumers" in Chapter 75). Plaintiffs claim that "[a] blanket exemption from antitrust suit under Chapter 75 for all quasi-municipal corporations regardless of their legislative grant of authority or role in the marketplace does not effectuate the Legislature's intent for Chapter 75 to provide a broad-based recovery by all aggrieved consumers," particularly given that "it

cannot be seriously disputed that, regardless of its government affiliation, [the Hospital Authority] is a market participant 'engaged in [the] business' of selling hospital services." Plaintiffs further argue that, "[i]f this Court chooses not to overrule *Badin Shores*, at a minimum it should correct the Court of Appeals' omission of the 'engaged in business' exception articulated in *F. Ray Moore Oil*" given that "[t]here is no reason that the State should be liable when 'engaged in business' whereas multi-billion dollar entities like [the Hospital Authority] should not be." As a result, for all of these reasons, plaintiffs request that we overturn the trial court's decision to dismiss its claims pursuant to Chapter 75; that we "curb the uncertainty that has arisen among the lower courts in this area of the law by officially adopting the state-action immunity doctrine"; and that we "correct the legal error" contained within the Court of Appeals' holding in *Badin Shores*.

The Hospital Authority responds, as an initial matter, by contending that *Badin Shores* applies to plaintiffs' Chapter 75 claims and that it was correctly decided.[5] The Hospital Authority begins by arguing that it "shares the same *material legal characteristics* as the sanitary district in *Badin Shores*" given that both sanitary districts and the Hospital Authority (1) "are created pursuant to state statutes by acts of local government"; (2) "are governed by boards appointed by elected, government officials"; (3) "are authorized to issue municipal bonds and notes under the Local Government Finance Act"; (4) "are subject to North Carolina's Public Records Law"; (5) "are subject to North Carolina's Open Meetings Law"; (6) "are subject to regulation by the Local Government Commission"; and (7) "have the power . . . of eminent domain." In light of these similarities, the Hospital Authority contends that the trial court properly applied *Badin Shores* to this case.

Moreover, the Hospital Authority argues that "[t]he Court of Appeals' decision in *Badin Shores* merely represents the logical application of *Sperry*, *F. Ray Moore Oil*, *Rea*, and *Stephenson*." The Hospital Authority notes that the Court of Appeals held in *Sperry* that "[t]he consumer protection *and antitrust* laws of Chapter 75 of the General Statutes do not create a cause of action against the State, regardless of whether sovereign immunity may exist," *Sperry*, 73 N.C. App. at 125, 325 S.E.2d at 644

5. In addition, the Hospital Authority points out that it is a quasi-municipal corporation and a "body corporate and politic," citing the Hospital Authorities Act, N.C.G.S. § 131E-16, *et seq*. In light of the fact that plaintiffs do not appear to contest that the Hospital Authority is a quasi-municipal corporation or a "body corporate and politic," we refrain from discussing the Hospital Authority's arguments with respect to this issue in greater detail.

(emphasis added), and that neither the State nor an individual "act[ing] as a representative of the State when dealing with [a] plaintiff" may be sued pursuant to Chapter 75, *id.* at 125, 325 S.E.2d at 645. In the Hospital Authority's opinion, the Court of Appeals decision in *F. Ray Moore Oil Co.* merely "confirmed" that the Court's "interpretation of [N.C.G.S. §] 75-16 did not rest solely on [the] phrase 'person, firm, or corporation,' but instead on a broader understanding of Chapter 75's purpose and intent," which is the understanding that N.C.G.S. § 75-16 was "aimed at unfair and deceptive practice by those engaged in business for profit," quoting *F. Ray Moore Oil Co.*, 80 N.C. App. at 142–43, 341 S.E.2d at 374. In view of the fact that "the State did not engage in 'business for profit,' " the Hospital Authority argues that the Court of Appeals' ultimate conclusion that "Chapter 75 was not intended to apply to governmental entities" "was consistent with [the] broader purpose" of Chapter 75.

The Hospital Authority asserts that the Court of Appeals relied upon such an understanding, in addition to the "language, history, and context" of N.C.G.S. § 75-16, in concluding in its subsequent decisions that, "[a]s creatures of the State," cities and towns are also "exempt from the reach of Chapter 75." *See Rea Construction*, 121 N.C. App. at 370, 465 S.E.2d 343 (cities); *Stephenson*, 136 N.C. App. at 448, 524 S.E.2d at 612 (towns). The Hospital Authority contends that the General Assembly "has continued to leave the definitional scope of Chapter 75 untouched," despite the "many times since 1985" that it has amended Chapter 75, thereby "demonstrating its acquiescence to and acceptance of *Sperry* and its progeny," citing *Wells v. Consolidated Judicial Retirement System of North Carolina*, 354 N.C. 313, 319, 553 S.E.2d 877, 881 (2001) (stating that, "[w]hen the legislature chooses not to amend a statutory provision that has been interpreted in a specific way, we assume it is satisfied with the administrative interpretation"). Moreover, the Hospital Authority notes that this Court has "declined review in at least five cases that rely [on] or expound on *Sperry's* original holding," so that "principles of *stare decisis* and a need to ensure uniform application of the law" "counsel *Sperry's* continued application," citing *Bacon v. Lee*, 353 N.C. 696, 712, 549 S.E.2d 840, 851–52 (2001), and *McGill v. Town of Lumberton*, 218 N.C. 586, 591, 11 S.E.2d 873, 876 (1940).

As to plaintiffs' argument that the general statutory definition of "person" set forth in N.C.G.S. § 12-3(6) should govern in this case, the Hospital Authority asserts that, not only did plaintiffs fail to cite this statute before the trial court, they have "persistently omit[ted] the critical final words" of that statute, which state that the general definition shall apply "unless context clearly shows to the contrary." In the

Hospital Authority's view, "the language and structure of Chapter 75 show that it was not intended to apply to the State and local government entities, and thus 'context clearly shows otherwise' from Section 12-3(6)." The Hospital Authority contends that the definition of "person" set forth in N.C.G.S. § 12-3(6) "was only ever intended to serve as a general, default rule that should not be applied where [the] context shows the Legislature intended a different meaning." Furthermore, the Hospital Authority argues that "applying Section 12-3(6)'s definition of 'person' to Chapter 75 would necessarily mean the statute applies to all 'bodies politic and corporate'—which includes the State itself," given that "Section 12-3(6) does not provide any basis to distinguish between the State and local governmental bodies when applying the phrase 'bodies politic and corporate.' " As a result, "adopting [p]laintiffs' argument would necessarily mean that Chapter 75 also applies to the State itself, not just quasi-municipal entities like the Hospital Authority," "a conclusion [which would] directly contravene[ ] the rule that '[n]ormally, general statutes do not apply to the State unless the State is specifically mentioned therein,' " quoting *Davidson County v. City of High Point*, 85 N.C. App. 26, 37, 354 S.E.2d 280, 286, *modified and aff'd*, 321 N.C. 252, 362 S.E.2d 553 (1987).

In addition, the Hospital Authority notes that, "when the General Assembly has wanted to apply certain provisions of Chapter 75 to municipalities, it has expressly included them," as it did in N.C.G.S. § 75-39 (prohibiting municipalities from conditioning the provision of water and sewer services on the purchase of electricity or other municipal utilities) and N.C.G.S. § 75-61(9) (adopting a separate definition of the term "person," specific to the Identity Theft Protection Act, that specifically includes a "government" and "governmental subdivision"), and that "[t]here would be no need to expressly include municipalities and governmental subdivisions in these provisions if they were already 'persons' governed under Chapter 75 through the application of Section 12-3(6)," citing *AH N.C. Owner LLC v. N.C. Department of Health & Human Services*, 240 N.C. App. 92, 111, 771 S.E.2d 537, 548–49 (2015). Finally, the Hospital Authority argues that "the unfair trade practice and antitrust provisions of Chapter 75 make clear that they are intended to apply to 'practice[s] by those *engaged in business for profit*,' " quoting *F. Ray Moore Oil*, 80 N.C. App. at 142, 341 S.E.2d at 374, and that "[t]his emphasis on businesses engaged in traditional commercial activities for profit plainly excludes governmental entities."

In spite of plaintiffs' assertion that *Badin Shores* and the cases upon which it relies are only applicable to the unfair and deceptive trade

practices portions of Chapter 75, and not to the antitrust provisions that also appear in Chapter 75, the Hospital Authority contends that "[p]laintiffs cannot offer any valid reason" for interpreting the relevant statutes in this manner. On the contrary, the Hospital Authority argues that "*Sperry*, *Badin Shores*, and the other cases interpreting [N.C.G.S. §] 75-16 have consistently made clear that they apply with equal force to claims under the State's antitrust statutes,"—"a point the [trial court] confirmed" in its order in this case—and that "either the statute as a whole applies to these entities or it does not."

For a variety of reasons, the Hospital Authority disputes the validity of plaintiffs' contention that their claims would survive in the event that the Court elected to utilize concepts drawn from federal antitrust jurisprudence in determining the scope of Chapter 75. As an initial matter, the Hospital Authority asserts that, "far from being inconsistent, somehow, with federal law," "Congress . . . made the same determination that *Badin Shores* and its predecessors found in Chapter 75" by enacting the Local Government Antitrust Act of 1984, 15 U.S.C. § 34, *et seq.*, which provides that "local governmental entities . . . are exempt from monetary damages under federal antitrust law," with "local governments" being defined so as to include school districts, sanitary districts, "or any other special function governmental unit," quoting 15 U.S.C. § 34. The Hospital Authority notes that a federal court recently held explicitly that the Hospital Authority "was just such a local government, exempt from money damages under the federal antitrust laws," see *Benitez v. Charlotte-Mecklenburg Hospital Authority*, 2019 WL 1028018, *5 (W.D.N.C. 2019) (stating that "[the Hospital Authority] is a special governmental unit under the [Local Government Antitrust Act]" and that "the [Local Government Antitrust Act] shields [the Hospital Authority] from antitrust claims for monetary damages").

In addition, the Hospital Authority argues that plaintiffs are "indirect purchasers," being "two or more steps down the distribution chain," and that federal law prohibits "indirect purchasers" from "bring[ing] antitrust claims for any purpose and against any entity," citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977). The Hospital Authority points out that, in response to the Hospital Authority's certiorari petition requesting this Court to review the right of indirect purchasers to sue pursuant to Chapter 75, "[p]laintiffs urged this Court *not* to 'graft' federal doctrines regarding antitrust standing onto Chapter 75" given that doing so "would have resulted in dismissal of their claims." In the Hospital Authority's view, plaintiffs "effectively take the position that federal law should be adopted where it only benefits [plaintiffs], and

otherwise must be ignored," an approach that the Hospital Authority characterizes as "both unprincipled and disingenuous."

In view of the fact that N.C.G.S. § 75-16 was enacted a year before Congress enacted its counterpart, which appears as Section 4 of the Clayton Act, the Hospital Authority asserts that plaintiffs' contention that the General Assembly intended to incorporate the provisions of federal antitrust law into Chapter 75 as of the date of its enactment is "nonsensical" given that the equivalent federal legislation "did not yet even exist." Moreover, the Hospital Authority argues that, "even assuming that the General Assembly intended to incorporate federal law that did not yet exist when it adopted [N.C.G.S. §] 75-16, the understanding at that time was that local governments were *not* subject to the antitrust laws," with it being "another sixty years . . . before the [Supreme Court] held that political subdivisions were subject to federal antitrust laws in certain circumstances," citing *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978), and *City of Boulder*, 455 U.S. 40, 102 S. Ct. 835, 70 L. Ed. 2d 810. The Hospital Authority notes that these decisions resulted in the passage of "the [Local Government Antitrust Act] just two years later," with the Fourth Circuit having recognized in *Sandcrest Outpatient Services, P.A. v. Cumberland County Hospital System, Inc.*, 853 F.2d 1139, 1142 (4th Cir. 1988), that the enactment of the Local Government Antitrust Act was "a response to the filing of 'an increasing number of antitrust suits, and threatened suits,' " quoting H.R. Rep. No. 965, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4602, 4603, as a result of the holdings in *City of Lafayette* and *City of Boulder*, which the Fourth Circuit determined "could undermine a local government's ability to govern in the public interest," quoting *id.*

Next, the Hospital Authority argues that, contrary to plaintiffs' assertions, "[n]othing [about our decision in *Madison Cablevision*] . . . amounts to a determination that [N.C.G.S. §] 75-16 was meant to apply to local governments," so that "*Madison Cablevision* does not govern" plaintiffs' Chapter 75 claims. Instead, the Hospital Authority asserts that the Court made clear in *Madison Cablevision* that it "did not have to reach [the] question" of whether N.C.G.S. § 75-16 applied to cities "in order to dispose of the case" given that "the Court was able to decide it based on a much narrower (and simpler) proposition that it would make little sense for the General Assembly to authorize an action in one statute only to make it illegal under another." Moreover, despite plaintiffs' reliance upon our decision in *N.C. Steel*, the Hospital Authority contends that that decision actually "cuts against [plaintiffs]" given the

fact that "none of the defendants in *N.C. Steel* [were] even . . . governmental entit[ies]" and the fact that we "expressly rejected arguments that *Madison Cablevision* adopted an analysis akin to the state action immunity doctrine under federal antitrust law" in that case. According to the Hospital Authority, "*Madison Cablevision* and *N.C. Steel* merely confirm that this Court has refused to adopt" "[p]laintiffs' bid to graft the federal state action doctrine onto Chapter 75," with "no reported cases in this State ha[ving] ever held that [N.C.G.S. §] 75-16 applies to governmental entities."

Finally, the Hospital Authority asserts that the federal state action immunity doctrine is not applicable to plaintiffs' Chapter 75 claims. Instead, the Hospital Authority argues that "[t]he state action immunity doctrine as developed under federal antitrust law is rooted in principles of federalism and is 'premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce,' " quoting *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56, 105 S. Ct. 1721, 1726, 85 L. Ed. 2d 36, 44 (1985), and "ha[d] no bearing on whether the General Assembly intended to subject local governments to claims for treble damages when it enacted [N.C.G.S. §] 75-16." The Hospital Authority also asserts that plaintiffs' contention that a "majority" of our sister states have adopted the state action immunity test is "incorrect." In addition to the five states listed by plaintiffs as having rejected the opportunity to adopt the state action immunity test into state law, the Hospital Authority lists four other states which have reached the same result and states that "there are at least four additional states in which courts construed their states' antitrust laws to be inapplicable to municipal corporations irrespective of the state action immunity doctrine." Moreover, even though plaintiffs have argued that numerous states had adopted the state action immunity doctrine, the Hospital Authority notes that, "[o]nce properly analyzed, there are sixteen states that follow the federal state action immunity construction for their antitrust laws"; "however, thirteen of those sixteen states do so as the result of specific statutory enactments unlike Chapter 75, not as the result of judicial adoption of this doctrine," and that there are, "in fact, only three states in which courts have taken the path urged on this Court by [plaintiffs]."

The Hospital Authority urges that this Court refrain from adopting the state action doctrine on the grounds that "it would be subjecting political subdivisions . . . to a raft of liability under all sections of Chapter 75," pointing out that, "[a]ccording to Senate Judiciary

Committee Reports, in the year and half between the time *City of Boulder* was decided and the [Local Government Antitrust Act] was passed, there were 'more than one hundred Federal antitrust suits seeking treble damages [filed] against' " local government entities, quoting S. Rep. No. 98th Cong., 2d Sess. 2 (1984), leading to the enactment of the Local Government Antitrust Act, which was intended to "allow local governments to go about their daily functions without paralyzing fear of antitrust lawsuits," quoting *Sandcrest*, 853 F.2d at 1142. The Hospital Authority adds that, "[i]n North Carolina, this [impact] would only be exacerbated by the fact that [N.C.G.S. §] 75-16 applies as well to unfair trade practice claims under [N.C.G.S. §] 75-1.1," violations of which are "claim[ed] in most every complaint based on commercial or consumer transaction[s] in North Carolina," quoting Matthew W. Sawchak and Kip D. Nelson, *Defining Unfairness in "Unfair Trade Practices*," 90 N.C. L. Rev. 2033, 2034 (2012) (quotation and citation omitted). As a result, for all of these reasons, the Hospital Authority asks that we affirm the trial court's decision to grant its motion for judgment on the pleadings with respect to plaintiffs' Chapter 75 claims and to dismiss those claims with prejudice.

We agree with the trial court that, as a quasi-municipal corporation, the Hospital Authority is not a "person, firm, or corporation" for purposes of N.C.G.S. § 75-16. To begin with, plaintiffs' suggestion that the definition of "person" set forth in N.C.G.S. § 12-3(6) includes bodies politic and corporate, and for that reason, covers the Hospital Authority in light of the fact that the Hospital Authorities Act specifically defines a hospital authority as "a public body and a body corporate and politic," N.C.G.S. § 131E-16(14), and that fact that the Hospital Authority's Certificate of Incorporation refers to it as a public body and a body corporate and politic, ignores the fact that N.C.G.S. § 12-3(6) also expressly states that this definition applies "unless the context clearly shows to the contrary." We are persuaded that the context here "clearly shows to the contrary" given that the Hospital Authority is acting in its delegated legislative function and not in a private fashion of any sort, particularly in light of our decision in *O'Neal v. Jennette*, 190 N.C. 96, 100–01, 129 S.E. 184, 186 (1925), holding that counties—which we know not to be "persons"—are also "bod[ies] politic and corporate." We find further support for this conclusion in *Student Bar Ass'n Board of Governors v. Byrd*, 293 N.C. 594, 60, 239 S.E.2d 415, 420 (1977) (holding that "the term 'body politic' connotes a body acting as a government; i.e., exercising powers which pertain exclusively to a government, as distinguished from those possessed also by a private individual or a private

association"); *Smith v. School Trustees*, 141 N.C. 143, 150, 53 S.E. 524, 527 (1906) (holding that "the words 'political', 'municipal', and 'public' are used interchangeably" to describe "municipal corporations"); and *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 18, 213 S.E. 2d 297, 300 (1975) (holding that, where a county possessed the authority to levy a special tax to operate and maintain a hospital which was created by legislative act as a "body corporate" and to substantially control that hospital through the actions of the county commission, the hospital was an agency of the county). Furthermore, we note that the term "person" as used throughout Chapter 131E is defined as "an individual, trust, estate, partnership, or corporation including associations, joint-stock companies, and insurance companies," N.C.G.S. § 131E-1(2), none of which clearly encompass the Hospital Authority.

Plaintiffs' attempts to equate the Hospital Authority to a corporation subject to liability under Chapter 75 do not strike us as persuasive given that plaintiffs have made no genuine effort to distinguish a quasi-municipal corporation from any other sort of corporation, including an ordinary business corporation. In our view, the two entities have significant differences. N.C.G.S. § 131E-16(9) defines "corporation" as "a corporation *for profit* or having a capital stock which is created and organized under Chapter 55 of the General Statutes or any other general or special act of this State, or a foreign corporation which has procured a certificate of authority to transact business in this State pursuant to Article 10 of Chapter 55 of the General Statutes" (emphasis added). The record reflects, on the other hand, that the Hospital Authority is a registered *non*-profit organization. Simply put, the Hospital Authority does not appear to us to be a "corporation" as defined in N.C.G.S. § 131E-16(9).

As we have previously held, quasi-municipal corporations are created "to serve a particular government purpose," with the General Assembly having "giv[en] to these specially created agencies [certain] powers and call[ed] upon them to perform such functions as the Legislature may deem best." *Greensboro-High Point Airport Authority v. Johnson*, 226 N.C. 1, 9–10, 36 S.E.2d 803, 809 (1946). Quasi-municipal corporations are "commonly used in [North Carolina] and other states to perform ancillary functions in government more easily and perfectly by devoting to them, because of their character, special personnel, skill and care." *Id.* at 9, 36 S.E.2d at 809. In such instances, "for purposes of government and for the benefit and service of the public, the [S]tate delegates portions of its sovereignty, to be exercised within particular portions of its territory, or for certain well-defined public purposes." *Gentry v. Town of Hot Springs*, 227 N.C. 665, 667, 44 S.E.2d 85, 86 (1947).

As the record clearly reflects, the Hospital Authority was created in accordance with N.C.G.S. § 131E-17(a) when the Charlotte city council adopted a resolution in which it "[found] that the public health and welfare, including the health and welfare of persons of low income in the City and said surrounding area, require the construction, maintenance, or operation of public hospital facilities for the inhabitants thereof." At that point, the mayor of Charlotte appointed eighteen individuals to serve as commissioners of the Hospital Authority pursuant to N.C.G.S. §§ 131E-17(b), -18, with the mayor having maintained the authority to remove commissioners "for inefficiency, neglect of duty, or misconduct in office" in accordance with N.C.G.S. § 131E-22. The Hospital Authority possesses the authority to acquire real property by eminent domain pursuant to N.C.G.S. § 131E-24 and to issue revenue bonds under the Local Government Revenue Bond Act pursuant to N.C.G.S. § 131E-26. The Hospital Authority is subject to annual audits by the mayor or the chairman of the county commission pursuant to N.C.G.S. § 131E-29; to the Public Records Law, *see Jackson*, 238 N.C. App. at 352, 768 S.E.2d at 24; and to regulation by the Local Government Commission, *see* N.C.G.S. §§ 131E-21(f), -26, -32(c). In sum, the Hospital Authority was clearly created by the City of Charlotte, pursuant to statute, to provide public healthcare facilities for the benefit of the municipality's inhabitants. We are satisfied that the Hospital Authority is a quasi-municipal corporation, rather than a for-profit corporation coming within the purview of N.C.G.S. § 75-16.

As a result, we have no hesitation in concluding that the trial court correctly determined that the Hospital Authority, as a quasi-municipal corporation, is not subject to liability under Chapter 75. First, we do not find our holding in *Madison Cablevision* to be germane in resolving this issue given that, as the trial court noted, the General Assembly specifically authorized the conduct at issue in that case, which makes it different than the circumstances that are before us in this case. The General Assembly's silence with respect to this issue does not end our analysis; instead, it simply means that our analysis cannot be as straightforward as it was in *Madison Cablevision*.

For that reason, we turn to the Court of Appeals' decision in *Badin Shores*, in which that Court concluded that "regardless of whether a sanitary district is entitled to sovereign immunity, as a quasi-municipal corporation it cannot be sued for unfair and deceptive trade practices." *Badin Shores*, 257 N.C. App. at 560, 811 S.E.2d at 210. The trial court interpreted *Badin Shores* as standing for the proposition that all quasi-municipal corporations are exempt from liability under Chapter 75,

noting that "[n]othing in the *Badin Shores* opinion appears to limit its holding to the factual scenario presented in that case" and that, "while *Badin Shores* involved an unfair and deceptive trade practices claim", its "holding encompasses all provisions of Chapter 75." As we previously discussed, quasi-municipal corporations are agencies which have been specially created by the General Assembly, *Greensboro-High Point Airport Authority*, 226 N.C. at 9–10, 36 S.E.2d at 809, by means of a legislative delegation of authority, to carry out the governmental purpose of providing a service to the benefit of the public, *Gentry*, 227 N.C. at 667, 44 S.E.2d at 86, which the legislature is not as well positioned to carry out itself. In this sense, quasi-municipal corporations are an extension of the government that have been created to more efficiently and effectively manage the provision of necessary services to the public. Although quasi-municipal corporations are not subject to all of the requirements applicable to other governmental entities, it is clear that their essential function is, at its core, the governmental provision of services. For that reason, just as *Rea Construction* and *Stephenson* held that cities and towns are governmental entities that are exempt from suit under Chapter 75, we conclude that the same is true of a hospital authority which is jointly operated by a city and a county and, indeed, that all quasi-municipal corporations are exempt from suit under Chapter 75.[6] As a result, we affirm the trial court's decision to dismiss plaintiffs' Chapter 75 claims.

C. Article I, Section 34 Claim

[2] In challenging the trial court's decision to deny its request for entry of judgment on the pleadings with respect to plaintiffs' monopolization claim, the Hospital Authority begins by contending that "the history and interpretation of the Anti-Monopoly Clause reveals that it applies only when competition is eliminated," rather than when "government actions reduce competition, or have an adverse effect on competition."[7] The Hospital Authority points out that N.C. Const. art. I, § 34, "was initially adopted as part of the State's first Constitution in 1776, and thus

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6. In light of this determination, we need not determine whether the Hospital Authority is entitled to the protections of the state action doctrine as it is known in federal antitrust law.

7. The Hospital Authority also asserts that, "by bringing an Anti-Monopoly Clause claim, [p]laintiffs concede the Hospital Authority is a governmental entity," despite plaintiffs contentions for the purposes of Chapter 75 that the Hospital Authority was a private actor or "nominally public." According to the Hospital Authority, plaintiffs were not entitled to assert their monopolization claim if the Hospital Authority was not, in fact, "a unit of government."

predates the federal Sherman Act and the state antitrust laws embodied in Chapter 75 by more than a century," citing N.C. Const. of 1776 Declaration of Rights, Art. XXIII; John V. Orth and Paul M. Newby, The North Carolina State ConstitutionThe North Carolina State Constitution 90–91 (2d ed. 2013) (Orth and Newby); and Stephen Calabresi, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 984, 1073 (2012). For that reason, the Hospital Authority argues that "[t]he Anti-Monopoly Clause . . . is not meant to be the constitutional embodiment of federal and State antitrust statutes." "Instead," the Hospital Authority contends, "the clause was intended to prevent historical practices under which 'English monarchs had used grants of monopolies to reward their political favorites,' " citing Orth and Newby at 90–91, and *McRee v. Wilmington & Raleigh Rail Road Co.*, 47 N.C. 186 (1855). The Hospital Authority asserts that, "[w]hile today the word 'monopoly' is generally used to refer to the private accumulation of economic power," "[t]he original meaning of the word 'monopoly' was *an exclusive grant of power from the government*—in the form of a 'license' or 'patent'—to work in a particular trade or to sell a specific good," quoting Calabresi, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y at 984 (emphasis added), "which had theretofore been a matter of common right," quoting *State v. Harris*, 216 N.C. 746, 761, 6 S.E.2d 854, 864 (1940). In the Hospital Authority's view, the "North Carolina courts have consistently adhered to this established, historical definition of 'monopoly' when applying the Anti-Monopoly Clause," citing *Rockford-Cohen Group, LLC v. N.C. Department of Insurance*, 230 N.C. App. 317, 749 S.E.2d 469 (2013) (holding that N.C. Const. art. I, § 34, prohibits the General Assembly from granting a single, named entity the exclusive right to train bail bondsmen); *Thrift v. Board of Commissioners*, 122 N.C. 31, 30 S.E. 349 (1898) (holding that N.C. Const. art. I, § 34, prohibits a municipality from granting an individual company the exclusive right to construct and maintain water and sewer systems within its corporate limits); and *McRee*, 47 N.C. 191 (holding that N.C. Const. art. I, § 34, prohibits the Governor from granting individuals the exclusive right to construct and operate bridges over a stream), while simultaneously having "upheld government actions that stop short of granting an exclusive franchise or control over a particular market," citing *Madison Cablevision*, 325 N.C. at 654, 386 S.E.2d at 211 (holding that, since "Morganton ha[d] not declared or established itself as the 'exclusive' supplier of cable television to its citizens," it had not violated N.C. Const. art. I, § 34, given that it "ha[d] not foreclosed . . . the possibility that franchises might be granted to other applicants"), or laws and regulations

that "do not grant license holders an *exclusive* monopoly or otherwise eliminate competition," citing *State v. Sasseen*, 206 N.C. 644, 175 S.E. 142, 144 (1934); *Capital Associated Industries, Inc. v. Stein*, 922 F.3d 198, 212 (4th Cir. 2019); and *In re DeLancy*, 67 N.C. App. 647, 654, 313 S.E.2d 880, 884 (1984). The Hospital Authority contends that "the fundamental goal when interpreting the State Constitution is 'to give effect to the intent of the framers of the organic law and of the people adopting it,' " quoting *Stephenson*, 355 N.C. at 370, 562 S.E.2d at 389, with due consideration being given to the "history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation," quoting *id.* at 370–71, 562 S.E.2d at 389.

The Hospital Authority asserts that the *American Motors* case is "the most pertinent case to the issues at bar," particularly given that "[t]he facts here are strikingly similar to those in *American Motors*," with *American Motors* having demonstrated that "the mere fact that competition had been 'restrained' was not enough to establish a constitutional violation, so long as competition had not been 'eliminated.' " The Hospital Authority notes that, in *American Motors*, while this Court recognized that North Carolina's Anti-Monopoly Clause was similar to a Georgia constitutional provision that had been used to invalidate auto-dealer statutes in that state, the Georgia provision prohibited the legislature from approving "any contract or agreement which may have the effect of defeating or *lessening* competition, or *encouraging* a monopoly," leading this Court to conclude that "the scope [of the Georgia provision] seem[ed] considerably more far-reaching into the area of commerce than our anti-monopoly provision." *American Motors*, 311 N.C. at 321, 317 S.E.2d at 359 (emphasis added).

The Hospital Authority asserts that the trial court "relied on an erroneous reading of *American Motors* to conclude that a 'monopoly' may exist under the Anti-Monopoly Clause, even though the alleged monopolist controls less than the entire market and 'some continued yet reduced competition' remains," resulting in the "commi[ssion of] a number of fundamental errors." In light of our conclusion in *American Motors* that competition which is not "as full and free" as it would be in the absence of governmental restraint upon the granting of additional dealerships within a given market area "is by no means eliminated" and that "[m]ore than a mere adverse effect on competition must arise before a restraint of trade becomes monopolistic," 311 N.C. at 317, 317 S.E.2d at 356, the Hospital Authority asserts that the trial court's decision in this case to allow plaintiffs' monopolization claim to proceed, despite

the fact that plaintiffs had merely alleged "a restriction on commerce" by the Hospital Authority, "stands directly at odds with the Court's reasoning in *American Motors*," particularly given that "the facts showing continued competition are even greater in this case than in *American Motors*" since plaintiffs "have affirmatively alleged [here] that there are six competitors *in the same market*."

In addition, the Hospital Authority contends that the trial court "focused on only a part of the Court's definition of 'monopoly' in *American Motors* without considering all of its elements." Although this Court enumerated four elements in defining the term "monopoly" in *American Motors*—"(1) control of so large a portion of the market of a certain commodity that (2) competition is stifled, (3) freedom of commerce is restricted, and (4) the monopolist controls prices," 311 N.C. at 316, 317 S.E.2d at 356—the Hospital Authority argues that the trial court "[f]ocus[ed] on only the first three elements" in deciding this case, each of "which deal with restriction of commerce, but not the control of prices indicative of a monopoly," and thereby erroneously concluding that "[p]laintiffs had stated a claim even though they have not alleged any facts to support the crucial fourth element in the *American Motors* definition" and even though the trial court "did not conduct any analysis to determine whether [p]laintiffs had alleged" facts to support the fourth element.

In the Hospital Authority's view, "[t]he ability to control prices lies at the heart of the 'public harm' that the Anti-Monopoly Clause is intended to prevent"; is "the critical element that distinguishes a monopoly from a firm with just some measure of 'market power,' " citing *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 480, 112 S. Ct. 2072, 2090, 119 L. Ed. 2d 265, 293 (1992) (holding that monopoly power requires "something greater than market power"); and is "key to determining whether a plaintiff has stated a claim at all, no matter what definition of 'monopoly' the Court adopts." Even so, the Hospital Authority argues that "[p]laintiffs conspicuously stop short of alleging any facts that would show the Hospital Authority controls prices for hospital services in Charlotte or that it has the power to exclude competitors," having simply argued, instead, that the Hospital Authority's market power enabled it to "*negotiate* high prices" and "*negotiate* contracts with health insurers that *restrain competition*."[8] Furthermore,

8. In its reply brief, the Hospital Authority states that it "has *not* argued that a state actor must eliminate each and every competitor or control 100% of the market before an Anti-Monopoly Clause violation occurs," and that, instead, "it is clear after *American Motors* that government actions which merely reduce, but do not eliminate, competition

the Hospital Authority argues that "alleging 'high prices,' or even 'supra-competitve prices,' is not enough to establish monopoly power," citing a number of decisions from certain federal circuit courts of appeal and from the Middle District of North Carolina.

In addition, the Hospital Authority argues that, in concluding that plaintiffs' allegations that "outside-market competitors 'would not prevent a hypothetical monopolist provider of acute inpatient hospital services located in Charlotte from profitably imposing small but significant price increases over a sustained period of time,' " the trial court "mistakenly relied on allegations in the complaints regarding the 'hypothetical monopolist test' as if they were factual allegations about the Hospital Authority itself." In the Hospital Authority's view, the "hypothetical monopolist test" is merely "a thought experiment used to define the boundaries of an economic market—not an analysis of actual market conditions or facts concerning the Hospital Authority," so that plaintiffs' allegations concerning this subject "ha[ve] nothing to do with the Hospital Authority."

Finally, the Hospital Authority argues that the trial court "ignor[ed] [this] Court's admonition in *American Motors* that the Anti-Monopoly Clause was intended to apply only to 'horizonal' restraints of competition," citing 311 N.C. at 318, 317 S.E.2d at 357, which the Hospital

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do not cause a violation," citing 311 N.C. at 317, 317 S.E.2d at 356, and that "governmental actions . . . must create or lead to the creation of a monopoly." According to the Hospital Authority, while an alleged monopolist need not hold one-hundred percent of the relevant market, the fifty percent share alleged in the complaint in this case is clearly insufficient. *See United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945) (stating that a ninety percent control over the aluminum market "is enough to constitute a monopoly" but that "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not"); U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act, Chapt. 2, n.23 (2008) (stating that "lower courts generally require a minimum market share of between 70% and 80%" to establish monopoly power for the purpose of antitrust statutes); *Exxon Corp. v. Berwick Bay Real Estate Partners*, 748 F.2d 937, 940 (5th Cir. 1984) (*per curiam*) (stating that "monopolization is rarely found when the defendant's share of the relevant market is below 70%"); *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1250 (11th Cir. 2002) (holding that a "market share at or less than 50% is inadequate as a matter of law to constitute monopoly power"); *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1411 (7th Cir. 1995) (stating that "[f]ifty percent is below any accepted benchmark for inferring monopoly power from market share"). In other words, the Hospital Authority asserts that, "[w]hile monopoly power certainly carries with it market power, market power does not create a monopoly"; thus, "a plaintiff must allege *facts* evidencing not just market power, but monopoly power in order to state a monopoly claim under State [law]," citing a number of federal district court decisions—a showing that the Hospital Authority asserts that plaintiffs simply did not make.

Authority describes as "agreements among competitors which eliminate competition," "rather than the 'vertical' restraints challenged in this case," with vertical restraints being defined as "restraints imposed by agreement between firms at different levels of distribution," quoting *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284, 201 L. Ed. 2d 678, 690 (2018) (quotations and citation omitted). In the Hospital Authority's view, "[t]here is good reason to distinguish vertical and horizontal restraints and limit the reach of the Anti-Monopoly Clause to horizontal restraints" given that "vertical restraints, such as those at issue in this case, 'can often have procompetitive effects,' " quoting *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 287 (2009); are "presumptively lawful," citing *American Express Co.*, 138 S. Ct. at 2284, 201 L. Ed. 2d at 678; and "do not automatically result in the elimination of competition, the establishment of a monopoly, or the control of pricing." Instead, the Hospital Authority contends that vertical restraints can "facilitate the arrangements that lead hospitals to offer insurance companies discounts in the first place" and "protect patient choice" by ensuring that "all in-network hospitals have an equal chance to compete for insurers' patients" and that "insurance companies are not able to put their thumb on the scale by requiring [ ] patients to see the insurance company's preferred provider in order to get the full benefit of the insurance they purchased." The Hospital Authority notes that horizontal restraints "are treated much more critically, as they are more likely to involve the type of 'naked restraints' the law views as inherently anticompetitive, such as price-fixing or market allocation arrangements among competitors to divide markets," citing *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007). By "ignoring" this distinction, the Hospital Authority contends that the trial court "replaced a bright-line rule . . . with a much more amorphous inquiry that will require [c]ourts to second-guess the reasonableness of every government action that arguably reduces, but does not eliminate, competition," contrary to our decision in *American Motors*.

The Hospital Authority cautions that, if the trial court's decision is allowed to stand, it would have "sweeping effects," with plaintiffs being able to "invoke the Anti-Monopoly Clause to challenge not just exclusive, government-sponsored franchises and monopolies, but *any* governmental action that restrains trade in any way." The Hospital Authority states that "[i]t is hard to overstate the change such a ruling would work in the law, or the extent to which it would hamper governmental conduct," "call[ing] into the question the legitimacy of the government's participation in markets for transportation, airports, hospitals, ports, water and sewer systems, construction, cablevision, and education" and leaving

"open[ ] to challenge virtually all regulations governing private commercial activity." Ultimately, in the Hospital Authority's opinion, the trial court's interpretation of the Anti-Monopoly Clause "would have a paralyzing effect on [government's] ability to effectuate important state policies," quoting *Madison Cablevision*, 325 N.C. at 657, 386 S.E.2d at 213, given that, "if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed," quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133, 98 S. Ct. 2207, 2218, 57 L. Ed. 2d 91, 105 (1978). In light of the fact that "the government's economic actions and commercial regulations are reviewed under the forgiving 'rational-basis test,' " citing *Tinsley v. City of Charlotte*, 228 N.C. App. 744, 751, 747 S.E.2d 145, 150 (2013), the Hospital Authority asks that we reverse the portion of the trial court's order dealing with plaintiffs' Anti-Monopoly Clause claim and direct the Court to enter judgment on the pleadings in favor of the Hospital Authority with respect to this issue.

In seeking to persuade us to uphold the trial court's decision with respect to the monopolization claim, plaintiffs begin by contending that the trial court correctly concluded that competition need not be "eliminated" to sustain such a claim. According to plaintiffs, the Hospital Authority used "isolated language" from our opinion in *American Motors* to support its point, ultimately "ignoring the holding [of that case] itself." Plaintiffs direct our attention to an excerpt from *American Motors* in which we stated that "[a] monopoly results from ownership or control of so large a portion of the market for a certain commodity that competition is stifled, freedom of commerce is restricted, and control of prices ensues," "denot[ing] an organization or entity so magnified that it suppresses competition and acquires a dominance in the market," with the result being a "public harm through the control of prices of a given commodity." 311 N.C. at 315–16, 317 S.E.2d at 355. According to plaintiffs, we "reduced this definition" to the four elements to which the Hospital Authority referred in its argument and, based upon an analysis of the relevant facts, proceeded to conclude that the Commissioner of Motor Vehicles did not violate N.C. Const. art. I, § 34, by revoking a Jeep dealership's franchise on the basis that: (1) there was already another Jeep dealership in that county, so that the market would not support two Jeep dealerships; and (2) there were other Jeep dealerships within a reasonable range of the affected geographic area.

In addition, plaintiffs assert that the trial court correctly noted that *American Motors* was decided on "a full factual record and not on a

motion for judgment on the pleadings," with the trial court having cited to a decision from the Eastern District of North Carolina, *Jetstream Aero Services, Inc. v. New Hanover County*, 672 F. Supp. 879, 885 (E.D.N.C. 1987) (denying the defendant's motion for judgment on the pleadings on the grounds that, "assuming [the] plaintiff can prove its allegations at trial, . . . a jury could find that [the] defendants' activities constitute a restraint of trade resulting in a monopoly"), in support of this aspect of its reasoning. Plaintiffs also argue that the trial court "correctly distinguished this case from *American Motors* on the facts" in light of its recognition that, in *American Motors*, the affected consumers could "easily" reach other, neighboring Jeep dealerships and other four-wheel drive vehicles, while, in this case, "[a]cute inpatient hospital services outside of the Charlotte area are not a reasonable substitute for such services within the Charlotte area," with "the lack of *reasonable* substitutes" being "important to monopolization claims."

Furthermore, plaintiffs contend that the trial court's decision was "consistent with *Madison Cablevision*" since the municipality at issue in that case had "expressly left open the possibility that other capable companies could" compete, rendering that decision consistent with the "longheld principle that merely by entering the market the state does not, without more, give rise to a [N.C. Const. art. I, § 34,] claim by a private competitor," citing 325 N.C. at 654, 386 S.E.2d at 211–12, and asserting that, otherwise, *Madison Cablevision* "is simply inapposite to [p]laintiffs' [N.C. Const. art. I, § 34,] claim" given that plaintiffs "are not challenging, facially, the ability of a local government to establish a hospital authority" and given that this case does not involve a situation in which a "competitor has failed to meet legal requirements to compete in the market."

Moreover, plaintiffs claim that the Hospital Authority "ignores or mischaracterizes a host of decisions that reveal a broader prohibition" than that provided for in response to the actions of the English monarchs and "effectively wants the Court to overrule a century of jurisprudence and return the State of North Carolina civil rights to some imagined scope in 1776" despite the absence of any support for this position. In plaintiffs' view, the approach advocated by the Hospital Authority conflicts with this Court's recognition of the importance of our fundamental legal principles, citing *Thrift*, 122 N.C. at 37, 30 S.E. at 351 (stating that "common law maxims and definitions . . . must be construed by us in the light of changed conditions"). In addition, plaintiffs assert that "the history of [N.C. Const. art. I, § 34,] jurisprudence shows it has been regularly applied to 'abuses' unknown to King George," citing *In re Certificate of*

Need for Aston Park Hospital, Inc., 282 N.C. 542, 551, 193 S.E.2d 729, 735–36 (1973) (holding that the Medical Care Commission's decision to "den[y] Aston Park the right to construct and operate its proposed hospital except upon the issuance to it of a certificate of need" amounts to the creation of "a monopoly in the existing hospitals contrary to the provisions of [N.C. Const. art. I, § 34,]" and makes "a grant to them of exclusive privileges forbidden by [N.C. Const. art. I, § 32]");[9] *Roller v. Allen*, 245 N.C. 516, 525, 96 S.E.2d 851, 859 (1957) (striking down a State scheme for the licensing of tile contracts on the grounds that "no substantial public interest is shown to be involved or adversely affected," so that "regulation is not justified"); and *Harris*, 216 N.C. 746, 762, 6 S.E.2d 854, 864 (1940) (striking down a State licensing scheme for dry cleaners which was of "little . . . importance" other than to give "interested members of the group . . . control [over] admission to the trade"). Although the Hospital Authority cited to several local-ordinance cases to support its position, plaintiffs contend that those cases "stand for the proposition that the state may not privilege one competitor or some competitors over others, regardless of the fact that competition has not been 'eliminated,' " and that none of those cases involved a situation in which a single member of a given profession was allowed to monopolize the relevant trade, citing *Sasseen*, 206 N.C. at 644, 175 S.E. at 142; *Capital Associated Industries*, 922 F.3d 198; and *In re DeLancy*, 67 N.C. App. at 654, 313 S.E.2d at 885.

Plaintiffs also argue assert that their monopolization claim is consistent with the "original purposes" of the Anti-Monopoly Clause. Plaintiffs assert that "the right to compete, and the attendant right of North Carolinians to prices set by free competition," is precisely the "fundamental principle" protected by N.C. Const. art. I, § 34. According to plaintiffs, "there has never been a historical consensus . . . that unlawful monopolization requires the complete elimination of competition" and that "even the earliest reported common-law case on monopoly, in 1599, confirms" that proposition, citing *Davenant v. Hurdis* (1599) 72 Eng. Rep. 769; Moore 576 (K.B.). Moreover, plaintiffs suggest that "North Carolina has elected a path of robust antitrust enforcement," "being one of two states with a constitutional prohibition on monopolies at the

9. The Hospital Authority correctly notes that, after our decision in *Aston Park*, the Court of Appeals held in *Hope – a Women's Cancer Center, P.A. v. State*, 203 N.C. App. 593, 607, 693 S.E.2d 673, 683 (2010), that certificate of need laws are constitutional. In light of that fact, the Hospital Authority asserts that *Aston Park* "has no continuing validity" and that, even if it did, it is otherwise distinguishable from the facts of this case. In light of our agreement that the facts at issue in this case are materially different from those at issue in *Aston Park*, we will refrain from commenting on its "continuing validity" in this opinion.

founding" and having "enacted a treble-damages remedy . . . even more comprehensive" than the one found in the federal Sherman Act "when one considers that North Carolina has extended the remedy to all consumers, including indirect purchasers."

According to plaintiffs, the allegations set out in their third amended complaint "repeatedly and in detail" alleged that the Hospital Authority possessed "market power [which] allowed it to control prices," effectively satisfying the fourth element of the test for the presence of a monopoly enunciated in *American Motors*, and that the trial court "acknowledged those allegations," having "block quoted two paragraphs" from plaintiffs' third amended complaint which "discussed the ways that [the Hospital Authority's] power affects prices" in denying the Hospital Authority's motion for judgment on the pleadings with respect to this issue. Plaintiffs suggest that, while the Hospital Authority "hangs its argument" on the fact that plaintiffs alleged that the Hospital Authority's market power "enabled it to *negotiate* high prices," "[t]he Hospital Authority may not cherry-pick one word out of a complaint and then ask the Court to draw inferences about that word in its favor" given that "[p]laintiffs clearly alleged that [the Hospital Authority] has amassed market power that is large enough to allow it to control prices."

According to plaintiffs, the "price-control prong of *American Motors* follows from the test for monopoly power under the federal Sherman Act" given that *American Motors* relied upon *State v. Atlantic Ice & Coal Co.*, 210 N.C. 742, 188 S.E. 412 (1936), in which plaintiffs assert that we decided "not . . . to be moored strictly to arcane definitions of monopolies" and, instead, "looked to Black's Law Dictionary and a Massachusetts case," *Commonwealth v. Dyer*, 243 Mass. 472, 486, 138 N.E. 296, 303 (1923) (stating that, "[i]n the modern and wider sense monopoly denotes a combination, organization or entity so extensive and unified that its tendency is to suppress competition, to acquire a dominance in the market and to secure the power to control prices to the public harm with respect to any commodity which people are under a practical compulsion to buy"), in defining what a monopoly is. With this "more flexible foundation in place," plaintiffs assert that "*Atlantic Ice* proceeded to apply federal antitrust precedent," such as *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911), and that decisions by the United States Supreme Court have consistently held that "the power to control prices or exclude competition may be inferred from, among other evidence, evidence of the ability to profitably raise prices substantially above the competitive level for a significant period of time," citing *Jefferson Parish Hospital District No. 2*

v. Hyde, 466 U.S. 2, 27 n.46, 104 S. Ct. 1551, 1566 n.46, 80 L. Ed. 2d 2, 22 n.46 (1984) (holding that "market power exists whenever prices can be raised above the levels that would be charged in a competitive market"); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001); and *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). In plaintiffs' view, the question of whether the Hospital Authority "in fact has market power sufficient to meet *American Motors*' requirements of control of a portion of the market large enough to stifle competition, restrict commerce, and control prices [is a] question[ ] properly left to the jury."[10]

Finally, plaintiffs suggest that the Anti-Monopoly Clause applies to vertical restraints as well as horizontal restraints and assert that the Hospital Authority's position to the contrary represents "a fundamental misreading of *American Motors*." According to plaintiffs, the Hospital Authority "ignores" the fact that the language that it relied upon from *American Motors* "address[ed] the petitioner's *facial* challenge to the dealer protection statute" in that case, making it "not even relevant conceptually," while, in this case, plaintiffs "challenge the specific restraints imposed on competition by [the Hospital Authority]," a fact that renders the language upon which the Hospital Authority relies beside the point. In addition, plaintiffs suggest that the Hospital Authority's "argument that a monopoly claim must involve horizontal restraints" "cannot be reconciled" with its argument that the Anti-Monopoly Clause "was understood only to prevent the State from granting or creating exclusive franchises of monopolies" given that "horizontal restraints, by definition, contemplate other market actors." Plaintiffs also note that "this case does not involve the type of intra-brand restraint that this Court approved in *American Motors*" since the "intent and effect" underlying the Hospital Authority's anti-steering restrictions "[is] to protect [the Hospital Authority] from price competition from its horizontal,

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10. In addition, plaintiffs argue that the Hospital Authority waived the right to argue that plaintiffs failed to plead the "control of prices" element given that the Hospital Authority never set out the elements of the test contained within *American Motors* before the trial court and cannot, for that reason, assert for the first time on appeal that plaintiffs failed to satisfy the fourth element. The Hospital Authority responds that it "clearly argued below that [p]laintiffs had failed to allege sufficient facts to establish a monopoly," that it did not advocate the application of the *American Motors* test, and that it could not, for that reason, "have known, prospectively, that the [trial court] would fail to fully apply it." In light of the fact that the Hospital Authority contended in the memorandum of law that it submitted in support of its motion for judgment on the pleadings that "[p]laintiffs have not alleged sufficient facts to support such a claim, and, indeed, have alleged facts in their [t]hird [a]mended [c]omplaint that establish just the opposite," we are satisfied that the Hospital Authority properly preserved this argument for purposes of appellate review.

inter-brand competitors: other hospitals." As a result, for all of these reasons, plaintiffs request that we affirm the trial court's decision to allow plaintiffs to proceed with respect to their monopolization claim.

In resolving the issue that is before us as a result of the trial court's decision to allow plaintiffs' monopolization claim to survive the Hospital Authority's motion for judgment on the pleadings, we are guided by our prior decision in *American Motors*, in which we held that the Commissioner of Motor Vehicles did not violate N.C. Const. art. I, § 34, by allowing only one Jeep franchise to operate within a particular county in light of the fact that there were Jeep franchises in multiple adjoining counties. 311 N.C. at 317, 317 S.E.2d at 356. In reaching this conclusion, we stated that "[a] monopoly results from ownership or control of so large a portion of the market for a certain commodity that competition is stifled, freedom of commerce is restricted, and control of prices ensues"; that "[i]t denotes an organization or entity so magnified that it suppresses competition and acquires a dominance in the market"; and that "[t]he result is public harm through the control of prices of a given commodity." *Id.* at 315–16, 317 S.E.2d at 355. As a result, we held that "[t]he distinctive characteristics of a monopoly are . . . (1) control of so large a portion of the market of a certain commodity that (2) competition is stifled, (3) freedom of commerce is restricted and (4) the monopolist controls prices." *Id.* at 316, 317 S.E.2d at 356. In other words, in "order to monopolize, one must control a consumer's access to new goods by being the *only* reasonably available source of those goods," with "a consumer [having to] be without reasonable recourse to elude the monopolizer's reach." *Id.* In addition, we concluded that, "[w]hile competition may not be as full and free as with multiple . . . Jeep franchises existing in the [same county], it [was] by no means eliminated," and that "[m]ore than a mere adverse effect on competition must arise before a restraint of trade becomes monopolistic." *Id.* at 317, 317 S.E.2d at 356. In reliance upon these fundamental principles, we turn to the application of the test enunciated in *American Motors* to the factual record that is before us in this case. At the conclusion of our analysis, we are unable to agree with the trial court's determination that plaintiffs adequately pleaded that the Hospital Authority controlled "so large a portion of the market" that it not only stifled competition and restricted freedom of commerce, but also controlled prices.

In spite of plaintiffs' insistence that the Hospital Authority possesses a "dominan[ce]" over the market and "excessive market power," plaintiffs explicitly alleged that the Hospital Authority possessed "an approximately fifty percent share of the relevant market." Although reviewing

courts have not identified a fixed percentage market share that an entity must allegedly possess in a given market in order to adequately allege a monopolization claim and although the absence of such a bright line test compels the conclusion that the relevant determination must be made on a case-by-case basis, we are satisfied that, when considered in its entirety, plaintiffs' third amended complaint does not sufficiently allege that the Hospital Authority had a monopoly in the relevant market.

In reaching this conclusion, we do not wish to be understood as holding that a monopolization claim cannot proceed unless all competition has been eliminated and do not understand our prior decision in *American Motors* to support the imposition of any such requirement. On the other hand, however, we agree with the Fourth Circuit and other jurisdictions that have been skeptical of monopoly claims that, like plaintiffs, assert that a monopoly exists when an entity, like the Hospital Authority, has a market share of fifty percent or less. *See*, *e.g.*, *White Bag Co. v. International Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974) (citing *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 974 n.6 (8th Cir. 1986) (stating that "when monopolization has been found the defendant controlled seventy to one hundred percent of the relevant market"). For that reason, in light of the market share disclosed by the third amended complaint, plaintiffs' monopolization claim cannot survive unless the other allegations in the third amended complaint show that the Hospital Authority has the ability to control prices in the Charlotte market in spite of the fact that it only has a fifty percent market share.

Instead of containing additional allegations that show the ability to control prices, however, the allegations contained in the third amended complaint cut the other way. For example, the third amended complaint alleges that other hospitals of significant size provide acute inpatient hospital services in the Charlotte area. In other words, unlike the situation at issue in *American Motors*, in which the only intrabrand competitors were located in different service areas, the allegations contained in the third amended complaint show that the Hospital Authority faces a material level of competition within the Charlotte area itself. Moreover, while the Hospital Authority allegedly used its market power "to insulate itself from competition" so as to charge "higher prices," such allegations are not tantamount to a showing that the Hospital Authority is able to effectively *control* prices in the relevant market. As a result, given that plaintiffs have alleged that the Hospital Authority has no more than a fifty percent share of the market for acute inpatient hospital services in the Charlotte area and that it faces sizeable competitors within that market and given that plaintiffs have failed to allege that the Hospital Authority

has the ability to actually control prices in that market, we are not persuaded that the allegations contained in the third amended complaint suffice to show that the Hospital Authority possesses "so large a portion" of that market that it risks causing the sort of harm to the public that N.C. Const. art. I, § 34, is designed to prevent. As a result, we hold that the trial court erred by denying the Hospital Authority's motion for judgment on the pleadings with respect to plaintiffs' monopolization claim.

III. Conclusion

Thus, for the reasons set forth above, we conclude that the trial court did not err by granting judgment on the pleadings in favor of the Hospital Authority with respect to plaintiffs' Chapter 75 restraint of trade and monopolization claims. On the other hand, however, we further conclude that the trial court did err by denying the Hospital Authority's motion for judgment on the pleadings with respect to plaintiffs' claim pursuant to N.C. Const. art. I, § 34. As a result, the challenged order is affirmed, in part, and reversed, in part.

AFFIRMED, IN PART; REVERSED, IN PART.

IN THE MATTER OF A.L.L.

No. 319A19

Filed 18 December 2020

1. Termination of Parental Rights—jurisdiction—requirements—dependency proceeding in another county

Where a child's permanent legal guardians filed a termination of parental rights petition in the district court in the same county where the child resided with them, that district court had subject matter jurisdiction (pursuant to N.C.G.S. § 7B-1101) to enter an order terminating the mother's parental rights in the child, regardless of the fact that a district court in another county previously had entered an order establishing a permanent plan of guardianship in the child's dependency proceeding.

2. Termination of Parental Rights—grounds for termination—dependency—alternative child care arrangement—placement with legal guardian

The trial court improperly terminated a mother's parental rights on grounds of dependency (N.C.G.S. § 7B-1111(a)(6)) where it failed to make any findings of fact addressing whether the mother lacked an appropriate alternative child care arrangement. Moreover, the statutory requirements for establishing dependency as grounds for termination could not be met where the child had been placed with legal permanent guardians pursuant to a valid permanency planning order.

3. Termination of Parental Rights—grounds for termination—willful abandonment—willful intent—parent with severe mental health issues

The trial court improperly terminated a mother's parental rights on grounds of willful abandonment where the court failed to enter any factual findings or conclusions of law stating that the mother willfully abandoned her child, and where the record lacked clear, cogent, and convincing evidence of willful intent to forgo all parental duties and claims to the child. Rather, the evidence showed that the mother intended to parent her child but lacked full capacity to do so because of multiple severe mental illnesses.

Justice NEWBY concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 29 April 2019 by Judge April C. Wood in District Court, Davie County. Heard in the Supreme Court on 2 September 2020.

Christopher M. Watford for petitioner-appellees.

Jeffrey L. Miller, for respondent-appellant mother.

EARLS, Justice.

Respondent appeals from an order entered by the Davie County District Court terminating her parental rights to her minor daughter, Ann.[1] The trial court determined that grounds existed to terminate respondent's parental rights pursuant to N.C.G.S. §§ 7B-1111(a)(6) and (a)(7). Although we agree with petitioners that the Davie County District Court had subject-matter jurisdiction to enter a termination order, we

1. We refer to the juvenile by the pseudonym "Ann" for ease of reading and to protect the privacy of the juvenile.

conclude that petitioners have not proven by clear, cogent, and convincing evidence that grounds existed to terminate respondent's parental rights. Further, we hold that the requirements of N.C.G.S. § 7B-1111(a)(6) are not met in this case because Ann resides with legal permanent guardians and that the record lacks any evidence supporting a conclusion that respondent acted willfully within the meaning of N.C.G.S. § 7B-1111(a)(7). Accordingly, there is no cause to remand for further fact-finding, and we reverse the trial court's order.

Standard of Review

A trial court with subject-matter jurisdiction "is authorized to order the termination of parental rights based on an adjudication of one or more statutory grounds." *In re J.A.E.W.*, 375 N.C. 112, 117, 846 S.E.2d 268, 271 (2020). Absent subject-matter jurisdiction, a trial court cannot enter a legally valid order infringing upon a parent's constitutional right to the care, custody, and control of his or her child. *In re E.B.*, 375 N.C. 310, 315–16, 847 S.E.2d 666, 671 (2020). Whether or not a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo. *See, e.g.*, *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 556, 809 S.E.2d 558, 560 (2018). Challenges to a trial court's subject-matter jurisdiction may be raised at any stage of proceedings, including "for the first time before this Court." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006).

"At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under [N.C.G.S. § 7B-1111(a)]." *In re J.A.E.W.*, 375 N.C. at 116, 846 S.E.2d at 271 (citation omitted). We review a trial court's order "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

Background

Respondent gave birth to her daughter, Ann, in July 2015. On the day Ann was born, respondent made concerning statements to hospital personnel indicating a lack of understanding of what was required to safely care for a newborn child. After receiving respondent's mental-health treatment records, which indicated that she had previously been diagnosed with schizophrenia, obsessive compulsive disorder, bipolar disorder, and an eating disorder, a doctor from the hospital conducted a mental health assessment and confirmed a primary diagnosis of

schizophrenia. A report was made to the Davidson County Department of Social Services (DSS) alleging that respondent's mental health conditions might render her unable to independently care for Ann. Respondent was unable or unwilling to provide information about Ann's father. She was unable to provide DSS with the name of any person that could assist her in caring for Ann or who could serve as an appropriate kinship placement.

Two days later, DSS filed a petition seeking to have Ann adjudicated to be a dependent juvenile. DSS obtained nonsecure custody and placed Ann with foster parents, the petitioners in the present case. Respondent entered into an out-of-home family services agreement, agreeing to participate in parenting classes, complete a psychological and parenting capacity assessment, complete individual counseling, and maintain suitable housing and visits with Ann. At a hearing on 7 October 2015, the parties stipulated that Ann was a dependent juvenile and the Davidson County District Court entered an order to that effect. Respondent was ordered to make progress towards completing the terms of her case plan. She was allowed supervised visits with Ann twice a week for two hours each time.

The trial court's first permanency-planning order reflects that respondent made significant progress towards satisfying the terms of her case plan. She had completed parenting classes and a psychological and parenting capacity assessment, started attending therapy and counseling, and obtained stable housing. She attended all visitations with Ann except one. However, DSS and others involved in treating respondent's mental health conditions continued to report significant concerns about respondent's capacity to safely care for Ann. Although respondent was receiving counseling and taking medications, she denied that she had a mental illness. She also failed to appropriately interact with her child during visits, persisting in behaviors suggesting inattentiveness to or incomprehension of Ann's needs. She demonstrated an unwillingness to acknowledge and address her deficiencies as a parent, disregarding basic parenting advice offered by DSS. Weighing respondent's progress against her undeniable shortcomings as a parent, the trial court established a permanent plan of reunification and a secondary plan of guardianship.

After the first permanency-planning hearing, respondent continued to struggle to address her severe mental health issues. At times, respondent was combative and disrespectful towards DSS. She repeatedly provided Ann with gifts, clothing, and food that were not age appropriate. Although none of her relatives were able to serve as a kinship placement,

a potential guardian who was acquainted with respondent's immediate family was identified and approved as an appropriate alternative caregiver for Ann. However, the trial court changed the permanent plan to guardianship with a secondary plan of termination of parental rights and adoption. Ultimately, the trial court implemented the primary permanent plan by appointing petitioners as Ann's legal permanent guardians pursuant to N.C.G.S. § 7B-600. Respondent was awarded visitation with Ann for one hour every three months supervised by petitioners in a public place of their choosing. The trial court waived future permanency planning and review hearings.

On 27 February 2018, petitioners filed a petition seeking to terminate respondent's parental rights in Davie County District Court. Petitioners stated that they wished to have respondent's parental rights terminated in order to adopt Ann "as soon as possible." Over respondent's objection, the trial court appointed her an attorney and a guardian *ad litem*. At a termination hearing on 15 April 2019, the trial court received evidence from a psychologist who evaluated respondent and the DSS social worker who managed respondent's case. The evidence indicated that while respondent "did everything that DSS and the [c]ourt asked her to do," her mental health conditions, and resultant deficiencies as a parent, rendered her unable to safely care for her daughter. Testimony presented at the hearing also indicated that respondent had persisted in her refusal to take prescribed medication to treat her mental health conditions, although the DSS social worker acknowledged that even if respondent had complied with her medication plan, she would still lack the "mental health stability" necessary to be a parent.

On 29 April 2019, the Davie County District Court entered an order terminating respondent's parental rights on the grounds that she was incapable of providing for the proper care and supervision of Ann such that Ann was a dependent juvenile, pursuant to N.C.G.S. § 7B-1111(a)(6), and that she had willfully abandoned Ann, pursuant to N.C.G.S. § 7B-1111(a)(7). Respondent appealed the trial court's order.

Analysis

Respondent raises three challenges to the Davie County District Court's order terminating her parental rights to Ann. First, she contends that the Davie County District Court lacked subject-matter jurisdiction to enter an order terminating her parental rights because the Davidson County District Court had previously entered a permanency-planning order establishing petitioners as Ann's legal permanent guardians. Second, respondent argues that the trial court failed to make adequate

findings to support a conclusion that she lacked an "appropriate alternative child care arrangement" for Ann as required under N.C.G.S. § 7B-1111(a)(6) and that the requirements of N.C.G.S. § 7B-1111(a)(6) cannot be satisfied as a ground for terminating the rights of a parent whose child has been placed with legal permanent guardians. Third, respondent argues that the trial court failed to make adequate findings to support a conclusion that she had "willfully abandoned" Ann within the meaning of N.C.G.S. § 7B-1111(a)(7) and that the record lacks any evidence indicating that her behavior was anything other than a manifestation of her severe mental health conditions. We address each argument in turn.

a. Jurisdiction

[1] Respondent argues that the Davie County District Court lacked jurisdiction because the Davidson County District Court had previously entered a legally valid order establishing a permanent plan of guardianship in Ann's underlying dependency proceeding. If respondent were correct that the Davie County trial court lacked subject-matter jurisdiction, then its order terminating respondent's parental rights was "[a] void judgment [which] is, in legal effect, no judgment. No rights are acquired or divested by it." *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956); *see also In re T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 790 ("Subject-matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act[.]"). However, we conclude that the Davie County District Court had subject-matter jurisdiction to enter an order terminating respondent's parental rights.

A trial court's subject-matter jurisdiction over a petition to terminate parental rights is conferred by N.C.G.S. § 7B-1101.

> The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion.

N.C.G.S. § 7B-1101 (2019). Respondent does not dispute that at the time the termination petition was filed, Ann resided with her legal permanent guardians in Davie County. Respondent does not dispute that petitioners were an appropriate party to file a termination petition given that they had "been judicially appointed as the guardian of the person of

the juvenile." N.C.G.S § 7B-1103(a)(1) (2019). In an attempt to circumvent the necessary conclusion that the Davie County District Court had subject-matter jurisdiction, respondent contends that permitting one court to override another court's permanency planning order frustrates the Juvenile Code's overarching policy of preserving family autonomy by preventing the unnecessary dissolution of parent-child bonds. *See* N.C.G.S. § 7B-100 (2019). Further, she argues that permitting the Davie County District Court to exercise jurisdiction would be inconsistent with North Carolina's "integrated" juvenile system, which creates "one continuous juvenile case with several interrelated stages, not a series of discrete proceedings." *In re T.R.P.*, 360 N.C. at 593, 636 S.E.2d at 792.

It is well-established that "[a] court's jurisdiction to adjudicate a termination petition does not depend on the existence of an underlying abuse, neglect, and dependency proceeding." *In re E.B.*, 375 N.C. at 317, 847 S.E.2d at 672. Indeed, although the Juvenile Code permits petitioners to seek termination in the same district court that is simultaneously adjudicating an underlying abuse, neglect, or dependency petition, the statutory language does not mandate filing in a single court. *See* N.C.G.S. § 7B-1102(a) (2019) ("When the district court is exercising jurisdiction over a juvenile and the juvenile's parent in an abuse, neglect, or dependency proceeding, a person or agency specified in [N.C.G.S. §] 7B-1103(a) may file in that proceeding a motion for termination of the parent's rights in relation to the juvenile."). Thus, as the Court of Appeals has correctly held, a trial court lacks jurisdiction over a termination petition if the requirements of N.C.G.S. § 7B-1101 have not been met, even if there is an underlying abuse, neglect, or dependency action concerning that juvenile in the district in which the termination petition has been filed. *In re J.M.*, 797 S.E.2d 305, 306 (N.C. Ct. App. 2016). However, if the requirements of N.C.G.S. § 7B-1101 have been met in one county, then a district court in that county has jurisdiction, even if an abuse, neglect, or dependency action is pending in another county.[2] In this case, the petitioners were Ann's legal permanent guardians who filed their petition in the district court in the county where they resided with Ann, satisfying the requirements of N.C.G.S. § 7B-1101. Accordingly, we reject respondent's jurisdictional claim and turn to the merits of the termination order.

b. Dependency

[2] A ground exists to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)(6) if petitioners can prove by clear, cogent, and convincing

2. We note that Davidson County and Davie County are in the same judicial district.

evidence that "the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of [N.C.G.S. §] 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future." N.C.G.S. § 7B-1111(a)(6). In order for dependency to provide a basis for terminating parental rights, the petitioners must also prove that "the parent lacks an appropriate alternative child care arrangement." *Id.* In the present case, the parties do not dispute that due to respondent's mental health conditions, she is unable to care for her child. Instead, respondent argues that the trial court made no findings of fact which provide clear, cogent, and convincing evidence that she "lacks an appropriate alternative child care arrangement" for Ann. A review of the record shows that respondent is correct. The burden was on the petitioners to prove that N.C.G.S. § 7B-1111(a)(6) supported termination by "(1) alleg[ing] and prov[ing] all facts and circumstances supporting the termination of the parent's rights; and (2) demonstrat[ing] that all proven facts and circumstances amount to clear, cogent, and convincing evidence that the termination of such rights is warranted." *In re Pierce*, 356 N.C. 68, 70, 565 S.E.2d 81, 83 (2002). The trial court's termination order contains no findings of fact addressing the availability to respondent, or lack thereof, of an alternative child care arrangement. Accordingly, the trial court's conclusion that the ground of dependency existed to terminate respondent's parental rights is not supported by clear, cogent, and convincing evidence, and its conclusion that respondent's parental rights may be terminated pursuant to N.C.G.S. § 7B-1111(a)(6) must be vacated.

Additionally, respondent asserts more broadly that the requirements of N.C.G.S. § 7B-1111(a)(6) cannot be satisfied in this case because Ann resides with legal permanent guardians. According to respondent, a legal permanent guardian is necessarily "an appropriate alternative child care arrangement" within the meaning of N.C.G.S. § 7B-1111(a)(6). In response, petitioners argue that the requirements of N.C.G.S. § 7B-1111(a)(6) have been satisfied because respondent did not herself identify, and is not presently able to identify, a viable alternative child care arrangement.

The effect of a child's placement with a legal permanent guardian on the requirements of N.C.G.S. § 7B-1111(a)(6) is a novel issue for this Court. However, this issue has been addressed by the Court of Appeals, which has concluded that the requirements of N.C.G.S. § 7B-1111(a)(6) are met even when a parent has acquiesced to a DSS-arranged placement, unless "*the parent . . . ha[s] taken some action* to identify [a]

viable alternative[]" child care arrangement. *In re C.B.*, 245 N.C. App. 197, 211, 783 S.E.2d 206, 216 (2016) (emphasis added). As the Court of Appeals explained in another case

> the fact that [the juvenile] was placed with his maternal grandmother cannot mean, without anything more, that respondent father had an alternative care arrangement. If this were the case, the requirement would be meaningless because, in the words of the guardian ad litem, "our courts will always do their best to ensure that someone" cares for children. Having an appropriate alternative childcare arrangement means that the parent himself must take some steps to suggest a childcare arrangement—it is not enough that the parent merely goes along with a plan created by DSS.

In re L.H., 210 N.C. App. 355, 365–66, 708 S.E.2d 191, 198 (2011).

We begin by noting that N.C.G.S. § 7B-1111(a)(6) contains no language indicating that it is the parent, and the parent alone, who must locate and secure an appropriate alternative child care arrangement. *See King v. Town of Chapel Hill*, 367 N.C. 400, 404, 758 S.E.2d 364, 369 (2014) (determining that when ascertaining the meaning of statutes, "we first must look to the plain language of the statutes themselves"). Rather, the statute provides that it is the availability or unavailability of an appropriate alternative child care arrangement, not the parent's success or failure in identifying one, that determines whether or not N.C.G.S. § 7B-1111(a)(6) supports the termination of parental rights. This Court has previously characterized N.C.G.S. § 7B-1111(a)(6) utilizing language that accords with this understanding, stating that a ground exists for terminating parental rights upon proof of "*the [un]availability to the parent* of alternative child care arrangements." *In re K.L.T.*, 374 N.C. 826, 847, 845 S.E.2d 28, 43 (2020) (alteration in original) (emphasis added). By analogy, the statutory provision defining indigency for the purposes of assessing a defendant's eligibility for court-appointed counsel utilizes a similarly passive construction. *See* N.C.G.S. § 7A-450(a) (2019) ("An indigent person is *a person who is financially unable* to secure legal representation and to provide all other necessary expenses of representation . . . ." (emphasis added)). In construing N.C.G.S. § 7A-450, this Court held that it is the availability or unavailability of sufficient resources to secure legal representation that determines a defendant's eligibility for court-appointed counsel, not the defendant's personal role in obtaining those resources. *See State v. McDowell*, 329 N.C. 363, 373, 407 S.E.2d 200, 206 (1991) (holding that an otherwise indigent defendant was

ineligible for assistant court-appointed counsel when family members paid for the defendant's private attorney). Similarly, the most natural reading of N.C.G.S. § 7B-1111(a)(6) is that it is the objective availability or unavailability of an appropriate alternative child care arrangement that is relevant in assessing dependency under N.C.G.S. § 7B-1111(a)(6), not the parent's personal role in securing the alternative arrangement.

This reading of N.C.G.S. § 7B-1111(a)(6) is consistent with the legislative intent embodied in North Carolina's Juvenile Code. *See, e.g.*, *State v. Tew*, 326 N.C. 732, 738, 392 S.E.2d 603, 607 (1990) ("It is a cardinal principle that in construing statutes, the courts should always give effect to the legislative intent."). The overarching purpose of the Juvenile Code is the "protection of children by constitutional means that respect both the right to family autonomy and the needs of the child." *In re T.R.P.*, 360 N.C. at 598, 636 S.E.2d at 794. It serves the state's interest in protecting children to authorize termination of parental rights when a parent is unable to provide appropriate care for a child and no appropriate alternative child care arrangement is available. However, when a parent is unable to provide appropriate care, but the child is residing with another appropriate permanent caretaker, then the parent's incapability does not itself supply a reason for the state to intervene to dissolve the constitutionally protected parent-child relationship. In this circumstance, requiring the parent to affirmatively identify an alternative child care arrangement threatens the parent's constitutional status without serving the state's *parens patriae* interest in the child's safety.

We disagree with the Court of Appeals that our interpretation of N.C.G.S. § 7B-1111(a)(6) renders the provision meaningless. Many of the provisions supplying grounds for terminating parental rights apply at some points in a juvenile proceeding and do not apply at others. There are still circumstances in which N.C.G.S. § 7B-1111(a)(6) will be a valid ground for terminating parental rights due to dependency. We emphasize that Ann currently resides with court-approved legal permanent guardians. Even if respondent could identify another appropriate alternative caregiver, respondent lacks legal authority to remove Ann from her guardians unless the trial court determines that terminating the guardianship serves Ann's best interests. N.C.G.S. § 7B-600(b) (2019). Thus, Ann will remain in her guardians' "care, custody, and control" until she reaches the age of majority or until the trial court determines that guardianship is no longer in Ann's best interests, that the guardians are unfit or neglectful, or that the guardians are no longer willing or able to care for Ann. *See id.*

Permanent guardianship, which provides a child with stability and the opportunity to develop durable, healthy, dependent bonds with adult caregivers, is distinct from a temporary custodial arrangement which leaves a juvenile in a state of ongoing uncertainty. *See* Josh Gupta-Kagan, *The New Permanency*, 19 U.C. Davis J. Juv. L. & Pol'y 1 (2015) (describing how permanent guardianship serves the juvenile system's interest in permanency by facilitating stable placements and reducing unnecessary litigation); Sarah Katz, *The Value of Permanency: State Implementation of Legal Guardianship Under the Adoption and Safe Families Act of 1997*, 2013 Mich. St. L. Rev. 1079, 1089 (2013) ("[P]ermanent legal guardianship is widely recognized as a positive permanency outcome by a broad array of child-welfare experts . . . ."). Requiring the identification of an alternative child care arrangement serves a child's interest in permanency when the child is in the custody of an incapable parent or a temporary caregiver. But when the child resides with a permanent legal guardian, the parent's ability to identify an alternative child care arrangement is extraneous to the concerns animating our Juvenile Code.[3] To construe N.C.G.S. § 7B-1111(a)(6) to be satisfied in this circumstance would make a parent's constitutional rights contingent on his or her ability to jump through an unnecessary procedural hoop. Accordingly, we hold that the requirements of N.C.G.S. § 7B-1111(a)(6) are not satisfied as a ground for terminating parental rights when, as in the present case, the parent's child has been placed with a legal permanent guardian pursuant to a valid order implementing the child's permanency plan. Because the requirements of N.C.G.S. § 7B-1111(a)(6) cannot be satisfied in the present case, a remand for further factual findings to address the availability to respondent of an appropriate alternative child care arrangement is unnecessary.

c. Willful Abandonment

[3] In addition to N.C.G.S. § 7B-1111(a)(6), the trial court also found that termination was warranted pursuant to N.C.G.S. § 7B-1111(a)(7), which permits termination of parental rights if "[t]he parent has willfully

3. When, as in this case, the guardianship results from the implementation of a juvenile's permanency plan, there is no reason for the mother to feel obligated to identify and propose an alternative child care arrangement which the parent will have no cause or authority to effectuate. By contrast, preliminary custody orders and other placement arrangements that recur throughout the history of abuse and neglect proceedings do not create the sorts of permanent alternative child care arrangements that suffice to preclude a finding that the parent's parental rights are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(6). Until a legal permanent guardianship has been established, a parent will still have reason to identify and propose an alternative child care arrangement.

abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(7). Willful abandonment requires both actual abandonment and a "willful intent to abandon [a] child" which is "a question of fact to be determined from the evidence." *In re N.D.A.*, 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019). To find that a parent has willfully abandoned his or her child, the trial court must "find evidence that the parent deliberately eschewed his or her parental responsibilities in their entirety." *In re E.B.*, 375 N.C. at 318, 847 S.E.2d at 673. At the adjudicatory stage, the petitioner bears the burden of proving willful abandonment by clear, cogent, and convincing evidence. *In re N.D.A.*, 373 N.C. at 74, 833 S.E.2d at 771.

There is no dispute that the trial court failed to make any findings regarding respondent's conduct within the "determinative" six months preceding the filing of the termination petition. *See id.* at 77, 833 S.E.2d at 773 ("[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the determinative period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." (cleaned up)). The trial court's order is also bereft of any factual findings or conclusions of law stating that respondent *willfully* abandoned her child. Thus, the trial court's conclusion of law that N.C.G.S. § 7B-1111(a)(7) supplied a ground for terminating respondent's parental rights is not supported by clear, cogent, and convincing evidence. *See In re Young*, 346 N.C. 244, 252, 485 S.E.2d 612, 617 (1997). Recognizing this deficiency, petitioners invite us to remand for further fact-finding, asserting that there is evidence in the underlying record that could support a conclusion of law that respondent willfully abandoned Ann within the meaning of N.C.G.S. § 7B-1111(a)(7). *See Green Tree Fin. Servicing Corp. v. Young*, 133 N.C. App. 339, 341, 515 S.E.2d 223, 224 (1999) (determining that vacatur and remand is appropriate unless "the facts are not in dispute and only one inference can be drawn from them"). In particular, petitioners emphasize respondent's mental-health treatment records, which show that during the determinative six-month window, she continued to suffer from "delusions" and "struggle[s] with reality," persisted in her refusal to take prescribed medications, and became "easily agitated," "delusional," and "incoherent" during a visit with Ann.

To prove that termination of parental rights is warranted, petitioners carry the burden of proving that respondent "acted willfully in abandoning [her] child." *In re L.M.M.*, 375 N.C. 346, 353, 847 S.E.2d 770, 776 (2020). Even if it were correct that respondent actually abandoned Ann, nothing in the trial court's findings of fact supports the legal

conclusion that respondent's behavior evinced a "purposeful, deliberative" intent to "forego all parental duties and relinquish all parental claims to the child." *In re A.G.D.*, 374 N.C. 317, 319, 841 S.E.2d 238, 240 (2020) (cleaned up). The evidence in the record also does not support this conclusion. Instead, the evidence shows that respondent's deficient conduct as a parent was largely, if not entirely, a manifestation of her severe mental illnesses. The trial court expressly found that respondent *intended* to be a parent to Ann, finding that she was "not capable of providing proper care or supervision [to Ann], *even though she desires to do so*." An entry in respondent's treatment records from the night before a scheduled visit with Ann states that respondent was "excited for [the] visit tomorrow." The record also confirms that respondent's actions did not always mirror her intentions—for example, on multiple occasions she attempted to demonstrate her love and affection for Ann by providing gifts and expressing concern for her child's well-being, although she frequently did so in misguided ways. Petitioners have not identified any evidence detracting from the obvious conclusion that respondent intended to parent Ann but, due to her mental health conditions, lacked the capacity to do so. Nothing in the record suggests that her conduct "manifest[ed] a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. at 251, 485 S.E.2d at 617 (citation omitted).

Evidence that respondent acted in a manner consistent with the symptoms of her severe mental illness is not, standing alone, evidence that she willfully intended to abandon her child. Nor does respondent's refusal to take prescribed medications transform her conduct into rational, volitional conduct, as both the trial court and petitioners imply. Respondent's refusal to take necessary medications may itself have resulted from the very mental health conditions that caused her to require treatment in the first place. *See*, *e.g.*, *Washington v. Harper*, 494 U.S. 210, 231 (1990) (citing Harold I. Schwarz, William Vingiano & Carol Bezirganian Perez, *Autonomy and the Right to Refuse Treatment: Patients' Attitudes After Involuntary Medication*, 30 Hospital & Community Psychiatry 1049 (1988)) ("Particularly where the patient is mentally disturbed, his own intentions will be difficult to assess and will be changeable in any event."). Further, we agree with the Court of Appeals that, logically, there must be "[e]vidence showing a parent's ability, or capacity to acquire the ability, to overcome factors which resulted in their children being placed in foster care" in order to support the conclusion that a parent has willfully abandoned his or her child by failing to correct those conditions. *In re Matherly*, 149 N.C. App. 452, 455, 562 S.E.2d 15, 18 (2002). Thus, at a minimum, a trial court

presented with evidence indicating that a mentally ill parent has willfully abandoned his or her child must make specific findings of fact to support a conclusion that such behavior illustrated the parent's willful intent rather than symptoms of a parent's diagnosed mental illness.[4]

Our reasoning should in no way be taken to suggest that every parent who struggles with a mental health condition lacks the capacity to make choices signifying an intent to abandon one's child. Rather, just as "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision," *In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) (alteration in original), behavior emanating from a parent's mental health conditions may supply grounds for terminating parental rights only "upon an analysis of the relevant facts and circumstances," such as the severity of the parent's condition and the extent to which the parent's behavior is consistent with recognizable symptoms of an illness. *In re K.N.*, 373 N.C. 274, 283, 837 S.E.2d 861, 868 (2020). In the present case, evidence that respondent "failed and refused to follow the medication regimen proposed by her doctors" and "dwelt in her mental illness" is insufficient to support the conclusion that she willfully abandoned Ann. Because there is no evidence in the record showing (1) that her failure to follow the medication regimen was itself a willful act, and (2) that compliance with her medication regimen would have enabled her to cure the parenting deficiencies caused by her mental illnesses, there is no cause to remand for further fact-finding.

We emphasize that our decision in this case does not threaten the petitioners' status as Ann's legal permanent guardians, although we acknowledge the tangible and symbolic differences between guardianship and parenthood. However, the protections provided to parents by our Juvenile Code and by our federal and state constitutions are enjoyed by healthy and infirm parents alike. Moreover, parents who cannot provide for their children as independent caregivers may still be able to maintain a limited but meaningful bond with their children that may benefit both the parent and the child, a bond which may grow over time if the parent-child relationship is preserved and the parent's condition improves. *See*, *e.g.*, *In re Cameron B.*, 154 A.3d 1199, 1201 (Me. 2017)

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4. Although it may be difficult to distinguish between a mentally ill parent who makes a volitional choice to refuse treatment and a mentally ill parent who refuses treatment because of his or her mental illness, courts must make a similar distinction when deciding if a mentally ill litigant is competent to refuse treatment or may be forcibly medicated against their expressed wishes. *See generally* Grant H. Morris, *Judging Judgment: Assessing the Competence of Mental Patients to Refuse Treatment*, 32 San Diego L. Rev. 343, 370 (1995).

("When it is appropriate, a permanency guardianship allows parents whose children cannot be returned to them to have a meaningful opportunity to maintain a legal relationship with their children and to have the court determine their rights to have contact with their children."). Although respondent's mental health challenges obviously interfere with her ability to be a parent to Ann, her condition is not prima facie evidence that her parental rights may be terminated.

Conclusion

The Davie County District Court had subject-matter jurisdiction to enter the order terminating respondent's parental rights, notwithstanding the prior order establishing petitioners as Ann's permanent guardians entered by the Davidson County District Court in the underlying dependency proceeding. However, petitioners have failed to carry their burden of proving the existence of a ground for terminating parental rights by clear, cogent, and convincing evidence. Because the requirements of N.C.G.S. § 7B-1111(a)(6) have not been met when a child has been placed with permanent legal guardians and because there is no evidence in the record indicating that respondent willfully abandoned her child, we reverse the trial court's order terminating respondent's parental rights.

REVERSED.

Justice NEWBY concurring in part and dissenting in part.

I agree with the majority that the district court had subject matter jurisdiction to terminate respondent's parental rights. I disagree with the majority's conclusion to reverse the termination of respondent's parental rights under subsections 7B-1111(a)(6) and (a)(7) of our General Statutes. This case involves a mother who is unable to parent her child due to severe mental illness that, according to the trial court's findings and evidence in the record, has only deteriorated in the over four years since the child was born. The majority, for policy reasons of its own, chooses guardianship over adoption, invalidating the trial court's decision to terminate respondent's parental rights on these two grounds, subsections 7B-1111(a)(6) and (a)(7). It does so by making its own findings, rendering a portion of the relevant statutes meaningless, and relying on social science articles and out-of-state cases that do not effectuate the purpose and intent of North Carolina's statutes providing for termination of parental rights. I would conclude that both grounds for termination are satisfied here. As such, I concur in part and dissent in part.

The first ground upon which the trial court terminated respondent's rights was dependency. Subsection 7B-1111(a)(6) provides that a parent's rights may be terminated when

> the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C.G.S. § 7B-1111(a)(6) (2019). Therefore, in addition to showing an incapability to care for the child, there must also be a showing that "the parent lacks an appropriate alternative child care arrangement."

There is no dispute that respondent is incapable of parenting the child in this case. Additionally, it is clear that, in the four years between the child's birth and the termination hearing, respondent was never able to identify an alternative childcare arrangement. The trial court order and record here show that from the time the child was born, respondent was unable and unwilling to provide the necessary information to establish an alternative childcare arrangement opportunity, beginning with her unwillingness to give any identifying information as to the child's father. Thus, the express statutory language is met. The majority now holds, however, that when DSS places the child in an arrangement that results in permanent guardianship, the requirements of subsection 7B-1111(a)(6) can never be met. Simply fulfilling its statutory duty, DSS arranged for a suitable home for the child without any assistance from respondent. Contrary to the majority's holding, a trial court can find that the dependency ground exists despite the fact that a child is placed in a permanent guardianship. Since 2011, the Court of Appeals has interpreted subsection 7B-1111(a)(6) to mean "the parent must have taken some action to identify viable [childcare] alternatives." *In re L.H.*, 210 N.C. App. 355, 364, 708 S.E.2d 191, 197 (2011). If this interpretation were wrong, the General Assembly would have acted to correct it. Now the majority overrules this ten-year-old precedent.

The majority reasons that the statutory language does not require a parent to have identified any alternative childcare arrangement; in the

majority's view, where DSS has established an appropriate alternative childcare arrangement, the second prong of subsection 7B-1111(a)(6) cannot be satisfied. The majority reasons that so long as "the child is residing with another appropriate permanent caretaker, then the parent's incapability does not itself supply a reason for the state to intervene" to terminate a respondent's parental rights. Even more concerning, the majority reasons that the alternative childcare arrangement element is never "satisfied as a ground for terminating parental rights when, as in the present case, the parent's child has been placed with a legal permanent guardian," even when respondent has not participated in identifying a permanent guardian for the child. Thus, the majority holds that where DSS acts in a way to protect the child by identifying a family that can serve as a permanent guardian when the parent is incapable of caring for the child, the parent's rights can never be terminated on dependency grounds.

Surely this reasoning cannot be correct given that DSS frequently has to identify a placement for a child upon that child's removal from the home and does so without any input from the parent. As the Court of Appeals has previously recognized, a holding to the contrary renders the second portion of subsection 7B 1111(a)(6) meaningless, which could not have been the General Assembly's intent in crafting the precise language and requirements of this statutory provision. *See In re L.H.*, 210 N.C. App. at 365–66, 708 S.E.2d at 198 ("[T]he fact that [the child] was placed with his maternal grandmother cannot mean, without anything more, that respondent father had an alternative care arrangement. If this were the case, the [statutory] requirement would be meaningless because, in the words of the guardian ad litem, 'our courts will always do their best to ensure that someone' cares for children."). The fact that DSS has identified an alternative placement does not relieve a parent from his or her obligation to show, when dependency arises, that there is an alternative childcare placement that should prevent termination of parental rights. The majority's opinion to the contrary creates a Catch-22 situation for DSS, discouraging DSS from immediately identifying a placement for the child because they will later be precluded from terminating a parent's rights on dependency grounds.

Moreover, it is the General Assembly, not this Court, that should make policy decisions. The General Assembly has decided as a matter of policy that a parent's rights may be terminated in dependency situations where the parent has a mental illness that makes parenting impossible. As clearly stated in our statutes, "it is in the public interest to establish a clear judicial process for adoptions, [and] to promote the integrity and

finality of adoptions." N.C.G.S. § 48-1-100(a) (2019); *see also* N.C.G.S. § 48-1-100(b) (2019) (discussing that it is desirable to "advance the welfare of minors by . . . facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support"). The majority here advances its own policy preferences, favoring permanent guardianship over adoption, instead of deferring to the policy enactments of the General Assembly. The legislature will have to intervene now that the majority has rendered subsection 7B-1111(a)(6) meaningless under these circumstances.

The trial court also terminated respondent's parental rights based on N.C.G.S. § 7B-1111(a)(7) (2019), the willful abandonment ground for termination. Subsection 7B-1111(a)(7) provides that a trial court may terminate a parent's parental rights if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion."

Though the trial court here did not explicitly reference the six months preceding the termination hearing, it is clear the trial court considered the relevant period since it made numerous findings related to respondent's abandonment of the child. The trial court noted that respondent persistently brought the child inappropriate gifts, consistently refused medication treatment for her mental illness, failed to comply with her physicians' recommendations, testified about the out-of-body experiences she has had and the times she has put herself in dangerous situations, and continuously demonstrated psychosis, mania, anger, poor insight, and poor impulse control without showing any improvement in the four years before the hearing. The trial court stated that, "[s]ince the child was born, the Respondent Mother's mental health status has deteriorated." Based on the fact that, when viewed as a whole, there is evidence in the record that supports the trial court's decision to terminate respondent's parental rights based on her conduct within the relevant six-month period, I would also uphold termination on this basis as well.

The majority finds facts not in the trial court order or the record about respondent's ability to parent the child and then concludes that there is no evidence that respondent's actions have been willful. Supporting its approach with various social science articles not presented to the trial court and cases from other states, the majority reasons that where a parent has a mental illness, in many cases, the trial court will not be able to determine that an individual's actions are willful if they can be attributable to an individual's mental illness. Though the majority notes that courts must make distinctions about the willfulness of mental capacity in other circumstances, the majority removes the trial court's ability

to make a willfulness determination here; instead, it finds that the trial court should not have concluded that respondent's actions could be categorized as willful. In short, the majority assumes itself to be in a better position to judge the willfulness of respondent's conduct from a cold record than the trial court which personally observed respondent.

Under the type of reasoning that the majority advances, the more severe the mental illness, the less likely it will be for the trial court to terminate parental rights based on any ground requiring a willfulness determination. This approach will leave children in legal limbo, unable to be adopted so long as a biological parent suffers from a significant mental health disorder. Thus, the chances of permanency through adoption will dramatically decrease as a parent's mental illness worsens. Surely this reasoning does not support the legislative goals of promoting the physical and emotional well-being of the child and providing permanency for juveniles at the earliest possible age. *See* N.C.G.S. § 7B-1100(1), (2) (2019). Nor does this reasoning promote the clearly established goal to facilitate and promote the integrity and finality of adoptions. *See* N.C.G.S. § 48-1-100(a), (b). The majority's new policy-driven standard for preventing termination of parental rights in cases in which the parent has worsening mental illness undermines expressly stated statutory goals for termination. The General Assembly will also need to address this issue.

To achieve its policy outcome the majority's opinion sets an unrealistic standard for termination that undermines the goals set forth in our termination statutes and ignores express statutory language. It places its policy preferences over those enacted by the legislature. I would affirm termination of respondent's parental rights on both grounds. Therefore, I concur in part and dissent in part.

IN RE B.L.H.

[376 N.C. 118 (2020)]

IN THE MATTER OF B.L.H.

No. 276A19

Filed 18 December 2020

Termination of Parental Rights—standard of proof—clear, cogent, and convincing evidence—statement in open court

The trial court did not commit error in a termination of parental rights case when it failed to include the "clear, cogent, and convincing" standard of proof in its written order because it announced the proper standard of proof in open court, satisfying the requirements of N.C.G.S. § 7B-1109(f).

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 24 April 2019 by Judge Marcus A. Shields in District Court, Guilford County. Heard in the Supreme Court on 13 October 2020.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe, for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by J. Lee Gilliam, Assistant Parent Defender, for respondent-appellant father.

HUDSON, Justice.

Respondent-father appeals from an order entered by Judge Marcus A. Shields in District Court, Guilford County, on 24 April 2019 terminating his parental rights in B.L.H. (Beth),[1] a girl born in November 2010.

Factual and Procedural History

Prior to the termination of respondent's parental rights, Beth was in the custody of her maternal grandparents. This arrangement was the result of a consent order agreed to by Beth's mother and respondent in January 2016. Once, while living with her grandparents, Beth was found a quarter of a mile from her grandparents' home unsupervised, unbathed, hungry, and wearing dirty clothes. A home inspection by the

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

Guilford County Department of Health and Human Services (DHHS) revealed that the home was unsanitary and unsafe for Beth. Shortly thereafter, DHHS assumed custody of Beth when the trial court entered a nonsecure custody order and DHHS filed a juvenile petition alleging Beth to be both a neglected and dependent juvenile. Following a hearing on 12 January and 6 February 2017, the trial court adjudicated Beth to be a neglected and dependent juvenile in an order entered on 11 April 2017.

Respondent and Beth's mother have a history of substance abuse problems and criminal convictions. Respondent's criminal record includes several breaking and entering and larceny convictions and one conviction for possession of a controlled substance. While in prison in 2016, respondent entered into a "prison service agreement," which focused on substance abuse, building family relationships, and developing parenting and life skills. However, respondent attended only two substance abuse meetings through the prison's AA/NA program. He wrote to his daughter only once while in prison, and he received numerous infractions for his conduct while incarcerated.

The trial court found that after being released from custody, respondent entered into a new service agreement with DHHS in May 2017. The service agreement required him to address his substance abuse problems by obtaining a substance abuse assessment, submitting to random drug screens, and refraining from possessing or using illegal drugs. Respondent failed to comply with this aspect of his service agreement. He relapsed into drug use several times over the course of the next year. He tested positive for heroin and suboxone in May 2017, was discharged from a treatment program for a relapse in September 2017, and overdosed on drugs in both October 2017 and January 2018. After this latter overdose, he refused treatment and failed to report the episode to his probation officer.

The service agreement also required respondent to seek and obtain stable employment, income, and housing. Respondent also failed to comply with these aspects of his service agreement. Throughout 2017 and 2018, respondent reported irregular, short-term employment, but he lost his last job after his most recent arrest and incarceration. He also did not provide financial support for Beth. Further, respondent did not obtain safe, stable, and dependent housing. Instead, he reported sporadic living arrangements, including at a halfway house, in a motel, and intermittent stays with friends and his brother, until the time of his most recent arrest in September 2018.

Finally, the service agreement required that respondent improve his parenting and life skills by participating in a parenting/psychological evaluation and completing a parenting class. Respondent did not attend a parenting class or submit to the evaluation. Further, respondent did not visit or contact Beth while she was in DHHS custody. Overall, respondent did not comply with the various requirements of his case plan: substance abuse, employment, income, housing, parenting skills, and life skills. In September 2018, respondent was again arrested for breaking and entering and returned to prison where he remained at the time of the termination hearing.

The trial court entered a permanency-planning order on 13 June 2018, which designated adoption as the primary plan for Beth, with a concurrent secondary plan of reunification. The trial court concluded that it would be in Beth's best interests for DHHS to seek the termination of respondent's parental rights.

In December 2018, DHHS filed a petition to terminate both parents' parental rights in Beth. The termination hearing was held on 11 March 2019. After hearing the evidence, the trial court rendered its decision to terminate parental rights, stating in open court that "[t]he Court, after hearing sworn testimony from the social worker makes the following findings of fact by clear, cogent, and convincing evidence." The trial court made findings of fact and concluded that grounds existed to terminate respondent's parental rights under N.C.G.S. § 7B-1111(a)(1), (2), (5), and (7). The trial court entered a written order terminating parental rights on 24 April 2019. The written termination order made more detailed findings of fact; however, it did not explicitly state that the grounds to terminate respondent's parental rights were proved by clear, cogent, and convincing evidence. Respondent filed notice of appeal on 3 May 2019.

Analysis

Respondent argues one issue on appeal: that the trial court erred by failing to affirmatively state the "clear, cogent, and convincing" standard of proof which is required by statute in its written termination order.[2] We disagree and hold that a trial court does not reversibly err by failing to explicitly state the statutorily-mandated standard of proof in the

2. We note respondent in his brief only challenges one finding of fact made by the trial court as falling short of this standard—the finding that respondent failed to establish paternity through a judicial proceeding. "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re A.B.C.*, 374 N.C. 752, 758, 844 S.E.2d 902, 907 (2020).

written termination order if, as here, the trial court explicitly states the proper standard of proof in open court at the termination hearing. We affirm the order of the trial court.

I.

The Juvenile Code requires the following process to govern the initial adjudication stage of the two-stage process for termination of parental rights proceedings:

> (e) The court shall take the evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in [N.C.]G.S. [§] 7B-1111 which authorize the termination of parental rights of the respondent. . . .
>
> (f) . . . [A]ll findings of fact shall be based on clear, cogent, and convincing evidence.

N.C.G.S. § 7B-1109(e)–(f) (2019). In *In re Montgomery*, 311 N.C. 101 (1984), this Court construed this language "to mean that in the adjudication stage, the petitioner must prove clearly, cogently, and convincingly the existence of one or more of the grounds for termination listed in [N.C.G.S. § 7B-1111]." *Id.* at 110, 316 S.E.2d at 252. Only after the petitioner has made the requisite showing may the trial court exercise its discretion to find that termination of parental rights is in the best interests of the child. *Id.*

This Court has not addressed whether the trial court must comply with the requirement of N.C.G.S. § 7B-1109(f) that "all findings of fact shall be based on clear, cogent, and convincing evidence" by affirmatively stating the standard of proof it applies. However, our Court of Appeals has addressed this issue. In *In re Church*, 136 N.C. App. 654, 525 S.E.2d 478 (2000), the trial court terminated the respondents' parental rights in their children but failed to affirmatively state that the findings of fact which it adduced in adjudicating the grounds for termination were based upon clear, cogent, and convincing evidence. On appeal, the respondents argued this was error.

The Court of Appeals held that it interpreted N.C.G.S. § 7B-1109(f) "to require the trial court to affirmatively state in its order the standard of proof utilized in the termination proceeding." *In re Church*, 136 N.C. App. at 657, 525 S.E.2d at 480. The Court of Appeals justified this holding by reasoning that "without such an affirmative statement the appellate court is unable to determine if the proper standard of proof was utilized." *Id.* Furthermore, it noted that the General Assembly had

specifically required that the statutory standard of proof be affirmatively stated in the context of delinquent, undisciplined, abuse, neglect, and dependency proceedings, and because these proceedings "[we]re all contained in a single chapter of the General Statutes and relate to the same general subject matter, [they] construe[d] these statutes together to determine legislative intent." *Id.* (citing *Carver v. Carver*, 310 N.C. 669, 674, 314 S.E.2d 739, 742 (1984)). The Court of Appeals held that although there was competent evidence to support a finding that any of three statutory grounds for termination existed, it vacated and remanded the judgment "for the trial court to determine whether the evidence satisfies the required standard of proof of clear and convincing evidence." *Id.* at 658, 525 S.E.2d at 481.

As an initial matter, respondent urges us to affirm *In re Church*'s reading of N.C.G.S. § 7B-1109(f). Petitioner, in turn, asks us to overrule *In re Church* and hold that trial courts are not required to affirmatively state the clear, cogent, and convincing standard of proof adopted by the statute. As this is a matter of statutory interpretation, we turn to the canons of construction to resolve this issue.

This Court has long held that "[t]he basic rule [of statutory construction] is to ascertain and effectuate the intent of the legislative body." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted). "The best indicia of that intent are the language of the statute[,] . . . the spirit of the act[,] and what the act seeks to accomplish." *Gyger v. Clement*, 375 N.C. 80, 83, 846 S.E.2d 496, 499 (2020) (alterations in original) (citing *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 629, 265 S.E.2d at 385). "Legislative purpose is first ascertained from the plain words of the statute." *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (citation omitted). "In interpreting an ambiguous statute, 'the proper course is to adopt that sense of the words which promotes in the fullest manner the object of the statute.' " *Duggins v. N.C. State Bd. of Cert'd Pub. Acct. Exmr's*, 294 N.C. 120, 126, 240 S.E.2d 406, 411 (1978) (citing 73 Am. Jur. 2d *Statutes* § 159 (1974)). "A construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *Elec. Supply Co. of Durham*, 328 N.C. at 656, 403 S.E.2d at 294 (citation omitted). Furthermore, "a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant," because "[i]t is presumed that the legislature . . . did not intend any provision to be mere surplusage." *Porsh Builders, Inc. v. City of Winston-Salem*, 302

N.C. 550, 556, 276 S.E.2d 443, 447 (1981). Finally, "[i]t is a basic principle of statutory construction that different statutes dealing with the same subject matter must be construed *in pari materia* and reconciled, if possible, so that effect may be given to each." *Great S. Media, Inc. v. McDowell Cnty.*, 304 N.C. 427, 430–31, 284 S.E.2d 457, 461 (1981) (citations omitted).

The statute at issue, N.C.G.S. § 7B-1109(f), merely specifies a particular standard of proof in termination-of-parental-rights proceedings—that "all findings of fact shall be based on clear, cogent, and convincing evidence." Petitioner argues that the Court of Appeals' decision in *In re Church* was wrongly decided because the meaning of N.C.G.S. § 7B-1109(f) is plain and it does not require the trial court to announce the standard of proof it applies in making its findings of fact in the written order or in open court. We disagree because the statute does not, in its own terms, provide whether the trial court must announce its own standard or not. We rely on well-settled canons of statutory construction to resolve this ambiguity.

First, we note that, if possible, we will construe a statute "so that none of its provisions shall be rendered useless or redundant." *See Porsh Builders, Inc.*, 302 N.C. at 556, 276 S.E.2d at 447. Here, to avoid rendering N.C.G.S. § 7B-1109(f) "useless," we must hold that the statute implicitly includes a requirement that the trial court announce the standard of proof it is applying in making findings of fact in a termination proceeding. As our Court of Appeals noted in *In re Church*, "without such an affirmative statement the appellate court is unable to determine if the proper standard of proof was utilized." *See In re Church*, 136 N.C. App. at 658, 525 S.E.2d at 480. If appellate courts cannot determine the standard of proof that was applied, then the statutory provision imposing a heightened burden of proof on trial courts is unenforceable and, therefore, effectively useless. The General Assembly did not intend for this provision to be "mere surplusage." *See Porsh Builders, Inc.*, 302 N.C. at 556, 276 S.E.2d at 447.

Interpreting the statute to require the trial court to make an affirmative statement of the standard of proof also best promotes the object of the statute. We have held "the proper course [of statutory construction] is to adopt that sense of the words which promotes in the fullest manner the object of the statute." *Duggins*, 294 N.C. at 126, 240 S.E.2d at 411. The provision at issue was first enacted in 1969 as part of a statutory scheme creating the proceedings to terminate parental rights, which did not exist at common law. *See In re Clark*, 303 N.C. 592, 607, 281 S.E.2d 47, 57 (1981). The General Assembly revised the Juvenile Code

in the Juvenile Justice Reform Act and as part of this comprehensive reform recodified the Termination of Parental Rights Act. *See* An Act to Develop a Plan of Reorganization for the Transfer of the Division of Youth Services of the Department of Health and Human Services and the Division of Juvenile Services of the Administrative Office of the Courts, to Establish the Office of Juvenile Justice, to Amend and Recodify the North Carolina Juvenile Code, and to Conform the General Statutes to the Recodification of the Juvenile Code, as Recommended by the Commission on Juvenile Crime and Justice, S.L. 1998-202, 1998 N.C. Sess. Laws 695, 771 (hereinafter, "Juvenile Justice Reform Act"). The General Assembly announced one policy underlying Article 11, titled "Termination of Parental Rights," as follows:

> The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile.

N.C.G.S. § 7B-1100(1) (2019). The statute provides that a "further purpose" of the article is "to recognize the necessity for any juvenile to have a permanent plan of care at the earliest possible age, while at the same time recognizing *the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents*." N.C.G.S. § 7B-1100(2) (emphasis added).

N.C.G.S. § 7B-1109(f) advances the purpose of Article 11 in two ways. First, it provides procedural protections for the interests of parents in their children by setting a heightened standard of proof by which a trial court must make findings of fact that show the grounds before determining whether parental rights should be terminated. Second, the provision in question protects children "from the unnecessary severance of a relationship with biological or legal parents" by requiring findings of fact to be "clear, cogent, and convincing" to support grounds for termination. *See* N.C.G.S. §§ 7B-1100(2), 7B-1109(f).

As we noted above, if the trial court is not required to announce the standard it is applying in making findings of fact that support a determination of grounds for termination, either in open court at the termination hearing or in the termination order itself, an appellate court reviewing the decision would be unable to determine if the trial court applied the proper standard of proof in making its findings of fact from the record on appeal. Therefore, an interpretation of N.C.G.S. § 7B-1109(f) that does

not require an affirmative statement of the standard of proof from the trial court would defeat two legislative policies underlying the statutory scheme for termination-of-parental-rights hearings—ensuring "judicial procedures" that provide adequate protections for the rights of parents and that also protect children from "unnecessary severance" of the parental relationship. This "construction [would] operate[ ] to defeat or impair the object of the statute." *Elec. Supply Co. of Durham*, 328 N.C. at 656, 403 S.E.2d at 294.We conclude that requiring the trial court to announce the standard of proof it uses and enabling our appellate courts to review the record for compliance would, in contrast, "promote[ ] in the fullest manner the object[s] of the statute." *Duggins*, 294 N.C. at 126, 240 S.E.2d at 411 (citation omitted).

Finally, we construe different statutes dealing with the same subject matter *in pari materia* and reconcile them, if possible, to give effect to each. *Great S. Media, Inc.*, 304 N.C. at 430–31, 284 S.E.2d at 461 (citation omitted). As the Court of Appeals noted in *In re Church*, other provisions, N.C.G.S. §§ 7B-807 and 7B-2411, provide statutory standards of proof for proceedings involving juveniles. Section 7B-807 governs abuse, neglect, and dependency proceedings and provides that "[i]f the court finds . . . that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state." N.C.G.S. § 7B-807(a) (2019). Section 7B-2411 governs delinquency proceedings and similarly provides that "[i]f the court finds that the allegations in the petition have been proved as provided in N.C.G.S. 7B-2409 [which provides that they be proved "beyond a reasonable doubt"], the court shall so state." N.C.G.S. § 7B-2411 (2019). As all of these proceedings are part of the same statute and legislation and, most importantly, address the same subject matter—heightened standards of proof for juvenile proceedings in which the trial court sits as finder of fact—we construe them together. *See Great S. Media, Inc.*, 304 N.C. at 430–31, 284 S.E.2d at 461 (citations omitted). The plain text of N.C.G.S. § 7B-807 and N.C.G.S. § 7B-2411 makes clear that the General Assembly intends to require trial courts to state the statutorily-required standard of proof in making its findings of fact. Construing N.C.G.S. § 7B-1109(f) *in pari materia*, we conclude the General Assembly intended the same requirement in termination-of-parental-rights proceedings.[3]

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3. Petitioner argues these provisions should not be construed *in pari materia* because they are now located in different subchapters of the statute. But this recodification was part of a comprehensive legislative reform which clearly evinces they concern the same subject matter. *See generally* Juvenile Justice Reform Act, S.L. 1998-202, 1998 N.C. Sess. Laws 695 at 695–895.

We hold that N.C.G.S. § 7B-1109(f), by providing that "all findings of fact shall be based on clear, cogent, and convincing evidence," implicitly requires a trial court to announce the standard of proof which they are applying on the record in a termination-of-parental-rights hearing. To hold otherwise would make the provision effectively unenforceable and would defeat the purposes of the statutory scheme. The General Assembly could not have intended such a result. Moreover, when construed *in pari materia*, it is clear N.C.G.S. § 7B-1109(f) should be read to require the trial court announce the standard it is applying because the General Assembly required the announcement of a similar heightened standard in delinquent, undisciplined, abuse, neglect, and dependency proceedings under N.C.G.S. §§ 7B-807 and 7B-2411 and a similar requirement is imposed in other instances where the trial court is designated the finder of fact and a statutory standard of proof is required.

II.

Although we hold that N.C.G.S. § 7B-1109(f) requires the trial court to announce the standard of proof, respondent asks us to go further and hold a trial court errs if it does not expressly state the standard of proof in the written termination order, even if it announces the correct standard of proof in making findings of fact in open court. This we decline to do. We hold the trial court satisfies the announcement requirement of N.C.G.S. § 7B-1109(f) so long as it announces the "clear, cogent, and convincing" standard of proof *either* in making findings of fact in the written termination order or in making such findings in open court. This rule ensures our appellate courts can determine whether the correct standard of proof was applied from the record on appeal without an undue formalism not reflected in the statutory language.

While this Court is not bound by precedent of our Court of Appeals, we note that this approach is consistent with how the Court of Appeals has interpreted the statutory requirement. In *In re Church*, our Court of Appeals held the trial court in that case "failed to recite the standard of proof applied in its adjudication order and its failure to do so is error"; however, in that case there was no evidence the trial court announced and applied the proper standard of proof elsewhere in the record. *In re Church*, 136 N.C. App. at 658, 525 S.E.2d at 480. In subsequent cases, the Court of Appeals has held that N.C.G.S. § 7B-1109(f) is satisfied even if the standard of proof is not announced in the written termination order, so long as it is announced at the termination hearing and therefore appears in the record on appeal. *See, e.g.*, *In re E.M.*, 249 N.C. App. 44, 56, 790 S.E.2d 863, 873 (2016) ("[T]he failure to state the burden of proof in the written order is not reversible error if the

court states the appropriate standard of proof in open court." (citing *In re M.D.*, 200 N.C. App. 35, 39, 682 S.E.2d 780, 783 (2009))); *In re M.D.*, 200 N.C. App. at 39, 682 S.E.2d at 783 ("Although the trial court should have stated in its written termination order that it utilized the standard of proof specified in N.C.[G.S.] § 7B-1109(f), the fact that the trial court orally indicated that it employed the appropriate standard and the fact that the language actually used by the trial court is reasonably close to the wording that the trial court should have employed satisfies us that the trial court did, in fact, make its factual findings on the basis of the correct legal standard.").

III.

In the present case, at the close of the 11 March 2019 termination hearing, the trial court made the following statement in open court: "The Court, after hearing sworn testimony from the social worker makes the following findings of fact by clear, cogent, and convincing evidence." The trial court then made findings of fact and concluded that grounds existed to terminate respondent's parental rights. The trial court subsequently entered a written order terminating parental rights on 24 April 2019. The written termination order, which included detailed findings of fact, did not explicitly state the standard of proof the trial court applied.

We hold that although the trial court failed to state the standard of proof required by N.C.G.S. § 7B-1109(f) in the written termination order, the trial court's oral statement of the "clear, cogent, and convincing" standard of proof in open court satisfies the statutory requirement. Respondent argues that this case is distinguishable from decisions of the Court of Appeals affirming the order of the trial court when the trial court had referenced but did not expressly state the standard of proof and also stated the correct standard in open court. For instance, in *In re A.B.*, 245 N.C. App. 35, 781 S.E.2d 685 (2016), the Court of Appeals affirmed an order of the trial court when the trial court stated the correct standard of proof for one set of findings of fact in the written order but not others and also stated the correct standard of proof in open court. *In re A.B.*, 245 N.C. App. at 42, 781 S.E.2d at 690. Here, as in *In re A.B.*, the trial court stated the correct standard of proof in open court and "the order does not mention any different standard of proof" and, therefore, nothing in the order indicates the trial court applied the incorrect standard of proof. *See id.* Respondent's argument is not persuasive.

Conclusion

Although it is the better practice for the trial court to state the correct standard of proof in the written termination order as well as in

making oral factual findings, the trial court does not err where, as here, it appears from the record that the standard was correctly stated in making findings of fact in open court and nothing in the written termination order indicates that a different standard was applied. We therefore affirm the order of the trial court.

AFFIRMED.

IN RE INQUIRY CONCERNING A JUDGE, NO. 18-193
EDWIN D. CLONTZ, RESPONDENT

No. 65A20

Filed 18 December 2020

Judges—discipline—probable cause hearing without presence of defense counsel—public reprimand

The Supreme Court issued a public reprimand for conduct in violation of Canons 2A and 3A(4) of the Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute (N.C.G.S. § 7A-376) where a district court judge held a probable cause hearing without a defendant's court-appointed counsel in order to "make a point" about defense counsel's chronic tardiness, demonstrating a disregard by the judge for the defendant's statutory and constitutional rights. The Court rejected respondent-judge's argument that an objectively reasonable reading of the General Statutes allowed him to conduct the probable cause hearing without defense counsel present.

Justice EARLS dissenting.

Justices NEWBY and DAVIS join in this dissent.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered on 23 January 2020 that respondent Edwin D. Clontz, a Judge of the General Court of Justice, District Court Division, Judicial District Twenty-Eight, be publicly reprimanded for conduct in violation of Canons 2A and 3A(4) of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings

the judicial office into disrepute in violation of N.C.G.S. § 7A-376. Heard in the Supreme Court on 12 October 2020.

Robinson, Bradshaw & Hinson P.A., by Mark A. Hiller, John R. Wester and Matthew W. Sawchak, Counsel for the Judicial Standards Commission.

Devereux & Banzhoff PLLC, by Andrew B. Banzhoff for respondent.

ORDER

The issue before this Court is whether Judge Edwin D. Clontz, respondent, should be publicly reprimanded, as recommended by the North Carolina Judicial Standards Commission, for violations of Canons 2A and 3A(4) of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). For the reasons stated below, we agree with and adopt the recommendations from the Commission.

On 4 February 2019 the Commission filed a Statement of Charges against respondent alleging respondent violated Canons 1, 2A, 3A(3), and 3A(4) when he held a probable-cause hearing without a defendant's court-appointed counsel present on or about 18 July 2018. Respondent waived personal service and filed an answer to the Factual Allegations in the Statement of Charges on 28 February 2019. Respondent's hearing before the Commission was originally scheduled for 11 October 2019 but was continued until 13 December 2019. Prior to this hearing, counsel for the Commission and respondent filed a Stipulation of Facts on 19 November 2019.

On 13 December 2019 a disciplinary hearing was held before the Commission Chair Judge Wanda G. Bryant and Commission members Judge Jeffrey B. Foster, Judge Sherri Elliot, Mr. William H. Jones Jr., Ms. Allison Mullins, Mr. Cresswell D. Elmore, and Mr. Grady H. Hawkins. Based on the Stipulation of Facts and its exhibits, the Commission found the following facts by clear, cogent and convincing evidence:

1. On or about July 18, 2018, Respondent was presiding over probable cause hearings in criminal district court when Assistant District Attorney (ADA) Kristin Terwey, representing the State, made a motion to continue *State v. Jermaine Logan*, Buncombe County File Nos. 18CR86478–84.

2. In response to ADA Terwey's motion to continue, Mr. Logan's court-appointed attorney Roger Smith objected to the State's motion and demanded a probable cause hearing on behalf of his client. Respondent then held the matter open for the parties to confer and instructed them both to return to court at 2:00 pm.

3. Respondent did not realize that Mr. Smith was court-appointed, but was obviously aware that Mr. Logan was represented by counsel in his felony criminal matter.

4. At or about 2:00 pm, Respondent resumed court. ADA Terwey was present for the State and had secured the necessary witnesses to proceed with Mr. Logan's probable cause hearing. Mr. Logan, who had remained in custody since his arrest, was brought from the jail to a holding cell adjacent to the courtroom with a barred window looking into Respondent's courtroom as indicated in the photographs attached as Exhibits 1 and 2 to the Stipulation of Facts.

5. Mr. Smith failed to return to the courtroom at 2:00 pm as Respondent had instructed. Respondent knew Mr. Smith from other criminal cases and had previously experienced situations when Mr. Smith was not present in a timely manner for court appearances. Respondent then directed the courtroom bailiff to communicate with the other courtrooms in an effort to determine if Mr. Smith was elsewhere in the courthouse. The bailiff could not locate Mr. Smith in any other courtroom.

6. At or around 2:50 pm, Respondent had concluded the day's calendar with the exception of Mr. Logan's case and one other matter and Mr. Smith still had not returned to the courtroom.

7. Without Mr. Smith present, and knowing that Mr. Logan was represented by counsel in the felony criminal matter before him, Respondent then instructed ADA Terwey to call Mr. Logan's case for hearing. Specifically, at the start of the probable cause hearing, Respondent stated on the record as follows:

"Defense attorney has asked for a probable cause hearing. He was told to be here at 2 p.m. It is now 2:50 p.m., and the attorney is not present. State is prepared to proceed on probable cause. They will call their first witness."

8. Upon receiving Respondent's instruction to proceed without Mr. Logan's counsel present, ADA Terwey hesitated but then called her first witness as directed by Respondent.

9. During the probable cause hearing, Mr. Logan remained in the holding cell adjacent to the courtroom. Mr. Logan cross-examined the State's two witnesses through the barred window of the prisoner holding area while he remained handcuffed and without access to pen or paper. It is routine in Buncombe County for in custody defendants to remain in the prisoner holding cell during court proceedings unless a specific request is made by a party to bring the defendant into the courtroom and no such request was made in this case

10. After the State concluded its evidence, ADA Terwey approached the bench to express to Respondent her discomfort with the hearing and her concern that Mr. Logan, if he testified without his attorney present, may incriminate himself. In response to ADA Terwey's concerns, Respondent then advised Mr. Logan that he would not be permitted to testify because he may incriminate himself. Specifically, Respondent informed Mr. Logan that he would not be allowed to speak to avoid accidentally incriminating himself and stated to Mr. Logan as follows: "I'm not going to allow you to make any statements, because this is a probable cause hearing. The State has presented their case. The standard of proof is so low – or it's lower than what would be beyond a reasonable doubt. I will let them make their argument."

11. Following Respondent's instructions to the State to make its argument, ADA Terwey proffered no closing argument and stated "I would simply ask that probable cause be found." Without giving Mr. Logan any

opportunity to be heard or make any arguments in his behalf, Respondent immediately ruled in the State's favor and announced his finding that there was sufficient evidence to establish probable cause for each of Mr. Logan's charges and bound Mr. Logan's matters over to superior court.

12. Shortly after Mr. Logan's probable cause hearing concluded, Mr. Smith returned to Respondent's courtroom to find that his client's case had been adjudicated in his absence. Mr. Smith, along with ADA Terwey and two other ADAs who were present during the probable cause hearing then went into a meeting with Respondent in his chambers.

13. While in Respondent's chambers, Mr. Smith explained that he was in the District Attorney's office discussing Mr. Logan's case. Just as he had made a point to put on the record at the start of the probable cause hearing that Mr. Smith was told to be in court at 2:00 pm and was not present by 2:50 p.m., Respondent again indicated to the parties that he proceeded with Mr. Logan's case without Mr. Smith to "make a point" because Mr. Smith was not present at 2:00 pm when he had been told to return to court and Mr. Smith did not otherwise communicate his location to the Court or courtroom personnel.

14. Respondent also acknowledged in the chambers meeting that he would not have proceeded with Mr. Logan's case had he known that the Superior Court ADA prosecuting Mr. Logan's case communicated that no plea bargain would be offered if Mr. Logan insisted on a probable cause hearing that day.

15. Respondent also told Mr. Smith that because his findings had already been entered by the clerk, Mr. Smith could appeal the finding of probable cause.

16. At the conclusion of the meeting in Respondent's chambers, Mr. Smith requested to be heard on Mr. Logan's bond. Respondent informed the parties that he would entertain such a motion. After the parties reentered the courtroom, Mr. Smith advocated for a lower

bond, which was opposed by the State. Respondent then lowered Mr. Logan's bond from $100,000 secured to $25,000 secured.

(citations to pages of the Stipulation and Record omitted). Based on these findings of fact, the Commission concluded as a matter of law that:

1. The Statement of Charges alleges Respondent violated Canon 1, Canon 2A, Canon 3A(3), and Canon 3A(4) of the Code of Judicial Conduct. The Commission concludes that the findings of fact support the conclusion that Respondent violated Canon 2A and Canon 3A(4).

2. Canon 2A of the Code of Judicial Conduct provides that "[a] judge should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Based on the findings of fact, the Commission concludes that on July 18, 2018, Respondent failed to conduct himself in a manner that promotes public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A of the North Carolina Code of Judicial Conduct.

3. Specifically with respect to Canon 2A, the Commission's findings of fact concerning Respondent's conduct show that Respondent knowingly proceeded with defendant's probable cause hearing without the defendant's counsel present to "make a point" about the lawyer's failure to appear in court at the time Respondent had directed. Respondent noted this point on the record at the outset of the hearing and reiterated it in the chambers conference thereafter. At the hearing itself, Respondent made no effort to ascertain if Mr. Logan wished to continue the hearing or waive his right to counsel and proceed. Respondent's conduct not only forced Mr. Logan to proceed without his court-appointed counsel, but also required Mr. Logan to cross-examine witnesses from behind bars while handcuffed without access to pen and paper. Respondent's conduct also threatened Mr. Logan's 5th Amendment right against self-incrimination, a point that ADA Terwey had to raise to Respondent. Finally, Respondent's conduct sent a clear message that a

criminal defendant will be held accountable for the tardiness of his court-appointed lawyer. This is a point that Respondent himself stated was not directed just at Mr. Smith, but at the entire Buncombe County Bar. Such conduct undoubtedly undermines public confidence in the fairness of criminal proceedings in violation of Canon 2A.

4. The Commission further finds that Canon 2A is violated, and conduct prejudicial to the administration of justice occurs, when a judge employs improper means to discipline an attorney for conduct the judge considered to be unprofessional or frustrating. *See*, *e.g.*, *In re Bullock*, 328 N.C. 712, 717–718, 403 S.E.2d 264, 267 (1991) (censuring Respondent for violation of Canon 2A and conduct prejudicial to the administration of justice upon a finding that Respondent improperly ordered an attorney into custody and further demanded information subject to the attorney-client privilege); *In re Scarlett*, Inquiry No. 10-209, Judicial Standards Commission, June 15, 2011)[sic] (publicly reprimanding Respondent for violation of Canon 2A among other violations and conduct prejudicial to the administration of justice for holding a disciplinary hearing against an attorney for unprofessional conduct without basic due process afforded to the attorney and dictating that the proceeding be closed to the public).

5. Canon 3A(4) requires a judge to "accord every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law . . . ." Based on the findings of fact, the Commission further concludes that Respondent failed to afford Mr. Logan and Mr. Smith a full right to be heard according to the law in violation of Canon 3A(4) of the North Carolina Code of Judicial Conduct.

6. Specifically with respect to Canon 3A(4), the Commission's findings of fact concerning Respondent's conduct on July 18, 2018, and as supported by the transcript and audio proceeding with the hearing, show that Respondent stated at the outset of the hearing that he was proceeding with the hearing regardless

of Mr. Smith's absence and directed the State to proceed. Respondent did so without giving Mr. Logan any opportunity to be heard regarding the absence of his court-appointed counsel, whether he wished to continue the matter, or whether he wished to waive his right to counsel and proceed. In addition to denying Mr. Logan the opportunity to be heard on these critical issues, Respondent also interfered with the attorney-client relationship by denying Mr. Logan the right to consult with his court-appointed attorney and have representation at the hearing. Moreover, Respondent also intentionally denied Mr. Logan the right to be heard following the close of the State's evidence, at which time Respondent directly and unequivocally informed Mr. Logan that he would not have the opportunity to be heard: "I'm not going to allow you to make any statements, because this is a probable cause hearing. The State has presented their case. The standard of proof is so low—or it's lower than what would be beyond a reasonable doubt. I will let them make their argument." Although Respondent's denial of Mr. Logan's right to be heard was rooted in the concerns ADA Terwey rightfully raised to Respondent about whether Mr. Logan if allowed to testify could incriminate himself in violation of his 5th Amendment rights, this was a situation caused by Respondent's conduct in forcing Mr. Logan to proceed without his court-appointed counsel. Based on the totality of these circumstances, Respondent's conduct denied Mr. Logan a full right to be heard as required under Canon 3A(4). *See also* Charles Gardner Geyh *et al.*, Judicial Conduct and Ethics § 2.05 at 2-33 (5th Edition 2013) ("A judge violates the duty under the Code to accord litigants their full right to be heard when the judge interferes with the litigant's relationship with counsel. The most overt interference with the attorney-client relationship occurs if court proceedings are conducted with counsel absent when the judge knows the party has representation.")

7. Although the Statement of Charges alleges that Respondent's conduct constituted willful misconduct in office in violation of N.C. Gen. Stat. § 7A- 376(b), the Commission concludes that the clear and convincing

evidence does not support a conclusion of willful misconduct in office. The Commission does conclude, however, that Respondent engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C. Gen. Stat. § 7A- 376(b). *See also* Code of Judicial Conduct, Preamble ("[a] violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute.")

8. The Supreme Court first defined conduct prejudicial to the administration of justice in *In re Edens*, 290 N.C. 299, 226 S.E.2d 5 (1976) as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office." *Id.* at 305, 226 S.E.2d at 9. Unlike willful misconduct in office, therefore, the motives or potential bad faith of the judge are not in issue. Instead, as the Supreme Court explained in *Edens*, conduct prejudicial to the administration "depends not so much upon the judge's motives, but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers." *Id.* at 305–306 (internal citations and quotations omitted).

9. Based upon the Commission's conclusions that Respondent's conduct violated Canon 2A and Canon 3A(4) as set forth in Paragraphs 2 through 6 above, the Commission further concludes that Respondent's conduct was prejudicial to the administration of justice and brings the judicial office into disrepute.

10. As noted above, the subjective motives or good faith of the Respondent are not the focus of an inquiry into whether his conduct was prejudicial to the administration of justice. The focus is on the impact Respondent's conduct might have on objective observers. *Edens*, 290 N.C. at 305, 226 S.E.2d at 9. Nevertheless, the Commission does address the assertions of Respondent's Counsel at the hearing of this matter that Respondent's conduct was the result

of a good faith legal error and thus he cannot be subject to discipline. Respondent's Counsel asserted that Respondent forced Mr. Logan to proceed without his counsel at the probable cause hearing because he felt he was obligated to do so after consulting the statutes, specifically N.C.G.S. § 15A-606(e) & (f), which govern probable cause hearings, and § 15A-611(c), which governs the procedures in probable cause hearings if a defendant appears without counsel.

a. As a factual matter, Respondent's defense of good faith legal error is not supported in the record. The Stipulation of Facts entered into by Respondent specifically addresses the agreed facts as to Respondent's motives and statements regarding his decision to proceed without Mr. Logan's court-appointed counsel present. It is undisputed that he did so to "make a point" to Mr. Smith and other lawyers about being on time to court. Nowhere in the Stipulation of Facts is there any reference to Respondent's alleged belief that he was required under N.C.G.S. § 15A-606(e) to proceed with a probable cause hearing involving a represented criminal defendant without counsel present. The audio and transcript of the probable cause hearing further establish that Respondent at no time indicated to the parties that he was proceeding with the hearing as he allegedly believed was required under § 15A-606(e). Instead, as the audio and transcripts make clear, he informed the parties he was proceeding because defense counsel asked for the hearing and then had failed to appear on time. For these reasons, there is no factual support in the record that Respondent proceeded with the hearing for any other reason than to "make a point" about attorney tardiness to court.

b. As a procedural matter, the Commission further finds that any alleged good faith legal error in interpreting § 606(e) does not preclude a finding that Respondent violated Canon 2A or 3A(4) or that his objective conduct and statements were prejudicial to the administration of justice and public esteem for the judicial office. Specifically, the Commission does not need

to consider or decide whether Respondent's interpretation of § 606(e) was correct as a matter of law to determine that Respondent denied Mr. Logan an opportunity to be heard at the probable cause hearing or engaged in conduct that undermines public confidence in the impartiality and integrity of the judiciary as established in Paragraphs 2 through 6 above.

11. In reaching these conclusions of law, the Commission also recognizes that judges have a duty under Canon 3B(3) of the Code of Judicial Conduct to take disciplinary action against attorneys for unprofessional conduct, and further, that there is a possibility that disciplinary action may have been warranted in the case of Mr. Smith's apparent chronic tardiness to court and failure to appear at 2:00 p.m. as Respondent directed. This is without question a problem that vexes many good judges across the state. But there are many tools available to judges to discipline attorneys for failure to appear on time. That being said, forcing a criminal defendant known to be represented by counsel to proceed to represent himself in a probable cause hearing to which he was entitled and requiring him to cross-examine witnesses while handcuffed and confined in a small holding cell is not a disciplinary measure against the defendant's attorney that comports with the Code of Judicial Conduct or promotes public confidence in the administration of justice.

12. Finally, the Commission recognizes that it is not empowered to determine matters of law and does not pass upon the legal question of whether Respondent's findings of probable cause was supported in fact or law. That matter, as Respondent acknowledged and informed Mr. Smith, was an appealable issue to be addressed by the appellate courts. As noted above, the Commission also does not decide the appropriate interpretation on N.C.G.S. § 611(c) or § 606(e) or their application to the facts of this matter. The Commission instead must evaluate Respondent's conduct at the probable cause hearing and "the impact such conduct might reasonably have upon knowledgeable observers." *Edens*, 290 N.C. at 305–306, 226

> S.E.2d at 9. Based on the findings of fact and for all the foregoing reasons, the Commission concludes as a matter of law that Respondent's conduct not only violated Canon 2A and Canon 3A(4) of the Code of Judicial Conduct, but was conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

(citations to pages of the Stipulation and Record omitted). Based on these findings of fact and conclusions of law, the Commission recommended that this Court publicly reprimand respondent. In support of this recommendation, the Commission offered the following information:

1. The Supreme Court in *In re Crutchfield*, 289 N.C. 597, 223 S.E.2d 822 (1975) first addressed sanctions under the Judicial Standards Act and stated that the purpose of judicial discipline proceedings "is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of its judges." *Id*. at 602, 223 S.E.2d at 825.

2. Under the statutes governing the Commission, a public reprimand is appropriate where "a judge has violated the Code of Judicial Conduct and has engaged in conduct prejudicial to the administration of justice, but that misconduct is minor." N.C.G.S. § 7A-374.2(7). The Commission considers Respondent's misconduct to be "minor" because of the lack of prejudice to Mr. Logan in his criminal proceeding given the low bar for the State to establish probable cause and his ability to appeal the probable cause determination. The Commission also considers Respondent's conduct in reducing Mr. Logan's bond following the finding of probable cause and the isolated nature of the incident.

3. Finally, in recommending reprimand as opposed to a more severe sanction, the Commission considers as mitigating factors Respondent's willingness to enter into the Stipulation of Facts and the character affidavits submitted by Respondent that attest to Respondent's professionalism, reputation for impartiality in criminal cases, and courteous demeanor as a jurist.

(citations to pages of the Stipulation and Record omitted).

In proceedings brought pursuant to N.C.G.S. § 7A-376, this Court acts as a court of original jurisdiction rather than an appellate court. *In re Hill*, 357 N.C. 559, 564 (2003) (citing *In re Peoples*, 296 N.C. 109, 147 (1978)). The Commission's recommendations are not binding on this Court, and this Court makes its own independent judgment when considering the evidence. *In re Nowell*, 293 N.C. 235, 244 (1977). This Court may "adopt the Commission's findings of fact if they are supported by clear and convincing evidence, or [we] may make [our] own findings." *In re Hartsfield*, 365 N.C. 418, 428 (2012) (quoting *In re Badgett*, 362 N.C. 202, 206 (2008)). If this Court finds that the Commission's findings of fact are supported by clear and convincing evidence and chooses to adopt them, we must determine whether those findings support the Commission's conclusions of law. *In re Stone*, 373 N.C. 368, 379 (2020) (citing *In re Hartsfield*, 365 N.C. at 429).

The Commission based its findings of fact on the stipulated facts and exhibits, and respondent does not contest these findings. After careful review, we agree that the Commission's findings of fact are supported by clear, cogent, and convincing evidence, and we adopt them as our own.

Respondent does not contest the fact that he held a probable-cause hearing without defendant's counsel present but instead argues that an objectively reasonable reading of our statutes allows a district court to conduct a probable-cause hearing without a defendant's counsel present. As an initial matter, this Court need not find a violation of our statutes in order to find a violation of our Code of Judicial Conduct. *See In re Tucker*, 350 N.C. 649, 651 (1999) (finding that respondent violated our Code of Judicial Conduct by rejecting a guilty plea and entering a verdict of not guilty without determining whether the judge's conduct also violated our General Statutes). Instead, this Court must determine whether respondent's statements, actions, and inactions constitute "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." N.C.G.S. § 7A-376(b) (2019).

Although our analysis hinges on respondent's conduct rather than his compliance with our General Statutes, we reject respondent's argument that his conduct was the result of an objectively reasonable interpretation of our statutes governing probable-cause proceedings. Respondent argues that N.C.G.S. § 15A-606(e) allows probable-cause hearings to proceed without defense counsel present and N.C.G.S. § 15A-606(f) barred him from continuing the matter. A thorough examination of these statutes shows why this argument fails. These two subsections provide that:

> (e) If an unrepresented defendant is not indigent and has indicated his desire to be represented by counsel, the district court judge must inform him that he has a choice of appearing without counsel at the probable-cause hearing or of securing the attendance of counsel to represent him at the hearing. The judge must further inform him that the judge presiding at the hearing will not continue the hearing because of the absence of counsel except for extraordinary cause.
>
> (f) Upon a showing of good cause, a scheduled probable-cause hearing may be continued by the district court upon timely motion of the defendant or the State. Except for extraordinary cause, a motion is not timely unless made at least 48 hours prior to the time set for the probable-cause hearing.

N.C.G.S. § 15A-606(e)–(f) (2019). Although § 15A-606(e) allows for a probable-cause hearing to proceed without counsel present, it only applies to defendants who are not indigent, and it also requires that the trial court inform the defendant that they have a choice of appearing without counsel or securing the attendance of counsel and that the hearing will not be continued due to counsel's absence except for extraordinary cause. Respondent's conduct does not objectively comply with this statute because there is no evidence that he ascertained whether defendant was indigent, as a threshold matter, and there is no evidence that he informed defendant of his choice between appearing without counsel or securing the attendance of counsel.

Sub-section 15A-606(f) does not justify respondent's conduct either because it explicitly only applies to motions made by the defendant or the State, not the trial court. Respondent's admission that he would not have conducted the hearing if he had known that the ADA threatened to withhold a plea offer if defendant challenged probable cause further negates his original argument that § 15A-606(f) barred him from continuing the matter.

Additionally, if respondent attempted to objectively follow all relevant statutes he would have followed N.C.G.S. § 15A-611, which is titled "Probable-cause hearings." Subsection (c) provides that:

> If a defendant appears at a probable-cause hearing without counsel, the judge must determine whether counsel has been waived. If he determines that counsel has been

> waived, he may proceed without counsel. If he determines that counsel has not been waived, except in a situation covered by G.S. 15A-606(e) he must take appropriate action to secure the defendant's right to counsel.

N.C.G.S. § 15A-611(c). The plain language of this subsection requires the trial court to inquire whether a defendant has waived counsel if they appear without counsel and further requires "appropriate action" if counsel has not been waived and the defendant is indigent. There is no evidence that the trial court ascertained whether defendant waived counsel, and respondent failed to take any "appropriate action to secure the defendant's right to counsel." *Id.* Therefore, respondent's conduct failed to reflect an objectively reasonable reading and interpretation of our General Statutes governing probable-cause proceedings.

Respondent further argues that subjecting him to punishment for a legal error would create a slippery slope and "extend the disciplinary provisions in the Code of Judicial Conduct to cover legal errors committed by trial judges[.]" He cites to our recent decision in *State v. Simpkin*s, 373 N.C. 530 (2020), in which we held that the trial court erred by determining the defendant had waived his right to counsel and remanded the matter for a new trial. *Id.* at 541. This analogy is inapposite. Unlike respondent here, the trial court in *Simpkins* made multiple attempts to determine whether the defendant wished to waive counsel and appointed standby counsel. *Id.* at 532. These additional actions by the trial court in *Simpkins* would foster public faith and confidence in the judiciary, even though the trial court was ultimately wrong in its determination that defendant waived counsel. Unlike the trial court in *Simpkins*, respondent rushed to hold a hearing without counsel present, he failed to explore other options regarding counsel prior to commencing the proceeding, and he made comments about "making a point" after the proceeding. This conduct demonstrated a disregard for the defendant's statutory and constitutional rights, and that disregard undermines public faith and confidence in the judiciary.

For the reasons articulated above, we agree with and adopt as our own the Commission's conclusions that respondent's conduct violates Canons 2A and 3A(4) of the North Carolina Code of Judicial Conduct and is prejudicial to the administration of justice, thus bringing the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b).

The Commission recommended that respondent be publicly reprimanded. This Court is not bound by the recommended sanction of the

Commission. *Hartsfield*, 365 N.C. at 429. "[W]e may exercise our own judgment in arriving at a disciplinary decision in light of respondent's violations of the North Carolina Code of Judicial Conduct." *In re Stone*, 373 N.C. 368, 379 (2020) (citing *Hartsfield*, 365 N.C. at 429). Therefore, "[w]e may adopt the Commission's recommendation, or we may impose a lesser or more severe sanction." *Id.* This Court does not have established guidelines for determining the appropriate sanction and "each case should be decided upon its own facts." *In re Martin*, 295 N.C. 291, 305 (1978).

We recognize the multiple affidavits submitted on respondent's behalf from attorneys in the Buncombe County Bar that attest to his fairness and further recognize that respondent has never been the subject of discipline from this Court. In light of this mitigating evidence and the fact that respondent voluntarily entered into a Stipulation of Facts, we conclude that the Commission's additional findings and recommendation of public reprimand are appropriate, and we adopt them as our own.

Therefore, the Supreme Court of North Carolina orders that respondent Edwin D. Clontz be publicly reprimanded for conduct in violation of Canon 2A and Canon 3A(4) of the North Carolina Code of Judicial Conduct, and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

By order of the Court in Conference, this the 15th day of December, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

Justice EARLS dissenting from Order.

A public reprimand is appropriate where the Supreme Court finds that "a judge has violated the Code of Judicial Conduct and has engaged in conduct prejudicial to the administration of justice, but that misconduct is minor." N.C.G.S. § 7A-374.2(7) (2019). Because it is not clear to me that respondent's conduct, while misguided, was so egregious as to be prejudicial to the administration of justice, I would have remanded to the Judicial Standards Commission for the issuance of a private letter of caution rather than issue a public reprimand from this Court. As a result, I respectfully dissent from the majority's Order in this matter.

This Judicial Standards Commission case proceeded on stipulated facts, and the Commission entered findings of fact based on the record before it. Respondent was presiding over probable cause hearings in criminal district court when the case of defendant Jermaine Logan was called. The assistant district attorney, Ms. Terwey, requested a continuance. Defense counsel, Mr. Smith, objected and demanded a probable cause hearing. The respondent held the matter open and instructed the parties to return at two o'clock that afternoon.

At two o'clock, ADA Terwey was present with the necessary witnesses and the defendant, Mr. Logan, had been brought from jail to a holding cell adjacent to the courtroom that had a barred window looking into the room. However, defense counsel, Mr. Smith, was not there.

After dealing with other matters on the calendar and having the bailiff check the other courtrooms to try to find Mr. Smith, respondent proceeded with the probable cause hearing without defense counsel present. Mr. Logan was allowed to cross-examine the State's witnesses "through the barred window of the prisoner holding area while he remained handcuffed and without access to pen or paper, which is routine in Buncombe County for in custody defendants, unless a specific request is made by a party to bring the defendant into the courtroom."

At the conclusion of the State's evidence, ADA Terwey indicated that she was uncomfortable with the proceedings. She stated that Mr. Logan might incriminate himself if he testified. Respondent advised Mr. Logan that he wouldn't be allowed to testify. ADA Terwey did not give a closing argument and respondent found that there was probable cause for the charges.

After the hearing concluded, Mr. Smith returned and the parties met in respondent's chambers. Mr. Smith reported that he had been in the

district attorney's office discussing Mr. Logan's case, where a Superior Court assistant district attorney threatened to withhold a plea deal if Mr. Smith pressed for a probable cause hearing. Respondent stated that if he had known about the threat he would not have proceeded with the hearing. He stated at this point "that he proceeded with Mr. Logan's case without Mr. Smith to 'make a point' because Mr. Smith was not present at 2:00 pm when he had been told to return to court and Mr. Smith did not otherwise communicate his location to the Court or courtroom personnel." In a bond hearing after the meeting in chambers, respondent lowered Mr. Logan's bond from $100,000 secured to $25,000 secured.

Respondent entered into evidence character affidavits from four witnesses who attest that he is generally well-regarded in the community, generally sensitive to the interests of defendants who appear before him, and that his conduct on this occasion was not part of a pattern of repeated misbehavior.

As the majority notes, respondent argues without merit that in these circumstances he was legally prohibited by statute from continuing the probable cause hearing and was permitted to proceed in the absence of defense counsel. However, this legal mistake, even combined with respondent's admitted improper motive, does not rise to the level of conduct which has warranted public reprimand in other cases. In the last five years, this Court has issued four public reprimands, the sum of which suggest that the instant case is inappropriate for public reprimand.

For example, in another case adjudicated on stipulated facts, a district judge, perceiving unfair treatment from her Chief District Court Judge, began complaining about the Chief Judge "to other judges in her district, retired judges, court staff, and local attorneys" and "also suggested to her case manager and a courtroom clerk that the Chief Judge's decisions regarding her schedule were based in part on racial prejudice." *In re Smith*, 372 N.C. 123, 126, 827 S.E.2d 516, 518 (2019). In addition to consistent complaints about the Chief Judge, which we concluded on the evidence were unwarranted, *id.* at 127, 827 S.E.2d at 518–19, the respondent in that case sometimes openly "announce[d] that she was adjourning court early for personal appointments, such as for hair and nail salon visits or to spend time with her child," which "created a perception that her judicial duties did not take precedence over her personal commitments and work schedule preferences." *Id.* at 127–28, 827 S.E.2d at 519. As a result of the respondent's conduct, "several members of the domestic bar" requested that the respondent be removed from their cases, and "several judicial and court colleagues" brought

concerns to the Chief Judge about the respondent's behavior. *Id.* at 128, 827 S.E.2d at 519. We concluded that a public reprimand was appropriate. *Id.* at 135, 827 S.E.2d at 523.

Similarly, we considered the case of a trial judge who "(1) failed to issue a ruling for more than two (2) years on a motion for attorney's fees and expenses . . .; (2) failed to respond or delayed responding to party and attorney inquiries as to the status of the pending ruling; and (3) failed to respond in a timely manner to numerous communications from the Commission's investigator regarding the status of the ruling during the Commission's investigation into this matter." *In re Henderson*, 371 N.C. 45, 46, 812 S.E.2d 826, 827 (2018). The respondent in that case admitted "that he had no excuses for the delay other than his 'dread' of the case." *Id.* at 47, 812 S.E.2d at 828. We concluded that the respondent should be publicly reprimanded. *Id.* at 52, 812 S.E.2d at 830.

We also considered the case of a Deputy Commissioner of the North Carolina Industrial Commission, where it was charged that the respondent had "wrecked his vehicle while driving under the influence of an impairing substance, putting at risk his own life and the lives of others." *In re Shipley*, 370 N.C. 595, 596, 811 S.E.2d 556, 557 (2018). The Judicial Standards Commission's factual findings, unchallenged by the respondent, stated that the respondent was involved in an accident with another vehicle at around nine o'clock in the evening, after which two breath alcohol tests produced results indicating that the respondent had been driving while impaired. *Id.* at 596–97, 811 S.E.2d at 557–58. We issued a public reprimand. *Id.* at 600, 811 S.E.2d at 560.

In another case, we considered a recommendation by the Commission concerning a district judge who was charged with failing to report extrajudicial income and "presiding over a criminal case that he had initiated and agreeing to the dismissal of the case after receiving restitution in chambers." *In re Mack*, 369 N.C. 236, 237, 794 S.E.2d 266, 267–68 (2016). The Commission's factual findings, unchallenged by the respondent, indicated that the respondent received rental income from two residential properties, but failed to report that income for a number of years. *Id.* at 238–42, 794 S.E.2d at 268–70. Moreover, the respondent presided over a criminal case, calendared in his courtroom by the Assistant District Attorney, in which he was the complainant against a former tenant who had damaged the respondent's rental home. *Id.* After acknowledging the judge's remedial efforts and strong dedication to the community, we determined that a public reprimand was appropriate. *Id.* at 247–49, 794 S.E.2d at 273–74.

In contrast to our prior cases issuing public reprimands, here respondent's conduct occurred in one proceeding over the course of one afternoon. In *Smith*, *Henderson*, and *Mack*, on the other hand, the respondent's conduct persisted over a significant period of time. *See In re Smith*, 372 N.C. at 126–28, 827 S.E.2d at 518–19; *In re Henderson*, 371 N.C. at 46, 812 S.E.2d at 827; *In re Mack*, 369 N.C. at 238–42, 794 S.E.2d at 268–70. Respondent's conduct in the present case involved no allegation of criminal conduct. However, the respondent in *Shipley* was accused of driving while under the influence of an impairing substance in violation of N.C.G.S. § 20-138.1. *In re Shipley*, 370 N.C. at 596, 811 S.E.2d at 557. Here, respondent's conduct was not part of a pattern of unprofessional or unbecoming behavior. The respondent in *Smith*, however, received a public reprimand after "attorneys that frequently appeared" before her reported that she "regularly rushed to conclude cases" so that they were concerned about having a full and fair opportunity to be heard, and after several complaints were lodged regarding this and other behavior. *In re Smith*, 372 N.C. at 125–29, 827 S.E.2d at 517–20. Moreover, none of the other cases in which the Court has issued a public reprimand in the last five years included an arguable claim of legal authority for the respondent's conduct. Upon review of the similar cases considered recently by this Court, I am convinced that the present case does not demonstrate the level of conduct warranting a public reprimand.

It is well-established that "[t]he Supreme Court 'acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court' when reviewing a recommendation from the Commission." *In re Smith*, 372 N.C. at 134, 827 S.E.2d at 522. In *Smith* we observed that:

> This Court is not bound by the recommendations of the Commission. Rather, we may exercise our own judgment in arriving at a disciplinary decision in light of Respondent's violations of several canons of the North Carolina Code of Judicial Conduct. Accordingly, '[w]e may adopt the Commission's recommendation, or we may impose a lesser or more severe sanction."

In re Smith, 372 N.C. at 135, 827 S.E.2d at 523 (citations omitted) (quoting *In re Hartsfield*, 365 N.C. 418, 429, 722 S.E.2d 496, 503 (2012)). Indeed, "[i]n arriving at a disciplinary decision, this Court employs its own judgment and 'is unfettered by the Commission's recommendations.' " *In re Hartsfield*, 365 N.C. at 429, 722 S.E.2d at 503 (quoting *In re Badgett*, 362 N.C. 202, 207, 657 S.E.2d 346, 349 (2008)).

In making that independent judgment, it is important to remember that a judicial standards inquiry "is merely an inquiry into the conduct of one exercising judicial power." *In re Nowell*, 293 N.C. 235, 241, 237 S.E.2d 246, 250 (1977). "Its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice." *Id.* On the facts of this case, accurately described by the Court's order, a public reprimand is not required to ensure the honor of the judiciary and the proper administration of justice. Rather, a letter of caution is sufficient. Accordingly, I respectfully dissent from the Court's order of public reprimand.

EARLS, J. dissenting from order; Justices NEWBY and DAVIS join in this dissent.

IN THE MATTER OF J.D.

No. 343A19

Filed 18 December 2020

1. Sexual Offenses—sexual exploitation of a minor—video recording of sexual activity—acting in concert—sufficiency of evidence—juvenile offender

The State failed to present sufficient evidence to survive a motion to dismiss a juvenile petition for second-degree sexual exploitation of a minor where the charged juvenile's cousin made and distributed a video recording of the charged juvenile engaging in sexual activity with another juvenile and the State relied on the theory of acting in concert. The State's evidence did not show a common plan or scheme—rather, it showed the charged juvenile telling his cousin not to make the video recording.

2. Sexual Offenses—forcible sexual offense—sexual act—anal penetration—sufficiency of evidence—juvenile offender

The State failed to present sufficient evidence to survive a motion to dismiss a juvenile petition for first-degree forcible sexual offense where the victim unambiguously denied that anal penetration occurred, the video recording of the incident did not show penetration, and witnesses indicated only that penetration could have occurred. The State thus failed to present sufficient evidence of a sexual act pursuant to N.C.G.S. § 14-27.20(4).

3. Juveniles—admissions—sufficiency of factual basis—termination of trial court's jurisdiction—juvenile reaching age of majority

The trial court did not err by accepting a juvenile's admission to attempted larceny where a bicycle was stolen and the juvenile was at the crime scene with bolt cutters in his backpack. However, because the juvenile turned eighteen years old during the pendency of the appeal, the trial court's jurisdiction terminated and the matter was not remanded for a new disposition hearing.

Justice NEWBY concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 267 N.C. App. 11 (2019), vacating an adjudication order entered on 13 November 2017 and a disposition order entered on 23 January 2018 by Judge Tabatha P. Holliday in District Court, Guilford County. Heard in the Supreme Court on 2 September 2020.

Joshua H. Stein, *Attorney General*, *by Stephanie A. Brennan*, *Special Deputy Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Amanda S. Zimmer*, *Assistant Appellate Defender*, *for defendant-appellee.*

BEASLEY, Chief Justice.

This Court is tasked with determining the sufficiency of evidence needed to survive a motion to dismiss a juvenile petition alleging that the juvenile committed second-degree sexual exploitation of a minor under an acting in concert theory and a juvenile petition alleging that the juvenile committed first-degree forcible sexual offense when the victim denies that penetration occurred. We must also determine the sufficiency of evidence required before a trial court can accept a juvenile's transcript of admission. We hold that the trial court erred by denying the juvenile's motions to dismiss second-degree sexual exploitation of a minor and first-degree forcible sexual offense but did not err by accepting the juvenile's admission of attempted larceny.[1] This holding

1. The Court of Appeals also held that the trial court erred by entering a Level 3 disposition and commitment order and denying the juvenile's motion for release pending his appeal. Because we are vacating the trial court's Level 3 disposition and commitment order, we do not address these additional issues.

also requires us to vacate the Level 3 disposition and commitment order entered by the trial court. However, we cannot remand the matter for the entry of a new disposition order because the trial court's jurisdiction terminated when the juvenile turned eighteen years old.

Factual and Procedural Background

This case stems from an incident at Jeremy's[2] house on 18 November 2016. Zane, age 13, spent the night with Jeremy, age 15, and Jeremy's cousins, Carl, age 12, and Dan, age 13. Jeremy's parents were home and the juveniles spent the evening playing outside and playing video games. At some point during the night Jeremy engaged in sexual contact against Zane's will, and Dan recorded a portion of the incident.

The video recording is twenty-one seconds long and does not show how the incident began or ended. During the entire recording Jeremy and Zane both have their pants pulled down and Zane is bent over a piece of furniture with Jeremy behind him performing a thrusting motion. Jeremy can be heard saying "you better not be recording this" and "[Dan] do not record this." Jeremy continued the thrusting motion and began to pull on Zane's hair, and Zane told Jeremy to "let go of [his] hair." Towards the end of the recording, Jeremy reaches for Zane's shirt with his left hand and lifts his left thumb from his fist. It is unclear whether he is giving a "thumbs up" or simply made a motion while grabbing Zane's shirt.

Dan sent the video to two people, and one of Zane's friends told Zane's father about the video. Zane was unaware the video was circulated to others, and Zane's mother called law enforcement once Zane's family became aware of the video. Law enforcement officers interviewed Jeremy, Dan, and Carl. Jeremy indicated that whatever occurred between him and Zane was consensual. He admitted that his penis touched Zane's "butt" but denied that any penetration occurred. Dan indicated that Jeremy and Zane were "doing it" and having "sex." He stated that nobody asked him to record the video and admitted to sending the video to two other people. Carl told law enforcement that he was in the room but covered his eyes once Jeremy's and Zane's pants were pulled down. He indicated that he told them to stop and it seemed like they were having sex.

Juvenile petitions were filed against Jeremy for second-degree sexual exploitation of a minor and first-degree forcible sexual offense. Petitions were also filed against Carl and Dan. While the initial petitions

2. Pseudonyms are used throughout the opinion to protect the juveniles' identities and for ease of reading.

were pending, a separate petition was filed against Jeremy for misdemeanor larceny.

The adjudicatory hearing for the petitions against Jeremy, Dan, and Carl for the incident on 18 November 2016 were held jointly without objection on 4 October 2017 and 1 November 2017. At the hearing, Zane testified that after playing video games he went to sleep and "woke up and [Jeremy] was behind me" and he "felt somebody holding [his] legs." He testified that his pants were pulled down and Jeremy was pulling on his hair. He "felt [Jeremy's] privates on [his] butt" but testified he did not feel Jeremy "go into [his] butt."

During Zane's testimony, the State introduced and played the video recording of the incident. The State also introduced and admitted, without objection, recordings of the statements made by Dan and Carl to law enforcement. Neither Dan nor Carl testified during the adjudicatory hearing.

At the close of the State's evidence, all juveniles made a motion to dismiss, which the trial court denied. These motions were renewed at the close of all of the evidence and were again denied by the trial court.

The trial court adjudicated Jeremy and Dan delinquent for the offenses of first-degree forcible sexual offense and second-degree sexual exploitation of a minor. It also found Dan delinquent for the offense of felony disseminating obscenity. The disposition hearing was continued until 24 January 2018 so Jeremy could have a psychosexual assessment at Children's Hope Alliance to identify Jeremy's sex-specific risk factors and determine treatment recommendations to be considered by the trial court at the disposition hearing.

At the dispositional hearing, the State asked for a Level 3 disposition and Jeremy's defense counsel asked for a Level 2 disposition. Jeremy's court counselor recommended a Level 2 disposition, and both Children's Hope Alliance and the court counselor recommended that Jeremy complete specialized sex-offender specific treatment.

Jeremy also entered a transcript of admission for misdemeanor attempted larceny. After Jeremy entered his transcript of admission on the record, the State gave the following factual basis:

> The date of offense on this matter is April 7th, 2017. [The victim] reported that his bicycle had been stolen. Police came, and witnesses said that two black males, giving descriptions, had taken the bike by using bolt cutters to cut the chain that secured it.

> And shortly after that, the—the responding officer saw three folks somewhat matching that description riding two bicycles. So, two were on one bicycle, one was on the other bicycle, kind of off on his own. That one off on his own on a bicycle turned out to be [Jeremy]. He's the only one who stopped and was willing to talk with the officer.
>
> He said that he had nothing to do with the theft of the bicycle, gave the name of the person who did, and he did admit to having the bolt cutters in his back pack.

Jeremy's defense counsel told the trial court that Jeremy was with the "wrong people" at the "wrong time" but had "accepted responsibility" for his role.

After accepting Jeremy's admission, the trial court entered a Level 3 disposition and committed Jeremy to a youth development center based on his adjudication for first-degree forcible sexual offense. On 14 February 2018 Jeremy filed a notice of appeal and requested release pending appeal. The trial court held a hearing on 20 February 2018 and denied Jeremy's request for release pending appeal.

On appeal, Jeremy argued that (1) there was insufficient evidence to support a finding that Jeremy committed second-degree sexual exploitation of a minor; (2) there was insufficient evidence to support a finding that Jeremy committed first-degree forcible sexual offense; (3) the trial court violated his right to confront his accusers by allowing the admission of out-of-court statements by Jeremy's codefendants; (4) the trial court erred by considering out-of-court statements as substantive evidence; (5) the trial court erred by failing to make written findings showing it considered all five factors under N.C.G.S. § 7B-2501 prior to entering its disposition order; and (6) the trial court erred by finding compelling reasons why Jeremy should remain in custody while his appeal is pending.

On 20 August 2019 the Court of Appeals issued a divided opinion reversing and remanding the adjudication and disposition orders of the trial court. *In re J.D.*, 267 N.C. App. 11 (2019). The majority held that the trial court erred by denying Jeremy's motion to dismiss his second-degree sexual exploitation of a minor charge because he told Dan to stop recording and there was no evidence that Jeremy wanted the recording to be made. *Id.* at 15. Because there was no evidence that Jeremy "took an active role in the production or distribution of the video," the trial

court erred by denying his motion to dismiss the second-degree sexual exploitation of a minor charge. *Id.*

The majority went on to conclude that there was not substantial evidence of anal penetration and that because Zane testified that no penetration occurred and the video did not show a "sexual act," the trial court erred by denying Jeremy's motion to dismiss the charge of first-degree forcible sexual offense. *Id.* at 16–17.

The majority further concluded that the trial court erred by accepting the admission to attempted larceny because "[t]here was not a showing of the requisite intent that defendant intended to steal, or assist others in stealing, the bicycle." *Id.* at 17. Because the State failed to present sufficient evidence that Jeremy attempted to steal the bicycle, the trial court erred in accepting Jeremy's admission of attempted larceny. *Id.*

The majority next addressed the statements made by Jeremy's codefendants who did not testify at the adjudicatory hearing. The majority concluded that these statements violated Jeremy's constitutional right to confront and cross-examine witnesses and were ultimately prejudicial to Jeremy's defense, that the evidence at trial was not overwhelming, and that "the State has failed to prove this testimony was harmless beyond a reasonable doubt." *Id.* at 18–19.

Although the majority held that the adjudications must be reversed, it nonetheless addressed disposition errors made by the trial court. *Id.* at 19–21. It concluded that the trial court erred by entering a Level 3 disposition because it "failed to effectively explain its decision" to ignore evaluations from the court counselor and Children's Hope Alliance recommending a Level 2 disposition and it failed to "explain how its findings satisfied all of the factors required by N.C. Gen. Stat. § 7B-2501(c)." *Id.* at 21.

Finally, the majority held that the trial court "did not list independent compelling reasons" when it denied Jeremy's motion for his release while his appeal was pending. *Id.* at 22. It described this failure as "especially disturbing" because it "caus[ed] the juvenile to be held in detention for a period of 17 months when his convictions were improper." *Id.*

The dissenting judge argued that "the evidence was sufficient to support the trial court's findings and its ultimate order" and that the trial court's order should be affirmed. *Id.* at 23 (Dillon, J., dissenting). The dissenting judge argued there was sufficient evidence of first-degree forcible sexual offense because of Jeremy's statements and the video

recording, which showed "sufficient *circumstantial* evidence of penetration." *Id.* at 26. The dissenting judge further argued that the trial court did not err by denying Jeremy's motion to dismiss his second-degree sexual exploitation of a minor charge because "a fact-finder could certainly infer from Jeremy's tone and the position of the cellphone that Jeremy knew that he was being recorded and was in approval of the recording." *Id.* at 30.

The dissenting judge next addressed the admission of Jeremy's codefendants' statements into evidence. The dissenting judge argued that the State had the burden of showing that the trial court's error was harmless beyond a reasonable doubt and the State met its burden because "the trial court made its finding regarding penetration based on the video itself" rather than the codefendants' statements. *Id.* at 31–32.

The dissenting judge next argued that the trial court did not err by accepting Jeremy's admission to attempted larceny because the State's recitation of the facts was "sufficient to show that Jeremy directly participated, or at least acted in concert, in the commission of the attempted theft of the bicycle." *Id.* at 32.

The dissenting judge next argued that the trial court did not err by entering a Level 3 disposition. *Id.* at 35–36. That judge argued that the trial court's findings were "appropriate" under N.C.G.S. § 7B-2501, supported by the evidence, and sufficient to support the trial court's Level 3 disposition. *Id.* at 34–35. The dissenting judge concluded by arguing that the trial court stated sufficient compelling reasons in support of Jeremy's continued confinement pending his appeal. *Id.* at 37.

Analysis

For the reasons stated below, we conclude that the trial court erred as a matter of law by denying Jeremy's motion to dismiss his second-degree exploitation of a minor charge and his first-degree forcible sexual offense charge.[3] The adjudication order and Level 3 disposition order must be vacated. We further hold that the trial court did not err by

3. The State argues that Jeremy failed to preserve a motion to dismiss based on insufficient evidence of penetration because "he made a very specific motion to dismiss at the close of all evidence based only on lack of aiding and abetting—without raising lack of penetration." Our recent decision in *State v. Golder*, 374 N.C. 238 (2020), discussed the distinction between a general motion to dismiss and a specific motion to dismiss. We found that "merely moving to dismiss at the proper time under Rule 10(a)(3) preserves *all* issues related to the sufficiency of the evidence for appellate review." *Id.* at 249. We concluded that attempting to "categorize motions to dismiss as general, specifically general, or specific, and to assign different scopes of appellate review to each category" would be

accepting Jeremy's attempted-larceny admission but that the trial court lacks jurisdiction to enter a new dispositional order.

This Court reviews de novo a trial court's denial of a motion to dismiss for insufficiency of the evidence to determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *In re T.T.E.*, 372 N.C. 413, 420 (2019) (quoting *State v. Turnage*, 362 N.C. 491, 493 (2008)). "Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion." *State v. Hunt*, 365 N.C. 432, 436 (2012) (quoting *State v. Abshire*, 363 N.C. 322, 327–328 (2009)). All evidence is viewed "in the light most favorable to the State and the State receives the benefit of every reasonable inference supported by that evidence." *Id.*

i. Second-Degree Exploitation of a Minor

[1] A juvenile commits the offense of second-degree sexual exploitation of a minor if he or she "[r]ecords, photographs, films, develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or . . . [d]istributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity." N.C.G.S. § 14-190.17(a) (2020). A "common thread" in the conduct covered by this criminal offense is that "the defendant [took] an active role in the production or distribution of child pornography without directly facilitating the involvement of the child victim in the activities depicted in the material in question." *State v. Fletcher*, 370 N.C. 313, 321 (2017).

The petition alleged that Jeremy committed second-degree sexual exploitation of a minor by "record[ing] material containing a visual representation of a minor . . . engaged in sexual activity, . . . the defendant knowing the material's content." All of the testimony showed, and the State agrees, that Dan, not Jeremy, made the recording. Accordingly, the State relied on an acting in concert theory as to Jeremy's criminal culpability.

If "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other

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inconsistent with Rule 10(a)(3) of our North Carolina Rules of Appellate Procedure. *Id.* Therefore, all issues related to the sufficiency of the State's evidence were properly preserved by Jeremy's motions to dismiss at the close of the State's evidence and at the close of all evidence.

crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof." *State v. Barnes*, 345 N.C. 184, 233 (1997) (alteration in original) (quoting *State v. Erlewine*, 328 N.C. 626, 637 (1991)). To act in concert means "to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356 (1979). This may be shown by "circumstances accompanying the unlawful act and conduct of the defendant subsequent thereto." *State v. Westbrook*, 279 N.C. 18, 42 (1971). However, "[t]he mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense." *State v. Sanders*, 288 N.C. 285, 290 (1975).

Here, the State presented insufficient evidence of a common plan or purpose to record the incident. The video recording of the incident contains insufficient evidence of a common plan or scheme. The recording is only twenty-one seconds long and starts after commencement of the sexual contact between Jeremy and Zane. The video does not show any statements, actions, or conduct by Dan or Jeremy prior to this incident which could be considered evidence of a common plan or scheme. Rather, the evidence tended to show that Jeremy did not wish to be recorded because he can be heard saying "you better not be recording this" and "[Dan] do not record this."

The State argues that Jeremy approved of the recording because he gave a "thumbs up" at the end of the video. Given the poor quality and length of the video, it is unclear whether he was giving a thumbs up or simply forming his hand into a fist. Even if Jeremy did give a thumbs up in the video, acting in concert requires more than mere approval. *See State v. Birchfield*, 235 N.C. 410, 413 (1952) ("The mere presence of a person at the scene of a crime at the time of its commission does not make him a principal in the second degree . . . even though he may silently approve of the crime . . . .")

The State failed to present any additional evidence showing a common plan or scheme. The State introduced statements from Dan, who denied anyone asking him to make the recording. The State presented no evidence that Jeremy asked or desired Dan to record the incident. Rather, the evidence showed that Jeremy did not wish to be recorded and that Dan's decision to record the incident was of his own volition. Therefore, we agree with the Court of Appeals that the trial court erred by denying Jeremy's motion to dismiss the charge of second-degree sexual exploitation of a minor and Jeremy's adjudication for this petition must be vacated.

ii. First-Degree Forcible Sexual Offense

[2] A juvenile commits a first-degree forcible sexual offense if they "engage[ ] in a sexual act with another person by force and against the will of the other person, and . . . [t]he person commits the offense aided and abetted by one or more other persons." N.C.G.S. § 14-27.26(a) (2019). A sexual act is defined as "[c]unnilingus, fellatio, analingus, or anal intercourse." N.C.G.S. § 14-27.20(4) (2020). Our statutes further explain that "[p]enetration, however slight, is vaginal intercourse or anal intercourse." N.C.G.S. § 14-27.36 (2019). Jeremy's petition alleged that he unlawfully, willfully, and feloniously engaged in anal intercourse with Zane by force and against his will.

The State may elicit evidence of penetration from the victim, but when a victim fails to testify that penetration occurred, the State must present additional corroborative evidence of actual penetration. *See State v. Hicks*, 319 N.C. 84, 90 (1987); *State v. Robinson*, 310 N.C. 530, 534 (1984). In *Hicks*, this Court reversed a conviction for first-degree sexual offense because of "the ambiguity of [the victim's] testimony as to anal intercourse" and the lack of corroborative evidence, such as physiological or demonstrative evidence, that anal intercourse actually occurred. *Hicks*, 319 N.C. at 90. Similarly, this Court reversed a conviction for first-degree rape in the case of *Robinson* because the victim never testified as to sexual intercourse and the only corroborative evidence was testimony from an examining doctor that a male sex organ "could" have caused the victim's injuries and an ambiguous statement by the defendant as to his culpability. *Robinson*, 310 N.C. at 534.

Here, the victim did not give ambiguous testimony as to anal penetration and explicitly denied that any anal penetration occurred, testifying that he only "felt [Jeremy's] privates on [his] butt." When asked whether he felt Jeremy's privates "go into [his] butt, however slightly," he responded in the negative, stating "[n]ot that I know of." This matter is distinguishable from *Hicks* because here the victim's testimony was unambiguous and he directly denied any penetration.

Despite Zane's testimony, the State argues that the video recording provided sufficient evidence of anal penetration. The video does show that Zane was held by Jeremy by force and against his will and that Jeremy was thrusting himself towards Zane while behind him with his pants pulled down, but it does not show anal penetration or any other sexual act as defined in N.C.G.S. § 14-27.20(4).

The State further argues that Jeremy's statements, coupled with Dan and Carl's statements, provided sufficient corroborative evidence

to support the trial court's denial of Jeremy's motion to dismiss. Dan told law enforcement that Jeremy and Zane were "doing it," and Carl indicated that it seemed like they were having sex. Jeremy denied that any penetration occurred when he spoke with law enforcement. We find these statements analogous to the statements in *Robinson* by the examining doctor that penetration could have occurred—statements that were insufficient as a matter of law to submit the charge of first-degree rape to the jury given the lack of testimony as to penetration by the victim. Although the State argues that sufficient evidence was presented to the trial court as to actual anal penetration, the State recognized the weakness of its evidence when Jeremy moved to dismiss, stating that "the State would concede that the—as to the first degree forcible sex offense, that there was not evidence of penetration." We agree and hold that the State failed to present sufficient evidence of a sexual act as defined in N.C.G.S. § 14 27.20(4). Therefore, we agree with the Court of Appeals that the trial court erred by denying Jeremy's motion to dismiss the charge of first-degree forcible sexual offense and Jeremy's adjudication must be vacated.

iii. Attempted Larceny

[3] The trial court found that there was a sufficient factual basis to support Jeremy's admission to attempted larceny. For the reasons articulated below, we agree and reverse the holding of the Court of Appeals as to this issue.

A trial court may accept an admission only after determining that there is a factual basis for the admission, and this determination can be based on a statement of facts by the prosecutor or statements by the juvenile's attorney. N.C.G.S. § 7B 2407(c) (2019). This factual basis must contain "some substantive material independent of the plea itself . . . which tends to show that [the juvenile] is, in fact, guilty." *State v. Sinclair*, 301 N.C. 193, 199 (1980). This evidence must be sufficient for an independent judicial determination of the juvenile's actual guilt. *See State v. Agnew*, 361 N.C. 333, 337 (2007) ("In sum, the transcript, defense counsel's stipulation, and the indictment taken together did not contain enough information for an independent judicial determination of defendant's actual guilt in the instant case.").

The elements needed to support an admission of attempted larceny are: "(1) [a]n intent to take and carry away the property of another; (2) without the owner's consent; (3) with the intent to deprive the owner of his or her property permanently; (4) an overt act done for the purpose of completing the larceny, going beyond mere preparation; and (5) falling

short of the completed offense." *State v. Weaver*, 123 N.C. App. 276, 287 (1996). Acting in concert can be proven when a juvenile is "present at the scene of the crime" and "act[s] together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime." *Joyner*, 297 N.C. at 357.

Jeremy entered into and signed a transcript of admission indicating that he was admitting to the charge of attempted larceny and that he did in fact commit the acts charged in the petition. The State gave the following factual basis for the attempted larceny:

> [The victim] reported that his bicycle had been stolen. Police came, and witnesses said that two black males, giving descriptions, had taken the bike by using bolt cutters to cut the chain that secured it.
>
> And shortly after that, the—the responding officer saw three folks somewhat matching that description riding two bicycles. So, two were on one bicycle, one was on the other bicycle, kind of off on his own. That one off on his own on a bicycle turned out to be [Jeremy]. He's the only one who stopped and was willing to talk with the officer.
>
> He said that he had nothing to do with the theft of the bicycle, gave the name of the person who did, and he did admit to having the bolt cutters in his back pack.

Defense counsel for Jeremy indicated that Jeremy let his friend borrow his bookbag, who placed the bolt cutters in the bookbag before "they went off to do their deed." He further indicated that "[Jeremy] was with them, shouldn't have been, had some knowledge of what was happening or should have knowledge of what was happening, and has accepted responsibility for that."

The factual basis from the State and the additional arguments from Jeremy's defense counsel constitute sufficient evidence upon which the trial court could rely on to accept his admission of guilt. The State's factual basis showed that two young males stole a bicycle using bolt cutters and Jeremy was found with two black males who matched the description. When Jeremy was found with these two males he had bolt cutters in his bookbag. Jeremy's defense counsel indicated that Jeremy let one of the other males place the bolt cutters in his bookbag before "they went off to do their deed" and that Jeremy was with the other males when the crime occurred. We find that his presence at the crime scene

coupled with his possession of tools used to commit the crime was sufficient evidence for the trial court to accept his transcript of admission. Therefore, the trial court did not err by accepting Jeremy's admission to attempted larceny.

Jeremy was sentenced to a Level 3 disposition based on his adjudication for committing first-degree forcible sexual offense, a B1 felony. He had zero prior delinquency points, so a Level 3 disposition was only available if he was adjudicated delinquent based on a Class A through E felony offense. N.C.G.S. § 7B-2508(a), (f) (2019). Having affirmed the Court of Appeals holding vacating his adjudication for a Class B1 felony and adjudication for a Class E felony, and given our decision that the trial court did not err by accepting his admission for misdemeanor attempted larceny, we must also vacate his Level 3 disposition order.

Although we hold that the trial court did not err by accepting Jeremy's attempted-larceny admission, we cannot remand this matter to the trial court for a new disposition hearing because the trial court's jurisdiction terminated once Jeremy turned eighteen years old.[4] Generally, our juvenile courts have jurisdiction over juveniles that commit offenses before turning sixteen until jurisdiction is terminated by the court or the juvenile reaches the age of eighteen. N.C.G.S. § 7B-1601(b) (2019). Here, Jeremy turned eighteen on 3 December 2019 while this matter was pending before this Court. On that date, the trial court's jurisdiction to enter a disposition order for Jeremy's misdemeanor attempted larceny terminated.[5]

Conclusion

For the reasons stated above, we agree with the Court of Appeals that the juvenile's adjudications for first-degree forcible sexual offense and second-degree sexual exploitation of a minor and his Level 3 disposition must be vacated. We reverse the Court of Appeal's holding that

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4. While his appeal was pending before this Court, Jeremy turned eighteen years old and filed a motion to dismiss this appeal. We ultimately denied that motion and addressed the merits of this case because an adjudication for a B1 felony can be used as an aggravating factor in adult sentencing proceedings. N.C.G.S. § 15A-1340.16(d)(18a).

5. The dissent argues that there was sufficient evidence to support an adjudication for the lesser included offense of attempted first-degree forcible sexual offense and the matter should be remanded for entry of an amended adjudication order. We agree that there was sufficient evidence to support an adjudication for attempted first-degree forcible sexual offense, but when Jeremy turned eighteen the trial court's jurisdiction to enter an adjudication order also terminated. For these reasons, we decline to address the sufficiency of the State's evidence as to attempted first-degree forcible sexual offense.

there was insufficient evidence to support his attempted-larceny admission and hold that the trial court lacks jurisdiction to enter a new dispositional order as to that offense.

AFFIRMED IN PART; REVERSED IN PART.

Justice NEWBY concurring in part and dissenting in part.

I agree with the majority that the trial court appropriately accepted respondent's admission of attempted larceny. I also agree that the evidence was insufficient to support the adjudication of delinquency for second-degree sexual exploitation of a minor and for first-degree forcible sexual offense. But I dissent in part because the evidence was sufficient to support the lesser included offense of attempted first-degree forcible sexual offense, which is a Class B2 felony. *See* N.C.G.S. § 14-27.26 (2019); N.C.G.S. § 14-2.5 (2019). When the evidence does not support the offense adjudicated at the trial court, but does support a lesser included offense, remand for an adjudication on that lesser included offense is appropriate. N.C.G.S. § 15A-1447(c) (2019); *State v. Stokes*, 367 N.C. 474, 476–78, 756 S.E.2d 32, 34–35 (2014). This Court thus should remand for entry of an amended adjudication against respondent for attempted first-degree forcible sexual offense.

IN THE MATTER OF J.J.H., K.L.R., J.J.H., S.S.S., J.M.S.

No. 430A19

Filed 18 December 2020

1. Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings—support for legal conclusion—likelihood of future neglect

The trial court properly terminated a mother's rights in her five children on grounds of neglect where clear, cogent, and convincing evidence supported the court's findings of fact and where those findings supported its conclusion that a repetition of neglect was likely if the children were returned to the mother's care. Specifically, the mother failed to secure appropriate housing to accommodate the children's special needs, reacted inappropriately to stressful situations, downplayed her children's health and behavioral

problems (including her eldest son's inappropriate sexual behavior), missed several scheduled visits with the children, and was incapable of managing the children's complicated schedules and taking them to school or medical appointments.

2. Termination of Parental Rights—best interests of the child—multiple children—consideration of factors—for each child

The trial court did not abuse its discretion by determining that termination of a mother's parental rights was in the best interests of her five children, where the court made the required dispositional findings under N.C.G.S. § 7B-1110(a) with respect to each child and weighed the findings applicable to each child in making its best interests determinations. Further, the trial court's findings demonstrated that it considered the children's bonds with each other and with their mother and the fact that not all of the children had preadoptive placements.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 23 September 2019 by Judge William B. Davis in District Court, Guilford County. This matter was calendared for argument in the Supreme Court on 23 November 2020, but was determined on the records and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Mercedes O. Chut for petitioner-appellee Guilford County Department of Health and Human Services.

Battle, Winslow, Scott & Wiley, P.A., by M. Greg Crumpler, for appellee Guardian ad Litem.

Anné C. Wright for respondent-appellant mother.

ERVIN, Justice.

Respondent-mother Niesha W. appeals from the trial court's order terminating her parental rights in the minor children, J.J.H.,[1] K.L.R., J.J.H., S.S.S. (Stacy), and J.M.S. After careful consideration of

1. J.J.H., K.L.R., J.J.H., S.S.S., and J.M.S. will be referred to throughout the remainder of this opinion, respectively, as "James," "Kim," "Jake," "Stacy," and "Joshua," which are pseudonyms used to protect the identities of the juveniles and for ease of reading.

respondent-mother's challenges to the trial court's termination order[2] in light of the record and the applicable law, we conclude that the challenged termination order should be affirmed.

I. Factual Background

On 4 April 2016, Guilford County Department of Health and Human Services filed juvenile petitions alleging that James, Jake, and Stacy were neglected and dependent juveniles and that Kim and Joshua were neglected juveniles and obtained the entry of orders placing the children into the nonsecure custody of DHHS. In its petitions, DHHS alleged that the agency had an extensive child protective services history with the family, having received eleven reports relating to the family between 8 October 2011 and 4 February 2016, nine of which had been substantiated. The reports that DHHS had received described instances of inadequate supervision, including (1) an incident in which two-year-old Stacy had been taken to the hospital on two different occasions as the result of burns to her buttocks, hands, and arms; (2) an incident in which five-year-old Joshua had hit and kicked four teachers at his daycare facility, resulting in his suspension; (3) an incident in which the children were left in the care of their maternal grandmother, who suffered from seizures and called a social worker to report that respondent-mother made a practice of dropping the children off at her house without permission even though the maternal grandmother could not care for them; (4) an incident in which the children were found alone at the home, with respondent-mother having explained that she had directed five-year-old Joshua to watch over the other children in her absence; (5) incidents in which Joshua had drawn pictures at school depicting sexual acts and explaining the human anatomy to his classmates, described sexual abuse by his older cousin who served as the children's nighttime babysitter, and attempted to engage in sexually inappropriate conduct with his younger siblings; (6) the fact that, even though James suffered from a birth defect that caused a large mass to grow in his nose, respondent-mother had missed five different medical appointments relating to his treatment for that condition; (7) an incident in which the children had to be returned to school because respondent-mother was not at home when they got off the bus; and (8) an incident in which the utilities had been turned off in the home. Although DHHS had offered to provide

2. The trial court terminated the parental rights of the fathers of the children in the challenged termination order as well. However, given that none of the children's fathers have sought relief from the trial court's termination order before this Court, we will refrain from discussing the proceedings relating to any of the children's fathers in this opinion.

in-home services to the family as a result of these incidents, respondent-mother had been resistant to these offers and had only participated in the proffered services on a sporadic basis.

The juvenile petitions further alleged that DHHS had received yet another child protective services report on 28 March 2016 which described an incident of domestic violence that had occurred between respondent-mother and the father of James and Jake. According to respondent-mother, the father had assaulted her when he came to pick up Jake; however, the investigating officers saw no evidence that any such assault had occurred. The father, on the other hand, claimed that respondent-mother had attempted to run over him with her automobile while he was holding Jake. In the aftermath of this incident, respondent-mother had been arrested and charged with assault with a deadly weapon. In the course of the ensuing DHHS investigation, Joshua reported that he had witnessed physical altercations between respondent-mother and James' and Jake's father and that he had been aware of drug use and inappropriate sexual behavior in the family.

As a result of these allegations, DHHS held a team decision meeting on 4 April 2016, in which respondent-mother had participated. According to the allegations contained in the juvenile petitions, respondent-mother had become upset during the meeting, at which point she "stood up and violently jerked [James], who suffers from a brain tumor, seizures, and a facial tumor, from his caregiver." Upon being told by a social worker not to leave with James, respondent-mother pushed and struck the social worker while holding James, resulting in intervention by agency security personnel. Although respondent-mother left the building with James, she subsequently reentered the building, handed James to another person, and, in an aggressive and threatening manner, approached the social worker, who was located behind the reception desk, resulting in a situation in which the social worker had to use her feet to fend off respondent-mother's assault and as the result of which respondent-mother was charged with "Simple Assault and Battery/Affray." At the conclusion of the team meeting, DHHS decided to seek nonsecure custody of the children.

The juvenile petitions came on for an adjudication hearing on 29 September 2016 and a dispositional and permanency planning hearing on 13 October 2016. On 10 November 2016, Judge Lawrence McSwain entered an order finding the children to be neglected and dependent juveniles as alleged in the DHHS petitions. On 28 November 2016, Judge Randle Jones entered a disposition and permanency planning order finding that respondent mother had entered into a services agreement,

or case plan, with DHHS on 27 April 2016 that included components relating to "employment/income management," "housing/environmental/basic physical needs," "parenting skills," "mental health," "substance abuse," "family relationships/domestic violence[,]" and "visitation/child support/other[.]" In addition, Judge Jones found that respondent-mother had begun to comply with the provisions of her case plan and that she had attended weekly supervised visitation with the children since 2 September 2016. Judge Jones determined that it was in the children's best interests to remain in DHHS custody and ordered that they do so. In addition, Judge Jones established a permanent plan of reunification with a concurrent plan of adoption; allowed respondent-mother to have supervised visitation with the children for one hour per week, with DHHS having the authority to increase the frequency or duration of these supervised visits; and ordered respondent mother to comply with the provisions of her case plan and to submit to random drug tests.

After a permanency planning hearing that began on 9 November 2017, continued on 7 December 2017, and concluded on 1 February 2018, Judge Tonia Cutchin entered an order finding that respondent-mother's behavior had not changed even though she had complied with some aspects of her case plan and that the concerns that had brought the children into DHHS custody remained in existence. Judge Cutchin found that efforts to reunify the children with respondent-mother would not be successful, that it would not be possible to return the children to respondent-mother's care within the next six months, that it would be in the children's best interests that termination of their parents' parental rights be pursued, and that adoption would benefit the children. As a result, Judge Cutchin changed the permanent plan for the children to one of adoption with a secondary concurrent plan of reunification and ordered DHHS to pursue termination of parental rights.

On 16 August 2018, DHHS filed a petition seeking to have respondent-mother's parental rights in the children terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and willful failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home, N.C.G.S. § 7B-1111(a)(2). The DHHS termination petition was heard before the trial court on 10 and 11 June 2019 and 8 and 10 July 2019. On 23 September 2019, the trial court entered an order terminating respondent-mother's parental rights in the children. In its termination order, the trial court concluded that respondent-mother's parental rights were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) and that the termination of respondent-mother's parental rights would be in the children's

best interests. Respondent-mother noted an appeal to this Court from the trial court's termination order.

II. Substantive Legal Analysis

In seeking relief from the trial court's termination order before this Court, respondent-mother argues that the trial court erred by concluding that her parental rights were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and that the termination of her parental rights would be in the children's best interests. According to well-established North Carolina law, the termination of a parent's parental rights in a child involves the use of a two-step process that consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110; (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). The petitioner bears the burden at the adjudicatory stage of proving the existence of one or more of the grounds for termination set out in N.C.G.S. § 7B-1111(a) by "clear, cogent, and convincing evidence." N.C.G.S. § 7B-1109(e), (f) (2019). In the event that the trial court finds that the parent's parental rights are subject to termination pursuant N.C.G.S. § 7B-1111(a), it must proceed to the dispositional stage, at which it must "determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110(a) (2019).

A. Grounds for Termination

[1] As an initial matter, respondent-mother argues that the trial court erred by finding that her parental rights in the children were subject to termination. "We review a trial court's adjudication under N.C.G.S. § 7B-1109 'to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusion of law.' " *In re J.A.E.W.*, 375 N.C. 112, 116, 846 S.E.2d 268, 271 (2020) (quoting *In re Montgomery*, 311 N.C. at 111, 316 S.E.2d at 253). "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 B.O.A.*, 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019) (citing *In re Moore*, 306 N.C. 394, 403–04, 293 S.E.2d 127, 132 (1982)). "Unchallenged findings of fact made at the adjudicatory stage are binding on appeal." *In re Z.V.A.*, 373 N.C. 207, 211, 835 S.E.2d 425, 429 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)). "The issue of whether a trial court's findings of fact support its conclusions of law is reviewed de novo." *In re J.S.*, 374 N.C. 811, 814, 845 S.E.2d 66, 71 (2020).

According to N.C.G.S. § 7B-1111(a)(1), a trial court may terminate the parental rights of a parent if the trial court determines that

the parent has neglected the child. N.C.G.S. § 7B-1111(a)(1) (2019). A neglected juvenile is defined, in pertinent part, as one "whose parent . . . does not provide proper care, supervision, or discipline; . . . or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15).

> Generally, "[t]ermination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)). However, "if the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *Id.* at 843, 788 S.E.2d at 167. When determining whether future neglect is likely, "the trial court must consider all evidence of relevant circumstances or events which existed or occurred *either before or after* the prior adjudication of neglect." *In re Ballard*, 311 N.C. at 716, 319 S.E.2d at 232–33. "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*." *Id.* at 715, 319 S.E.2d at 232.

In re J.O.D., 374 N.C. 797, 801–02, 844 S.E.2d 570, 575 (2020).[3]

In the challenged termination order, the trial court found that the children had previously been adjudicated to be neglected juveniles on 29 September 2016. In addition, the trial court made extensive evidentiary findings that detailed the extent to which respondent-mother had made progress complying with the components of her case plan relating to "employment/income," "housing," "substance abuse," "parenting skills," "mental health," "family relationships/domestic violence," and "visitation/child support/other." After determining that respondent-mother had made progress toward complying with the relevant provisions of her case plan, the trial court found that:

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3. As we have noted in our recent opinion in *In re R.L.D.*, No. 122A20, slip op. at 5 & n.3 (N.C. Dec. 11, 2020), a showing of past neglect and a probability of future neglect is not necessary to support a determination that a parent's parental rights in a juvenile are subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) in light of the fact that such a determination is also permissible in the event that there is a showing of current neglect.

> On the whole, the evidence reports, observations, exhibits and testimony are that while [respondent-mother] has made substantial progress in activities on her case plan, and while she dearly loves her children, she lacks substantial capacity to meet the needs of the children, has inadequate plans for the future and has not demonstrated an ability to plan for obstacles.

As a result, the trial court concluded that respondent-mother's parental rights in the children were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) because:

> 29. Grounds have been proven to terminate the parental rights of [respondent-mother] . . . given that [she] . . . neglected the juveniles, the neglect continues to date, and there is a likelihood of the repetition of neglect if the juveniles were returned to [her], as follows:
>
> a. Past neglect of the juveniles was proven by clear cogent and convincing evidence at the [a]djudication in the juveniles' respective underlying cases.
>
> b. The current ongoing neglect by [respondent-mother] is evidenced by the fact that she has been resistant towards utilizing psychological services; she has refused to submit to random drug screens for long periods of time, which has impeded the monitoring of compliance; she has exhibited improper responses to stressful situations despite completion of anger management counseling; and has not proven the ability to care for herself and the children financially despite her employment. [She] has made substantial strides and efforts towards complying with her case plan and there is no doubt that she dearly loves the juveniles, and would like to be reunited with them. Her lack of substantial capacity for analysis and forecasting problems and problem-solving issues as they arise, and planning for future circumstances presents substantial obstacles to her ability to provide appropriate care to the juveniles, and makes the likelihood of repetition of neglect high. Given [her] limitation to do these things, the substantial struggles, obstacles

> and needs of the juveniles, limited housing and transportation capacity of [her], if the juveniles were to return to her care there is a substantial likelihood of repetition of neglect, and the juveniles would not receive appropriate levels of care and supervision.
>
> . . . .
>
> e. Given that many of the conditions which led to removal still exist, there is a likelihood of repetition of neglect by [respondent-mother] in that [she has] failed and continue[s] to fail to comply with the components of [her] respective case plan[ ] to address the conditions that led to the removal of [her] children.

Although respondent-mother concedes that the children had previously been found to be neglected juveniles, she argues that the trial court's ultimate findings that there was current ongoing neglect and a likelihood of repetition of neglect were not supported by the record evidence and the trial court's evidentiary findings, particularly given that, in her view, a number of the trial court's evidentiary and ultimate findings lacked sufficient record support.

1. Sufficiency of the Evidentiary Support for the Trial Court's Findings of Fact

a. Employment/Income

In its order, the trial court found that respondent-mother "ha[d] not proven the ability to care for herself and the children financially despite her employment." According to respondent-mother, the trial court erred by depicting her financial situation in this manner given its statement in Finding of Fact No. 18 that, "[a]t this time, [she] has sufficient income to provide for herself and the juveniles." We do not find respondent-mother's contention to this effect to be persuasive.

Finding of Fact No. 18 states that

> [o]n or about December 2017 and while working at Wendy's, [respondent-mother] completed a budget. The budget included rent of $495.00 per month, utilities, water, groceries, household supplies, gas, insurance, and her child support obligation of $126.00 per month. Her rent and other expenses have stayed the same. However, the budget did

> not list any medical expenses for herself or the juveniles, cost for clothing and shoes, or any potential child care/school cost, such as school supplies. At this time, [respondent-mother] has sufficient income to provide for herself and the juveniles. The budget presented appears to reflect an incomplete accounting of her own personal expenses for the month of December 2017, with no allowance for additional expenses that might be incurred if the juveniles came to reside with her. However, that budget reflects a monthly surplus of $471.80, an income in excess of her expenses that would potentially be applied to additional expenses if the juveniles were to come live with her, and her current employment provides an even greater income.

As we read the language of the relevant finding, the trial court found that respondent-mother's budgeting skills contained certain deficiencies and made reference to the potential expenses that might be associated with the larger residence that the trial court determined elsewhere in the termination order that respondent-mother would need. As a result, when taken in context, we are satisfied that the trial court's findings reflect, without directly stating, a nuanced determination that, while respondent-mother's financial situation had improved in light of her ability to obtain higher-paying employment and even though she appeared to have sufficient financial resources in light of current conditions, the trial court continued to harbor reservations about respondent-mother's ability to satisfy her own financial needs and those of all five children, particularly given that her budgeting skills appeared to be deficient, that a number of the children had special needs and that, as is discussed in more detail below, respondent-mother's current living quarters were inadequate to house the entire family safely. As a result, we are not persuaded that the trial court's determination that respondent-mother had "not proven the ability to care for herself and the children financially" should be disregarded in determining whether a repetition of neglect was likely to occur if the children were returned to respondent-mother's care.

b. Housing

Next, respondent-mother argues that the trial court's findings relating to the issue of housing do not support a conclusion that the children would probably experience a repetition of neglect given that she has maintained stable housing for almost two years and she has the financial capacity to pay for a larger home. According to Finding of Fact. No. 18, respondent-mother's

> home is fully furnished and has two bedrooms and one bathroom. Initially, [respondent-mother] reported the children would sleep in one bedroom that has two sets of twin bunk beds and a single twin bed . . . . She also indicated that she would place a partition between the juveniles to separate the boys and the girls. . . . [Respondent-mother] was made aware . . . that her current housing plan was not appropriate, in light of the sexualized behaviors of [Joshua], and that [Joshua] needed his own room. [Respondent-mother] revised her plan and stated that she would be willing to give up her room to allow [Joshua] to have his own room and she will sleep in the living room. Between that time and now, [respondent-mother] is taking steps to find more appropriate housing, but has been unable to find housing that is more appropriate for the juveniles, while also being affordable within her budget. . . . Given the variety of challenges that the various juveniles face, even a revised living plan within the current residence will not provide for sufficient space and opportunities for the juveniles in the home.

In addition, the trial court found that respondent-mother had taken steps to find more appropriate housing without actually locating a suitable residence that could be procured consistently with her existing budgetary constraints, noting that "subsidized housing programs would not approve her for a residence that would be scaled based on all the juveniles, unless or until they had a date as to when the juveniles will be living with her." In our view, since the trial court's evidentiary findings of fact clearly show that respondent-mother had not been able to identify, much less obtain, housing that would be adequate to safely accommodate both respondent-mother and the children as of the conclusion of the termination hearing despite the fact that she was on notice that her existing residence was deemed inadequate,[4] the challenged portion of the trial court's housing-related finding of fact has ample record support

4. Admittedly, respondent-mother faces a dilemma arising from the fact that she cannot obtain additional housing assistance until a date upon which the children will begin living with her has been established and that she cannot obtain adequate housing in the absence of this increased amount of public housing assistance. However, since respondent-mother has apparently not been able to even locate a residence that she could obtain in the event that additional housing assistance became available to her, we do not believe that the dilemma discussed in this footnote provides any basis for concluding that the relevant finding lacks sufficient record support.

despite the fact that she might have sufficient financial resources to rent an adequate residence upon locating one.

In seeking to persuade us to reach a contrary conclusion, respondent-mother argues, in reliance upon the decision of the Court of Appeals in *In re A.G.M.*, 241 N.C. App. 426, 773 S.E.2d 123 (2015), that the trial court had erred by considering the suitability of her current housing situation in determining whether there was a likelihood of a repetition of neglect given (1) the fact that there was no reason to believe that the children would be allowed to live with her or have overnight visitation at her current resident in the immediate future and (2) the fact that she would be eligible for housing assistance that would permit her to obtain a larger home in the event that the children were returned to her care and the fact that she had already been able to obtain increased income through her employment. We do not find this argument persuasive.

In *In re A.G.M.*, the Court of Appeals reversed the trial court's determination that the respondent's parental rights were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) on the grounds that the three-month period of time between the entry of the dispositional order in the underlying juvenile proceeding and the termination hearing was insufficient to permit the making of a reasonable determination that future neglect would be probable. *Id.* at 441, 773 S.E.2d at 134. In its opinion, the Court of Appeals added that:

> [w]hile we agree that [r]espondent's efficiency apartment at the time of the termination hearing would not be appropriate housing for the children if [r]espondent continued to share the apartment with a man, DSS has failed to demonstrate how [r]espondent's living conditions were inappropriate or harmful to the children while the children were living with their foster parents, without any contact with [r]espondent, and while [r]espondent was without any legitimate expectation that she would obtain overnight visitation rights, much less custody of the children, in the immediately foreseeable future.

Id. at 441–42, 773 S.E.2d at 134. Aside from the fact that the language upon which respondent-mother relies constitutes dicta and has "no effect as declaring the law," *State v. Scoggin*, 236 N.C. 1, 13, 72 S.E.2d 97, 105 (1952); *see, e.g.*, *In re T.R.P.*, 360 N.C. 588, 597, 636 S.E.2d 787, 794 (2006), there was no indication that the respondent in *A.G.M.*, unlike respondent-mother, had ever intended to bring the children to live with her in her existing residence. As a result, we conclude that respondent-mother's reliance upon *In re A.G.M.* is misplaced.

Finally, respondent-mother challenges the sufficiency of the record support for the trial court's housing-related findings concerning the dogs that are being kept at respondent-mother's residence. According to respondent-mother, the record does not support the trial court's findings that she owned "three" large dogs and that there were "several" 911 calls regarding the dogs. However, aside from the fact that certain reports that were admitted into evidence at the termination hearing make reference to the fact that three dogs were kept at respondent-mother's residence and that there had been multiple 911 calls concerning these animals, respondent-mother admitted at the termination hearing that she owned two dogs, one "little Jack Russell" and one "American Bully," and that law enforcement officers had been called to her home "more than one time" because the larger dog had broken loose from its chain and barked in an intimidating manner. In addition, a social work supervisor testified at the termination hearing that "two of the social workers who have been to the home have not even been able to get to the—the front door and had described the dog as being vicious." As a result, regardless of the number of intimidating dogs that actually occupied respondent-mother's home, the record clearly shows that there were safety-related concerns applicable to respondent-mother's residence given the apparently threatening nature of at least one of its canine residents. For that reason, we conclude that the trial court did not err by taking the concerns relating to respondent-mother's dogs into account in evaluating the likelihood that the children would be subject to a repetition of their earlier neglect in the event that they were returned to respondent-mother's home. As a result, for all of these reasons, we hold that the trial court did not err in considering respondent-mother's housing situation in determining whether it was probable that the children would be neglected if they were returned to respondent-mother's care.

c. Substance Abuse

The trial court found that respondent-mother had obtained a substance abuse assessment in May 2016 and had completed the recommended substance abuse treatment in September 2016, with that treatment having included both individual and group sessions. Since she completed treatment, respondent-mother had not tested positive for the presence of illegal drugs. Although the trial court found that respondent-mother had refused to participate in four drug screens between June and August 2017, it also found that respondent-mother's

> refusal to resume drug screens was not as a result of her resuming the use of illegal substances, but her frustration with [DHHS] and the [c]ourt. As a result, the [c]ourt d[id]

> not review them as a substantive violation of her case plan, in that they [were] not reflective of actual use of a controlled substance.

On the other hand, the trial court found that respondent-mother's refusal to participate in the drug screening process was "reflective of [her] incapability to respond effectively to frustration in difficult situation[s] and to persist in appropriate behavior, despite those frustrations." In addition, the trial court found that respondent-mother had complied with all requests that she submit to drug screens after October 2017, when DHHS representatives explained to her that her participation in the drug screening process had been required as part of her case plan and that DHHS was not trying to catch her using drugs.

As a result of the fact that respondent-mother has not challenged the sufficiency of the record support for the evidentiary findings that the trial court made with respect to these substance abuse-related issues, those findings are binding upon us for purposes of appellate review. *See In re Z.V.A.*, 373 N.C. at 211, 835 S.E.2d at 429. Respondent-mother does, however, argue that the trial court erred by relying on substance abuse-related concerns in determining whether there was a likelihood of future neglect given the absence of any record support for the statement in Finding of Fact No. 29 that respondent-mother "ha[d] refused to submit to random drug screens for a long period of time, which has impeded the monitoring of compliance." After carefully reviewing the record, we agree with respondent-mother that the record evidence and the trial court's evidentiary findings do not support a determination that she refused to participate in the drug screening process for a "long period of time" or show that her temporary refusal to participate in the drug screening process had "impeded the monitoring of compliance." In addition, we note that a social worker acknowledged in her testimony that respondent-mother's substance abuse did not continue to be an issue at the time of the termination hearing. As a result, we will disregard the challenged portion of the trial court's findings relating to the issue of substance abuse in determining whether a repetition of neglect was probable in the event that the children were returned to respondent-mother's care. *See In re J.M.*, 373 N.C. at 358, 838 S.E.2d at 177.

In addition, respondent-mother disputes the trial court's determination that her refusal to submit to drug screens was "reflective of [her] incapability to respond effectively to frustration in difficult situation[s] and to persist in appropriate behavior, despite those frustrations." According to respondent-mother, her compliance with the drug screening process after the purpose of that process had been explained to her

demonstrates that she has the ability to deal with frustrating situations. However, the record evidence and the trial court's unchallenged evidentiary findings indicate that respondent-mother believed that "she had done enough for the [DHHS] and she would only do a drug screen if the [j]udge told her to do so." In our view, the fact that respondent-mother subsequently complied with requests that she submit to drug screening does not negate the fact that she expressed frustrations about the drug screening process in June, July, and August 2017. For that reason, we hold that the trial court did not err to the extent that it included respondent-mother's reactions to requests that she participate in the drug screening process in determining whether a repetition of the neglect that the children had previously experienced was likely in the event they were returned to respondent-mother's care.

d. Parenting Skills

In addressing the extent of respondent-mother's parenting skills, the trial court found that respondent-mother had completed a parenting/psychological evaluation with Dr. Edward Morris on 1 September 2016 and that the recommendations that had been made as a result of that evaluation had been incorporated into her case plan. In addition, the trial court made findings of fact that reflected a number of Dr. Morris's opinions, including Dr. Morris's concern that, "[i]f the motivation or incentive isn't high enough to act in a certain way, she is not likely to give more than a cursory thought," a pattern which he found to be "potentially harmful and [which could] compromise the physical safety and emotional security of the children." In addition, the trial court pointed out Dr. Morris's statement that, on occasions when the children's medical, emotional, and educational needs were brought to respondent-mother's attention, she "either dismisses or minimizes them." Moreover, the trial court's findings reflect that respondent-mother struggles to manage her relationships with other people and note her tendency to deny or externalize problems, her poor judgment, her disregard for expectations, her resistance to changing her beliefs, and her lack of problem-solving skills. The trial court further found that respondent-mother had completed the Parenting Assessment Training Education program on 6 September 2016, that she had completed a second phase of the PATE program, and that she had "also completed the From Darkness to Light program to better understand [Joshua's] sexual acting out and to recognize its origins and safety concerns." As a result of the fact that respondent-mother has not challenged the extent to which these findings have sufficient evidentiary support, they are binding for purposes of appellate review, *see In re Z.V.A.*, 373 N.C. at 211, 835 S.E.2d at 429, and are entitled to be

considered in determining the risk that the children will be neglected in the future.

e. Mental Health

Although respondent-mother has not challenged the sufficiency of the record support for the evidentiary component of the trial court's mental health-related findings, she does argue that the record evidence and the trial court's evidentiary findings do not support the trial court's ultimate finding that her "resistan[ce] towards utilizing psychological services" tended to show the existence of a risk of future neglect. In its termination order, the trial court found that DHHS had referred respondent-mother for a mental health assessment on 31 May 2016, that respondent-mother had completed a Comprehensive Clinical Assessment on 9 June 2016, and that the assessment had resulted in recommendations that she participate in individual mental health therapy and substance abuse-related group therapy. Respondent-mother began individual therapy on 6 July 2016 and "complied with therapy until she was discharged in May 2017."

A social worker testified at the termination hearing that, even though respondent-mother's therapist had discharged her in 2017, the therapist "could not say that [respondent-mother] was actually done with the therapy or had like successfully completed it but that the mother stated on several occasions to the therapist that she had gotten all that she could out of therapy." Another social worker testified that, in spite of the fact that DHHS had attempted to discuss the importance of continued therapy with respondent-mother, "[respondent-mother] was not willing to be open to kind of discuss[ing] anything else with the therapist," that "the mother commented in the meeting [ ] that she didn't . . . need therapy anymore," and that respondent-mother "was just not open to receiving that at that time." The social worker supervisor testified that she brought up the topic of therapy with respondent-mother in a later meeting, at which point respondent-mother became "really upset" and "agitated" and "made the statement that unless the judge tells her to do it she does not care what DSS has to say."

According to a permanency planning order entered on 22 August 2018 that was admitted into evidence at the termination hearings, a therapist who worked with respondent-mother's eldest son had stated that "it [was] not in [Joshua's] best interest for [respondent-mother] to be included in his therapy sessions" given that Joshua feared respondent-mother and that respondent-mother "continued to minimize [his] need

for therapy." Similarly, in a permanency planning order entered on 31 May 2019 that was also admitted at the termination hearing, the trial court found that, "[d]espite having completed Level I therapy and parenting classes, the mother has continued to minimize the reasons that the juveniles came into custody and even made comments regarding the juvenile(s) needing physical discipline (including that [her eldest son] just needed a 'butt whooping')." As a result, in light of the trial court's evidentiary findings and the extensive record evidence concerning respondent-mother's attitude toward the therapy process, we hold that the trial court had ample justification for determining that respondent-mother "ha[d] been resistant" to utilizing therapy and mental health services, so that, in spite of her claim that she had done everything that she had been asked to do, there were legitimate grounds for questioning whether she had appropriately benefitted from the therapy that she had received.

f. Family Relationships/Domestic Violence

The trial court found in Finding of Fact No. 18 that, even though respondent-mother "[was] in compliance in that she has attended the required programs and met the goals, the [c]ourt [remains] concerned that her anger still remains an issue at times." In its evidentiary findings, the trial court determined that respondent-mother had completed anger management counseling in September 2016 and a domestic violence victim's program in January 2017; that there were no known reports that she had been a victim or the perpetrator of violence since that time; that her "outlook and response ha[d] improved substantially"; that "[s]he ha[d] demonstrated increased maturity over the length of [the] case and responded to interventions"; and that, even so, "as recently as May 2019, [respondent-mother] became argumentative when the Social Worker praised one of the juveniles . . . for completing chores[,] [because she] did not believe the [s]ocial [w]orker's report."

Once again, respondent-mother has not challenged the trial court's evidentiary findings relating to family relationships and domestic violence as lacking in sufficient evidentiary support. Respondent-mother does, however, argue that the trial court erred by determining that her "improper responses to stressful situations despite completion of anger management counseling" provided evidence that future neglect was probable. More specifically, respondent-mother contends that the trial court's continued concern with her inappropriate responses to stressful situations rested solely upon a May 2019 incident in which she "became argumentative" in interacting with the social worker.

Respondent-mother's argument with respect to this issue, when reduced to its essence, consists of an attempt to minimize the significance of this issue by asserting that her conduct during this incident was motivated by a concern for Joshua, directing our attention to her own testimony that Joshua had complained to her about the chores that he had been praised for completing, and asserting that her conduct on this occasion actually reflected an increased ability to empathize with her children. According to respondent-mother, this isolated incident does not reflect the existence of a risk of future neglect given the absence of any indication that it had an adverse impact upon the children.

Once again, we do not find respondent-mother's argument to be convincing. As we read the record, the trial court did not rely solely upon the May 2019 incident in determining that respondent-mother did not handle stressful incidents well, with this conclusion being evidenced by the fact that the trial court's reference to the event that had occurred "as recently as May 2019" tends to suggest that the incident in question was only one of a number of incidents that revealed the existence of the underlying problem. This interpretation of the trial court's findings is bolstered by the social worker's testimony that respondent-mother would become loud and argumentative, on occasion, and that she had difficulty processing stressful subjects. In addition, the social worker explained that respondent-mother was able to handle situations more effectively when everything was going to suit her, but that she raised her voice, argued, and would not believe the things that she was told on other occasions—a description of respondent-mother's conduct that is consistent with that reflected in other portions of the record. In light of the manner in which respondent-mother tended to react to apparently stressful situations, the trial court had ample justification for expressing concern about the May 2019 incident. Finally, as we have already noted, the trial court found in other parts of the termination order that respondent-mother's refusal to submit to requested drug screens in 2017 reflected an inability to react in an appropriate manner when frustrated. As a result, the trial court's evidentiary findings and the record evidence amply support the trial court's ultimate finding that respondent-mother continued to have difficulty controlling her anger, with this problem having an obvious bearing upon the probability that the children would be neglected in the future given the likelihood that respondent-mother would inevitably have to deal with difficult situations in the event that the children were returned to her care.

g. Visitation/Child Support/Other[5]

The trial court detailed respondent-mother's attendance at visitation with the children over the course of the proceedings and summarized her attendance as "good at times and not good at other times." According to the trial court, respondent-mother missed at least twenty-two of her scheduled visits with the children, a record that she attempted to explain in various ways, such as by stating that the visits had "slipped her mind" or that she had failed to confirm with DHHS in apt time. In addition, the trial court noted that, "on one occasion, when asked by the juveniles when they will come home, [respondent-mother] stated 'when they let you all,' " and found that respondent-mother's statement created "the concern that she values her and the juveniles' happiness in the present moment, but fails to recognize that in the long-term, she will need to provide them with appropriate care and discipline."

The trial court made additional findings relating to the visits that respondent-mother had with Joshua and the efforts that she made to understand his inappropriate sexual behavior. The trial court determined that, in addition to her completion of the From Darkness to Light program, respondent-mother had participated in therapeutic visits with Joshua from March to July 2017 and had "spoken with [Joshua] about his behaviors and has reviewed his behavior folder with him." On the other hand, the trial court found that respondent-mother "ha[d] a history of minimizing [Joshua's] inappropriate behavior, including statements like, '[h]e doesn't act that way around me' " and had "endorsed harsh physical punishments in response to [Joshua's] behavior, including, '[h]e just needs a butt whooping,' " while noting respondent-mother's testimony "that she no longer holds [the] position that physical punishment is appropriate" and stating that,

> due to her education throughout the process of this case, [respondent-mother] has learned additional tools for discipline, in that if the juveniles were to return home, she would tailor appropriate discipline to the specific needs of each juvenile, including using timeout, taking away toys, etc.[,] based on age and appropriate discipline for the juvenile involved.

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5. We will refrain from addressing the trial court's findings relating to the issue of child support given that respondent-mother has not challenged those findings as lacking in sufficient record support and given that the trial court does not appear to have relied upon them in making its determination concerning the likelihood of future neglect.

In challenging the lawfulness of the trial court's findings concerning the statements that she made about the manner in which the children should be disciplined, respondent-mother argues that these statements constitute "historic information," did not reflect the nature of her thinking as of the time of the termination hearing, and do not tend to suggest that future neglect of the children would be probable. However, given the content of the trial court's finding concerning the nature of respondent-mother's current position with respect to the manner in which the children should be disciplined, we hold that the trial court's findings, taken in their entirety, adequately account for the changes that have occurred in respondent-mother's views and are not, for that reason, erroneous.

In addition, respondent-mother argues that the trial court erred by finding that respondent-mother's testimony that she did not want to make the children sad by imposing discipline upon them during visits creates a concern that she fails to recognize the need to provide adequate care and discipline for the children and that she is unable to appropriately address situations in which she is required to resolve problems. The concerns that the trial court expressed about respondent-mother's willingness to address disciplinary and other difficult situations are consistent with statements made by Dr. Morris, who found in his parenting/psychological evaluation that respondent-mother "denies or externalizes the problems, minimizes their severity, or tries to maintain the fantasy at the expense of reality." For that reason, we have no difficulty in concluding that this aspect of respondent-mother's challenge to the trial court's findings lacks merit, particularly given that, while respondent-mother may have developed improved insight concerning the manner in which discipline should be imposed, the record reflects the existence of an ongoing concern about the extent to which respondent-mother recognizes when the imposition of discipline is appropriate and when it is not.

The trial court also expressed concern that respondent-mother would be unable to manage the children's "complicated schedules, including appointments for doctors, therapy, medication, school, occupational therapy, speech therapy, tutoring[,] and IEP meetings." After noting that respondent-mother had experienced ongoing transportation difficulties, the trial court expressed concern about "whether she will have the ability to transport the minor children to their medical and school appointments." In addition, the trial court noted that, even though respondent-mother had testified that she would rely upon the help of family and friends in order to manage the children's complex schedules, she had failed to identify these friends and family members

"so that an evaluation [could] be made as to the ability of these individuals to meet the needs of the children."

Respondent-mother challenges the validity of the trial court's findings concerning her transportation-related issues and her ability to ensure that the children attended their medical and school appointments on a number of grounds. First, respondent-mother argues that the trial court's finding that the children have appointments for occupational therapy lacks sufficient evidentiary support. As DHHS agrees, the record does not contain any evidence tending to show that any of the children have occupational therapy appointments. On the other hand, the trial court's error in this respect has very little bearing upon the proper resolution of this case given that the remainder of the challenged finding, which states that "[t]he juveniles . . . have complicated schedules, including appointments for doctors, therapy, medication, school, . . . speech therapy, tutoring[,] and IEP meetings," has ample evidentiary support in light of the fact that each of the children suffers from various educational, medical, and psychological problems that require significant medication and therapeutic assistance.

As the record reflects, respondent-mother's eldest son Joshua has been diagnosed with Attention Deficit Hyperactivity Disorder, Oppositional Defiant Disorder, Post-traumatic Stress Disorder, and behavioral problems; attends therapy twice a week; and takes five prescription medications. Among other things, Joshua has engaged in "property damage and acting out towards his siblings" and "a large amount of inappropriate sexualized behaviors" and "continues to steal, provoke[ ] fights with peers, break rules, talk[ ] to himself, [and] act[ ] out fighting with toys." After a psychological evaluation conducted in February of 2018, the examiner noted that Joshua had "disclosed a history of sexualized situations while living with his mother" and that his "inappropriate sexualized behaviors are reactive in nature to his past experiences." As a result, the psychologist recommended that Joshua "not be left alone unsupervised with children three or more years younger than him at any time," that "his access to the internet [should] be monitored closely in all settings," and that he should have his own bedroom.

Although the needs of the other children are less substantial than those of Joshua, each of them faces challenges of his or her own. Stacy has been diagnosed with Attention Deficit Hyperactivity Disorder and Adjustment Disorder with Disturbance of Conduct, attends therapy twice a week, and takes two prescription medications. Jake formerly attended weekly play therapy to address his behavioral problems, but those sessions were discontinued in 2018. As of the time of the termination

hearing, Jake was scheduled to begin monthly individual therapy. Kim receives speech therapy twice each week. James was born with a birth defect that created pressure within his nasal passage, causing the development of a mass in his nose that affected his brain, and experienced a brain tumor and seizures during his infancy. In spite of the fact that James received corrective surgery for his birth defect in 2016, he continues to suffer from medical issues, receives speech therapy twice a week, and displays behavioral issues including frequent temper tantrums. In light of the children's extensive needs and respondent-mother's failure to assure the trial court that she would have access to transportation in the future, respondent-mother's arguments that "the missed medical appointments [related to James's birth defect] that caused concern when the children were [placed into DHHS] custody . . . [are] no longer an issue[,]" and that, "[a]s to the other appointments, it is not as if each child has all those appointments[,]" do not strike us as persuasive.

Respondent-mother also argues that the trial court's findings expressing concern about her (1) "ability to ensure that the juveniles attend scheduled appointments despite her claims that she now has the ability to schedule and manage appointments with a calendar reminder system" and her (2) "ability to transport the minor children to their medical and school appointments" "[g]iven [her] significant issues with transportation," lack sufficient evidentiary support and do not tend to show a likelihood of future neglect. The trial court's findings relating to this issue focus upon a visit that respondent-mother missed with the children on 21 May 2019. According to the trial court, respondent-mother failed to call to confirm the visit, took vacation time to go to a different city to look for a new car, and missed the scheduled visit because it "slipped her mind[.]" In the trial court's view, the missed visit created a legitimate concern about respondent-mother's ability to schedule and manage the children's appointments.

At the termination hearing, respondent-mother testified that, if the children were returned to her care, she would keep up with their medications and medical and school appointments using a calendar that she would link to her phone so that she would be alerted to the needs of the children. However, upon being asked about why she could not get to her weekly supervised visits with the children, respondent-mother claimed that the underlying missed visit stemmed from a problem in making the required day-ahead confirmation call. Although a confirmation call was required prior to each visit, respondent-mother testified that she simply forgets to make it. Upon being asked if it had occurred to her to adopt the calendar and reminder-based system that she had described

in the testimony at the termination hearing, respondent-mother stated, even though she had reminders on her phone, "sometimes my phone—it just—it don't go off for the call thing." In our view, this evidence supports the trial court's expression of concern about respondent-mother's ability to schedule and manage the children's medical and school appointments, with the existence of such difficulties clearly tending to show that there is a risk that future neglect will occur if respondent-mother becomes responsible for the children's care.

After finding that respondent-mother had transportation-related difficulties and that these problems had impaired her ability to get to her scheduled visits with the children, the trial court noted that, "despite her transportation difficulties, [respondent-mother] has never missed a day of work or been late to work." In addition, a social worker testified that she expected that the children would see providers in the community in which respondent-mother lived, rather than in Greensboro, in the event that they were returned to respondent-mother's care and that public transportation would be available for respondent-mother's use. In light of the trial court's findings that she had never missed work and the social worker's testimony that the children would likely see local providers, respondent-mother argues that the trial court's expression of concern about the impact of her transportation-related difficulties on the children lacked sufficient record support and did not support a determination that the children were likely to be neglected in the future.

Aside from the fact that there was no guarantee that the children's appointments would be transferred to her local community or that public transportation would be adequate to serve respondent-mother's needs, the simple facts of the matter remain, as the trial court's evidentiary findings reflect, that respondent-mother had transportation difficulties, that the children had complicated schedules, and that respondent-mother had missed visiting with the children due to her own inattention. As a result, the trial court had legitimate grounds for being concerned about respondent-mother's ability to get the children to their numerous medical and school-related appointments even though the record contained evidence that would have supported a contrary inference, *see In re B.O.A.*, 372 N.C. at 379, 831 S.E.2d at 310 (stating that "[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"), and did not err by considering these difficulties in determining whether there was a probability that the children would be neglected if they were returned to respondent-mother's care.

Finally, the trial court found that respondent-mother worked from "7:00 p.m. to 7:00 a.m.[,]" that "her plan of care would include family and friends," and that "she has failed to provide sufficient information to [DHHS] or the [c]ourt so that an evaluation can be made as to the ability of these individuals to meet the needs of the children." Although we note that respondent-mother has not challenged the sufficiency of the record support for these findings, so that they are binding for purposes of appellate review, *In re Z.V.A.*, 373 N.C. at 211, 835 S.E.2d at 429, we note that many people with similar work schedules are able to provide more than adequate care for their children and do not believe that respondent-mother's work schedule, standing alone, has any bearing upon the extent to which the neglect that the children had previously experienced is likely to be repeated if they are returned to respondent-mother's care.

After reviewing the relevant portions of the record, we hold that the trial court's finding that "[respondent-mother] has made substantial progress in activities on her case plan" has ample record support. On the other hand, the same is true of the trial court's determination that, despite the commendable progress that respondent-mother had made in complying with the provisions of her case plan, "she lacks substantial capacity to meet the needs of the children, has inadequate plans for the future[,] and has not demonstrated an ability to plan for obstacles." Simply put, the record supports the trial court's determinations that respondent-mother has failed to acquire appropriate housing that is sufficient to safely accommodate the children's special needs and behavioral issues; that respondent-mother continues to react inappropriately in stressful situations; that respondent-mother has failed to consistently visit with the children as a result of her inability to remember to confirm visits and her transportation-related problems; that there were reasons for concern about respondent-mother's ability to manage the children's complex schedules and appointments; and that respondent-mother had not provided a sufficient plan of care for the children.

2. Likelihood of Repetition of Neglect

Secondly, we must determine whether the trial court's findings of fact support its conclusion that there is a likelihood that the neglect that the children had previously experienced would be repeated if they were returned to her care. *See In re J.O.D.*, 374 N.C. at 807, 844 S.E.2d at 578 (noting that a determination that there is a likelihood of repeated neglect is a conclusion of law, regardless of the manner in which it is labeled). According to respondent-mother, the trial court should have answered this question in the negative given that she had made

substantial progress in satisfying the requirements of her case plan and given that the nature and the extent in the changes that she had made by the time of the termination hearing provided no support for a determination that future neglect was probable. We disagree.

As this Court has previously noted, a parent's compliance with his or her case plan does not preclude a finding of neglect. *See In re D.W.P.*, 373 N.C. 327, 339–40, 838 S.E.2d 396, 406 (2020) (noting the respondent's progress in satisfying the requirements of her case plan while upholding the trial court's determination that there was a likelihood that the neglect would be repeated in the future because the respondent had failed "to recognize and break patterns of abuse that put her children at risk"). Although respondent-mother had substantially complied with most of the requirements of her case plan, many of the concerns that resulted in the children's placement in DHHS custody continue to exist.

As we have previously noted, the trial court's findings establish that respondent-mother's housing, while stable, could not safely accommodate the children given their special needs and behavioral issues, including Joshua's inappropriate sexual behavior; that respondent-mother had failed to locate appropriate housing despite the fact that DHHS had raised concerns about the adequacy of her current residence as early as February 2018; that respondent-mother continued to display inappropriate responses in stressful situations despite the fact that she had completed anger management classes; that respondent-mother had missed at least twenty-two scheduled visits with the children; that there were legitimate concerns about respondent-mother's ability to manage the children's complicated schedules and to get the children to their various medical and therapeutic appointments; and that respondent-mother did not have an adequate plan for dealing with her work-related commitments and transportation-related difficulties. As a result, after carefully reviewing the record, we have no difficulty in concluding that the trial court's findings provide more than ample support for a determination that the children would likely be neglected in the event that they were returned to respondent-mother's care. In fact, the making of a contrary determination would require us to conclude that, in spite of the fact that respondent-mother has a limited ability to deal with frustrating situations, faces financial and housing-related difficulties, has trouble keeping track of her obligations (such as the children's numerous appointments), and has limited access to transportation-related resources, respondent-mother will be able to provide minimally acceptable care for five children, one of whom has significant emotional problems and all of whom have special needs, by providing them with adequate housing; managing

their emotional, medical, and interpersonal difficulties; and getting them to their appointments without a repetition of the neglect which they had previously experienced. All in all, we conclude that the combination of respondent-mother's weaknesses coupled with the challenges created by the children's conditions provides compelling justification for a determination that a decision to return the children to respondent-mother's care would almost certainly end in future neglect and that respondent-mother had been provided more than sufficient time to overcome the obstacles that she faced in attempting to provide adequate care for the children. As a result, we hold that the trial court did not err by determining that a repetition of neglect is likely if the children are returned to respondent-mother's care and affirm the trial court's determination that respondent-mother's parental rights in the children were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1).

B. Dispositional Determination

[2] In addition, respondent-mother contends that the trial court erred by determining that it was in the children's best interests that her parental rights be terminated. At the dispositional stage of a termination of parental rights proceeding, the trial court is required to "determine whether terminating the parent's rights is in the juvenile's best interests" based upon a consideration of the following factors:

(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.G.S. § 7B-1110(a). We review the trial court's determination concerning whether the termination of a parent's parental rights in a child would be in that child's best interests for an abuse of discretion. *See In re Z.A.M.*, 374 N.C. 88, 99–100, 839 S.E.2d 792, 800 (2020). "Under this standard, we defer to the trial court's decision unless it is 'manifestly unsupported by reason or one so arbitrary that it could not have been

the result of a reasoned decision.' " *Id.* at 100, 839 S.E.2d at 800 (quoting *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998)).

In this case, the trial court made the dispositional findings required by N.C.G.S. § 7B-1110(a) by addressing the children's ages, the likelihood that each child would be adopted, and the quality of the relationship between the children and the proposed adoptive parents, to the extent that any such person or persons had been identified. With respect to the children who did not yet have prospective adoptive parents, the trial court made findings addressing the relationship between the children and their foster parents.[6] The trial court found that all of the children were bonded with their current placements and that each of them had adapted to their current placements well. After finding that each of the children had a bond with respondent-mother, the trial court further found that Joshua's relationship with respondent-mother was more reserved. Moreover, the trial court found that termination of parental rights would assist in the effectuation of the children's primary permanent plans of adoption by freeing them for the adoptive process. Finally, the trial court found that, while the children were bonded with one another, the extent to which the children would be able to retain their existing connection in the event that they were adopted was outside DHHS's control.

Although respondent-mother has not challenged the sufficiency of the evidentiary support for the trial court's dispositional findings, she does argue that "[t]he potential effect of having or not having any one or more of the siblings in the household is a relevant consideration and [that] the trial court erred in failing to address this." In essence, respondent-mother asserts that the best interests of each child hinges upon the best interests of the other children and contends that the trial court should have made findings concerning the manner in which the best interests of each child would be affected by a decision to terminate her parental rights in certain of the other children, but not all of them. We disagree.

At the dispositional stage of a termination of parental rights proceeding, the trial court must determine the best interests of each child based upon his or her individual circumstances. N.C.G.S. § 7B-1110(a); *see also In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 251 (stating that "the fundamental principle underlying North Carolina's approach

6. James, Kim, and Jake had been placed in pre-adoptive placements while Stacy and Joshua had not.

to controversies involving child . . . custody [is] that the best interest of the child is the polar star"). In view of the fact that the trial court made the required dispositional findings with respect to each child and weighed the findings applicable to each child in making its dispositional decision, we are unable to conclude that the trial court's findings are insufficient to support its dispositional decision.

In addition, respondent-mother argues that the termination of her parental rights was not in the best interests of the children given that each of them was bonded with her and each of the other children and that not all of the children were living in pre-adoptive placements. However, the trial court's findings demonstrate that it considered the children's bonds with each other and with respondent-mother and the fact that all of the children did not have pre-adoptive placements. Although each of the factors upon which respondent-mother's argument relies were appropriately considered in the trial court's dispositional analysis, none of them is entitled to dispositive effect. *See In re A.J.T.*, 374 N.C. 504, 512, 843 S.E.2d 192, 197 (2020) (stating that "[t]he absence of an adoptive placement for a juvenile at the time of the termination hearing is not a bar to terminating parental rights") (citing *In re A.R.A.*, 373 N.C. at 200, 835 S.E.2d at 424); *In re Z.A.M.*, 374 N.C. at 100, 839 S.E.2d at 800 (weighing the children's bonds along with the other "best interest" factors). After carefully reviewing the record, we are satisfied that the trial court's findings demonstrate that it conducted an appropriate and reasoned "best interests" analysis relating to each child. As a result, we hold that the trial court did not abuse its discretion by concluding that the termination of respondent-mother's parental rights would be in the children's best interests.

III. Conclusion

Thus, for the reasons set forth above, we hold that the trial court did not err by determining that respondent-mother's parental rights in the children were subject to termination on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) and that termination of respondent-mother's parental rights in the children would be in the children's best interests. As a result, the trial court's termination order is affirmed.

AFFIRMED.

Justice EARLS, dissenting.

The majority affirms the trial court's order terminating respondent-mother's parental rights in the minor children, agreeing with the trial court that "while [respondent-mother] made substantial progress in activities on her case plan, and while she dearly loves her children, she lacks substantial capacity to meet the needs of the children, had inadequate plans for the future and has not demonstrated an ability to plan for obstacles." While these children have not been in their mother's care for a long time, nevertheless I would hold that the trial court's findings ultimately do not provide clear, cogent, and convincing support for the trial court's conclusion that respondent-mother is unable to meet the needs of the children, has inadequate plans for the future, and has not demonstrated the ability to plan for obstacles. Further, I am concerned that in minimizing the importance of the substantial progress respondent-mother made on her case plan to the analysis of whether a ground existed to terminate parental rights, the majority devalues the efforts of parents across our State working to improve their parenting capacities and regain custody of their children by meeting the requirements imposed by local agencies.

The facts the majority cobbles together to support the trial court's order terminating respondent-mother's parental rights on the grounds of neglect are not overwhelming. Moreover, they illustrate the danger that this parent is losing her children primarily because of her poverty, despite the fact she is employed full-time. It is hard to imagine what she could possibly do differently at this time, before she has custody of her children or even a reasonable expectation that they will be returned to her custody imminently, to satisfy the requirements of a larger home and better transportation. Her ability to plan for obstacles is surely affected by her finances. Earning a low income while working in a full-time job is not itself evidence that there is a likelihood of future neglect.

Employment/Income

The trial court found that respondent-mother's budget reflected "a monthly surplus of $471.80, an income in excess of her expenses that would potentially be applied to additional expenses if the juveniles were to come live with her, and her current employment provides an even greater income." The trial court found the budget surplus could be applied to medical expenses and/or potential childcare and school costs that she would incur if the children were to live with her, and it further found that while "[h]er rent and other expenses have stayed the same[,]"

"her current employment provides an even greater income." Based on its evidentiary findings, the trial court found "[respondent-mother] has seen a substantial increase in her earning capacity[,]" and, "[a]t this time, [she] has sufficient income to provide for herself and the juveniles."

According to the majority, the fact that respondent-mother obtained steady employment that allowed her to earn sufficient financial resources to provide for her children is not enough to address the concerns regarding this aspect of her case plan because "the trial court found that respondent-mother's budgeting skills contained certain deficiencies." In the majority's view, respondent-mother's failure to account for her children's expenses in a budget that appears to have accurately accounted for her expenses at the time it was created in December 2017—more than a year after the children were taken out of her custody by DHHS—is sufficient evidence to support the conclusion that respondent-mother "ha[d] not proven the ability to care for herself and the children financially despite her employment." But in concluding that the trial court's findings "reflect, without directly stating, a nuanced determination that, while respondent-mother's financial situation had improved in light of her ability to obtain higher-paying employment and even though she appeared to have sufficient financial resources in light of current conditions, the trial court continued to harbor reservations about respondent-mother's ability to satisfy her own financial needs and those of all five children," the majority reads into the trial court order a factual finding that simply is not there. And by identifying the respondent-mother's "deficient" budgeting skills as evidence which supports the trial court's supposed factual finding, the majority places inordinate weight on an incident of unclear significance which bears extremely limited probative value. In contrast to the majority, I would disregard the challenged portion of finding of fact twenty-nine concerning respondent-mother's inability to provide for herself and the children financially. *See In re J.M.*, 373 N.C. 352, 358, 838 S.E.2d 173, 177 (2020).

Housing

The trial court found in finding of fact eighteen that respondent-mother "went to substantial effort to obtain independent housing" and "obtained her own housing in Thomasville, North Carolina." She notified DHHS when she obtained housing, provided DHHS a copy of her lease dated 12 September 2017, and DHHS had completed home visits. Her home was a two-bedroom house and was fully furnished. Respondent-mother initially planned for the children to sleep in one bedroom with two sets of twin bunk beds and single twin beds and a partition to separate

the boys and girls. However, she revised her plan to allow Joshua to have his own bedroom after DHHS informed her in February 2018 that the initial arrangement was inappropriate due to Joshua's sexualized behaviors. Nevertheless, the trial court found that "even a revised living plan within the current residence will not provide for sufficient space and opportunities for the juveniles" given "the variety of challenges that the various juveniles face," including attention deficit/hyperactivity disorder, oppositional defiant disorder, behavioral problems, and academic struggles. The trial court additionally found that respondent-mother was taking steps to find more appropriate housing but had yet to find suitable housing within her budget, noting that "subsidized housing programs would not approve her for a residence that would be scaled based on all the juveniles, unless or until they had a date as to when the juveniles will be living with her." Lastly, the trial court found that respondent-mother "has three large dogs at the home"; "911 logs contained several calls to the home in reference to the dogs"; and a social worker was unable to approach the porch during an unannounced home visit in June 2019 because "there was a very large dog barking viciously."

It is clear from testimony at the termination hearing that there were no concerns regarding the cleanliness or maintenance of respondent's home, and no concerns are reflected in the trial court's findings or in the record. The testimony was that DHHS's concerns related solely to the size of the home given the number of children, their challenges and needs, and the presence of the dogs. As the majority acknowledges, "respondent-mother faces a dilemma arising from the fact that she cannot obtain additional housing assistance until a date upon which the children will begin living with her has been established and that she cannot obtain adequate housing in the absence of this increased amount of public housing assistance." I disagree with the majority's conclusion that this "dilemma" is irrelevant in assessing the evidentiary record because respondent-mother "has apparently not been able to even locate a residence that she could obtain in the event that additional housing assistance became available to her." It appears that the sole barrier to obtaining suitable housing is respondent-mother's inability to access an expanded housing subsidy. Her maintenance and upkeep of her current apartment indicates that there is no cause to doubt that she will be able to provide a safe and appropriate home for the children if she obtained custody. There is no independent evidence in the record supporting the inference the majority draws that even if she obtained an expanded housing subsidy, she would be unable to obtain suitable housing. Thus, I would conclude that respondent-mother is correct that the evidence in

the record does not support the trial court's conclusion that her housing situation at the time of the termination hearing demonstrated a likelihood of repetition of neglect.[1]

Respondent-mother also challenges the findings related to the dogs. She contends the evidence does not support the findings that she owned "three large dogs" or that there were "several" 911 calls regarding the dogs. I agree there was not clear, cogent, and convincing evidence to support the challenged findings. While prior records in the case indicated respondent-mother owned three large dogs, a social worker testified at the termination hearing that she only saw two dogs during her unannounced home visit, and respondent-mother testified that she owned two dogs, a "little Jack Russell" and an "American Bully." Additionally, the evidence concerning 911 calls related to the dogs did not indicate the number of calls or the reasons for the calls; the testimony was simply that there were 911 calls regarding the dogs. Accordingly, I would disregard the challenged portions of the findings related to the dogs.

Substance Abuse

The majority concluded that "the trial court's evidentiary findings do not support a determination that she refused to participate in the drug screening process for a 'long period of time' or show that her temporary refusal to participate in the drug screening process had 'impeded the monitoring of compliance.' " Although I agree with the majority that "the fact that respondent-mother subsequently complied with requests that she submit to drug screening does not negate the fact that she expressed frustrations about the drug screening process in June, July, and August 2017," I would also recognize that the respondent-mother's eventual acknowledgment of the importance of the drug screening requirement and her subsequent compliance is the kind of "considerable change in conditions [that] had occurred by the time of the termination proceeding" which must be examined in reaching an ultimate conclusion as to whether a ground exists for terminating her parental rights. *In re Young*,

1. The majority argues that *In re A.G.M.* is inapposite because in the present case, there was evidence that respondent-mother "intended to bring the children to live with her in her existing residence." However, *In re A.G.M.* stands for the proposition that a parent's current lack of appropriate housing is not evidence of future neglect if the respondent-parent is willing and able to cure any deficiencies prior to having "any legitimate expectation that she would obtain . . . custody of the children." *In re A.G.M.*, 241 N.C. App. at 442, 773 S.E.2d at 134. In the present case, the mere fact that respondent-mother at one point contemplated that the children might live in her home does not negate the fact that if she were to gain custody of her children, she would be able to use her additional housing assistance to obtain more suitable housing.

346 N.C. 244, 250, 485 S.E.2d 612, 616 (1997). After accounting for these changes, I do not see how her brief period of missed drug screenings in 2017 supports terminating respondent's parental rights today.

Mental Health

Respondent-mother correctly contends that although there was evidence indicating she was resistant to therapy at times, there was also evidence that she sought additional services on her own when DHHS expressed concern that she was no longer engaging in therapy. A social worker testified that respondent-mother sought therapy in Davidson County, but that there was a waitlist for services. Despite some evidence of resistance, the trial court failed to issue any evidentiary findings to support its determination that ongoing neglect was evidenced by respondent-mother's resistance to psychological services. The evidentiary findings made by the trial court show respondent-mother engaged in recommended mental health services, as well as recommended substance abuse, parenting, domestic violence, and anger management courses. In contrast to the majority, I would disregard the portion of finding of fact twenty-nine regarding resistance to utilizing psychological services.

Visitation/Child Support/Other

The majority's analysis with regard to these aspects of respondent-mother's case plan fails to address the trial court's finding that respondent-mother "redirects [the children] as needed" during visits and does not adequately credit the clear finding that she "has learned additional tools for discipline, in that if the juveniles were to return home, she would tailor appropriate discipline to the specific needs of each juvenile." Given this finding, the trial court's other findings relating to respondent-mother's previous statements evincing a belief in inappropriate forms of discipline should be treated as past conditions that are no longer present and thus not relevant to the determination of whether she is likely to neglect the children in the future by inappropriately disciplining them. I agree with the majority that the lack of detail at this stage concerning how respondent-mother's work and family obligations could be met is an obstacle to reunification, but that obstacle, by itself, is too slim a reed upon which to base an ultimate finding of a likelihood of future neglect.

Conclusion

Respondent-mother argues the trial court erred by concluding there was a likelihood of repetition of neglect because she had made

substantial progress on her case plan and the changed conditions existing at the time of the termination hearing do not support the conclusion that there was a likelihood of repetition of neglect. She summarizes her case plan progress, including her gainful employment; stable housing; completion of programs to address substance abuse, parenting skills, domestic violence, and anger management and to understand Joshua's behavior issues; and general betterment of herself as compared to when the children were placed in DHHS custody.

It is true that case-plan compliance does not preclude a conclusion that a repetition of neglect is likely. *See In re D.W.P.*, 373 N.C. 327, 339–40, 838 S.E.2d 396, 406 (2020). It is also true that although respondent-mother substantially complied with the requirements of her case plan, some issues and concerns that brought the children into DHHS custody remained. However, the fact that there is evidence suggesting that there may be ongoing concerns regarding respondent-mother's circumstances is not equivalent to evidence that she is likely to neglect her children in the future, which must be judged against the enumerated standards for neglect defined by our Juvenile Code. N.C.G.S. § 7B-101(15). Further, while respondent-mother's substantial progress on her case plan does not preclude the court from finding that there is a likelihood of future neglect, evidence that she has made "progress on her case plan [ ] to become a better parent" does signify that she has taken steps "to reduce or remove the likelihood of future neglect." *In re C.N.*, 266 N.C. App. 463, 469, 831 S.E.2d 878, 883 (2019). As this Court has previously held, a trial court "may appropriately conclude that [a] child is neglected" only when "a parent has failed or is unable to adequately provide for his [or her] child's physical and economic needs, . . . and it appears that the parent will not or is not able to correct those inadequate conditions within a reasonable time." *In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252. In the present case, while there is evidence to support a conclusion that there are conditions in respondent-mother's life that might make it difficult for her to attend to her children's needs, there is not clear, cogent, and convincing evidence that these conditions make it *likely* that she will provide *inadequate* care.

With regards to at least some of the relevant conditions, such as her present lack of suitable housing or her ability to provide financially for her children, the evidence indicates that she will be able to correct those inadequate conditions within a reasonable time. Although there may be a possibility that respondent-mother will face difficulties in adequately caring for her children, a mere possibility of future neglect is an

insufficient basis upon which to permanently sever the parent-child bond. *Cf. In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693, 698 (2019) (when making "predictive" judgments about the future, "the trial court must assess whether there is a *substantial risk* of future . . . neglect of a child") (emphasis added); *In re F.S.*, 268 N.C. App. 34, 43, 835 S.E.2d 465, 471 (2019) ("[T]he trial court must assess and find the probability that there is substantial risk of future neglect."). In the present case, the evidence simply does not support the conclusion that respondent-mother is likely to neglect her children in the future, nor does it support the conclusion the dissent reaches that "a decision to return the children to her care would almost certainly be doomed to failure." Accordingly, I dissent from the majority's decision to affirm trial court's adjudication of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) as grounds to terminate respondent-mother's parental rights, and I would not reach the question of whether termination was in the best interests of the children.

IN THE MATTER OF K.M.W. AND K.L.W.

No. 356A19

Filed 18 December 2020

Termination of Parental Rights—parental right to counsel—withdrawal of counsel—pro se representation—inquiry by trial court

The trial court erred by allowing a mother's retained counsel to withdraw from representation in a termination of parental rights case without first conducting an inquiry into the circumstances surrounding counsel's motion to withdraw—for example, whether the mother had been served the withdrawal motion, whether counsel had informed the mother of his intent to withdraw, why the mother had asked him to withdraw, and whether the mother understood the implications of counsel withdrawing. The trial court then further erred by allowing the mother to represent herself at the termination hearing without first conducting an adequate inquiry into whether she knowingly and voluntarily wished to appear pro se.

Justice MORGAN dissenting.

Justice NEWBY joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 27 June 2019 by Judge Elizabeth Heath in District Court, Lenoir County. Heard in the Supreme Court on 12 October 2020.

Robert Griffin for petitioner-appellee Lenoir County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Annick Lenoir-Peek, Deputy Parent Defender, for respondent-appellant mother.

ERVIN, Justice.

Respondent-mother Holly W. appeals from orders terminating her parental rights in her children K.M.W. and K.L.W.[1] After careful consideration of the arguments advanced in respondent-mother's brief in light of the record and the applicable law, we hold that the challenged termination orders should be reversed and that this case should be remanded to the District Court, Lenoir County, for further proceedings not inconsistent with this opinion, including a new termination hearing.

Khloe was born on 22 November 2012, while Kylee was born on 25 March 2008. The Duplin County Department of Social Services became involved with respondent-mother and the father[2] on 9 July 2015 after receiving a report alleging that respondent-mother—who, at the time, had custody of the children—had engaged in an incident involving domestic violence with her boyfriend in the presence of the children and had been administering medicine to the children in order to get them to sleep. An investigation into this report revealed that domestic violence had occurred, that respondent-mother had been consuming marijuana, and that respondent-mother lacked stable housing.

Following the making of this report, the children were voluntarily placed with their paternal grandparents. On 22 July 2015, respondent-mother broke down an interior door in the paternal grandparents' home,

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1. K.M.W. and K.L.W. will be referred to throughout the remainder of this opinion as, respectively, "Khloe" and "Kylee," which are pseudonyms used to protect the identity of the juveniles and for ease of reading.

2. In view of the fact that the father is not a party to the proceedings before this Court on appeal, we will refrain from discussing information particular to him throughout the remainder of this opinion.

at which point the children were placed with their father and his girlfriend by the consent of all parties.

On 4 April 2016, DSS filed a petition alleging that the children were neglected juveniles. On 29 July 2016, Judge Sarah C. Seaton entered an order finding that the children were neglected juveniles. After this case was transferred from Duplin County to Lenoir County by consent of the parties following respondent-mother's move from Swansboro to Kinston, the trial court entered a dispositional order on 20 October 2015 placing the children in the joint custody of their parents, with the father being awarded primary physical custody and with respondent-mother having been awarded two hours of visitation each week, and requiring respondent-mother to take a number of steps in order to alleviate the conditions that had led to the finding that the children were neglected juveniles, including, but not limited to, obtaining a mental health assessment and complying with any resulting recommendations, obtaining a substance abuse assessment and complying with any resulting recommendations, participating in parental responsibility classes and demonstrating the ability to use the skills that she had learned, obtaining and maintaining stable housing and employment, participating in Family Drug Treatment Court, participating in an anger management course or counseling, and attending victim empowerment education.

A review hearing was held on 6 December 2016 at which the trial court instructed respondent-mother to refrain from making unannounced visits to the father's home. At a review hearing held on 24 January 2017, the trial court learned that respondent-mother had made unannounced appearances at the father's home on two occasions for the purpose of seeing the children. As a result, the trial court entered an order granting custody of the children to the father; allowing respondent-mother to have unsupervised visitation with the children every other weekend and every Wednesday evening; ordering respondent-mother to abide by many of the same corrective conditions that she had previously been ordered to comply with and the additional condition that respondent-mother refrain from having men in her home when the children were present; and removing this case from the active review docket, subject to the understanding that the court remained available to hear any matter that any party might elect to raise in the future.

After the entry of the 24 January 2017 order, DSS learned that, despite the trial court's prior order, respondent-mother had had a male friend in her home while the children were present and that respondent-mother's male friend had allegedly sexually abused Khloe while in respondent-mother's home. After refusing to participate in a Safety Assessment,

respondent-mother violated a Safety Assessment that had been entered into by the father by allowing Khloe to speak on the phone with the alleged perpetrator. Following this conversation, Khloe recanted her accusation of sexual abuse against respondent-mother's male friend and subsequently told respondent-mother that the father had touched her "pee-pee."

A second petition alleging that the children were neglected juveniles was filed by the Lenoir County Department of Social Services on 17 May 2017, with James Perry having been appointed to represent respondent-mother in this matter. On 16 November 2017, the trial court entered an order finding that Khloe and Kylee were neglected juveniles and putting the children in DSS custody; approving the placement of the children with their maternal grandparents; terminating respondent-mother's visitation with the children until the children and respondent-mother had begun therapy; and ordering respondent-mother to obtain a mental health assessment and comply with any resulting recommendations, obtain a substance abuse assessment and comply with any resulting recommendations, attend and participate in parenting responsibility classes and demonstrate the ability to use the skills that she had learned in those classes, obtain and maintain stable housing and employment, submit to random drug testing, attend and participate in a victim empowerment class or address such issues in counseling, and refrain from having any contact with her male friend.

After a review hearing was held on 14 November 2017, the trial court entered an order on 30 January 2018 relieving DSS from any obligation to attempt to reunify respondent-mother with the children and refusing to allow respondent-mother to visit the children in the absence of a recommendation that such visitation be authorized by the children's therapist. After a permanency planning hearing held on 12 December 2017, the trial court entered an order eliminating reunification with the parents from the children's permanent plan and changing the children's permanent plan to a primary plan of guardianship and a secondary plan of custody with a relative or other suitable person. In addition, the trial court noted that the children's therapist's was recommending that respondent-mother have no contact with the children, ordered that respondent-mother not be allowed to visit with the children until such contact was recommended by the children's therapist and approved by the trial court, and authorized respondent-mother to contact the therapist in order to provide the therapist with respondent-mother's perspective.

After a permanency planning review hearing held on 15 May 2018, the trial court entered an order on 8 June 2018 in which it reiterated that the current permanent plan for the children remained a primary plan of guardianship and a secondary plan of custody with a relative or other suitable person. In addition, the trial court noted that the children's therapist continued to recommend that respondent-mother have no contact with the children, pointed out that the therapist's recommendation was bolstered by respondent-mother's failure to comply with prior orders of the court, and reiterated that respondent-mother might be able to visit with the children in the future in the event that such visits were recommended by the children's therapist and approved by the trial court. Perhaps most importantly, the trial court acknowledged that the maternal grandparents were no longer interested in serving as a long-term placement for the children and pointed out that DSS had identified respondent-mother's cousins by marriage as a prospective placement for the children.

On 30 August 2018, the trial court entered a permanency planning order in which it authorized the placement of the children with respondent-mother's cousins by marriage, changed the permanent plan for the children to a primary plan of adoption and a secondary plan of guardianship, and ordered DSS to file a petition seeking to have the parents' parental rights in the children terminated. After a permanency planning hearing held on 20 November 2018, the trial court entered an order on 2 January 2019 in which it observed, among other things that, while respondent-mother had recently begun to comply with her case plan, she "ha[d] not adequately addressed issues of domestic violence, housing stability, unemployment, substance abuse, and mental health concerns in the years that she has been involved with [DSS.]" As a result of the fact that the trial court had scheduled another permanency planning review hearing for 16 April 2019, counsel for DSS served a copy of the 2 January 2019 order upon Mr. Perry on 7 January 2019.

On 21 December 2018, DSS filed petitions seeking to have both parents' parental rights in Khloe and Kylee terminated on the basis of neglect, N.C.G.S. § 7B-1111(a)(1) (2019), and willful failure to make reasonable progress toward correcting the conditions that had led to the children's removal from the family home, N.C.G.S. § 7B-1111(a)(2). On 3 January 2019, Mr. Perry filed a motion seeking leave to withdraw as respondent-mother's counsel in light of her decision to retain privately-employed counsel using funds derived from a back payment that she had received in connection with a recent SSI award.

At a hearing held on 8 January 2019, respondent-mother confirmed in the presence of the trial court that she wished to retain privately-employed counsel and to waive her right to the assistance of court-appointed counsel. In the course of this hearing, Mr. Perry indicated that his motion was specific to the termination of parental rights case and that he intended to "stay in the other one until its completed."[3] At the conclusion of the hearing, respondent-mother signed a waiver of counsel form indicating that she "[did] not want a court-appointed lawyer" and "[would] hire [her] own lawyer at [her] own cost."

After the trial court entered an order on 9 January 2019 allowing Mr. Perry's withdrawal motion, respondent-mother retained Roy Dawson to represent her in the termination of parental rights proceeding. On 13 February 2019, Mr. Dawson filed verified answers on respondent-mother's behalf in which she denied the material allegations of the termination petitions and requested that those be denied.

On 25 March 2019, respondent-mother made an unannounced visit to the residence of her cousins by marriage for the purpose of requesting to be allowed to see the children and to deliver certain gifts to them. As a result of this violation of prior court orders, the guardian *ad litem* filed a motion on 8 April 2019 requesting that an order be entered requiring respondent-mother to show cause why she should not be held in contempt.

A permanency planning review hearing was held on 16 April 2019, at which Mr. Perry appeared while respondent-mother did not. The trial court noted in a subsequent order that respondent-mother had been notified of the 16 April 2019 hearing both in writing and during the 20 November 2018 hearing. In light of the fact that respondent-mother had not been in contact with Mr. Perry since 20 November 2018, the trial court concluded that Mr. Perry should be relieved of his appointment as respondent-mother's counsel in the underlying neglect proceeding. On the same date, the trial court entered an order requiring respondent-mother to appear on 30 April 2019 and show cause why she should not be held in contempt.

On 30 April 2019, the trial court held a hearing for the purpose of addressing the show cause motion. In light of her belief that the show cause hearing involved a criminal, rather than a civil, proceeding, respondent-mother initially appeared in criminal district court. After

3. The "other case" to which Mr. Perry made reference was the underlying neglect proceeding.

Mr. Perry located respondent-mother and brought her to the correct courtroom and after he explained "what was going on and what her options were," respondent-mother left the courtroom. At Mr. Perry's request, the trial court continued the show cause hearing until 14 May 2019 so that respondent-mother could discuss her situation with Mr. Dawson. Later that day, however, Mr. Dawson filed motions seeking leave to withdraw as respondent-mother's counsel in the termination proceedings. Although the withdrawal motions were served upon counsel for DSS, they do not appear to have been served upon respondent-mother.

On 14 May 2019, the issues arising from Mr. Dawson's withdrawal motion and the show cause motion came on for hearing before the trial court in respondent-mother's absence. At the hearing, Mr. Dawson informed the trial court that he had been "requested to withdraw by [respondent-mother]" and that, while he "ha[d] attempted to secure [respondent-mother's] presence in court today for this," he had "been unable to do so." As a result, Mr. Dawson asked that he be allowed to withdraw from his representation of respondent-mother in the termination of parental rights proceedings, a request that the trial court granted without further inquiry. In addition, after finding respondent-mother in contempt, the trial court continued the disposition of that matter until 11 June 2019. Mr. Dawson served the trial court's order allowing his withdrawal motion upon respondent-mother on 15 May 2019.

A notice that a termination of parental rights hearing had been set for 9:00 a.m. on 11 June 2019, which noted that respondent-mother's attorney had been discharged, was served on respondent-mother by first-class mail on 21 May 2019. At the time that the termination petitions were called for hearing at 9:24 a.m. on 11 June 2019, respondent-mother was not present. In response to the trial court's inquiry concerning whether DSS had been able to determine whether respondent-mother lived at the address to which the notice of hearing had been sent, counsel for DSS responded that "[w]e don't have any new information about that," that "[t]hat [address] was where [Mr.] Dawson said that [respondent-mother] lived," and that the address in question was "the address that we've been using for processing."

At 9:40 a.m., after a social worker had begun testifying, respondent-mother entered the courtroom. The trial court did not, however, make any inquiry of respondent-mother concerning whether she was represented by counsel, whether she wished to have counsel appointed, or whether she wished to represent herself. After respondent-mother objected to certain testimony given by the social worker on the grounds that the testimony in question was untrue, the trial court overruled

respondent-mother's objection. Once the direct examination of the social worker had been completed, the trial court allowed respondent-mother to cross-examine the social worker. Subsequently, the trial court allowed respondent-mother to testify on her own behalf and to make a closing argument concerning the issue of whether grounds existed to support the termination of her parental rights in the children.

After announcing its decision that grounds for terminating respondent-mother's parental rights in the children existed, the trial court proceeded to the dispositional phase of the proceeding and informed respondent-mother that she would be able to present dispositional evidence if she wished to do so. Almost immediately after the beginning of the dispositional hearing, respondent-mother left the courtroom "without any conversation with the [trial court] about what her position [was], or where she[ ] [was] going, or whether she intend[ed] to come back." Approximately fifteen minutes later, once the presentation of dispositional evidence had concluded, respondent-mother re-entered the courtroom and apologized to the trial court for her departure, stating that "I know it was disrespectful, but this is just a lot—a lot for any parent, I hope, that loves their kids to try and take in at once because I love my kids and it's just hard to hear all this.." At the conclusion of the dispositional proceeding, the trial court announced that respondent-mother's parental rights in the children would be terminated and that no punishment would be imposed upon respondent-mother in the contempt proceeding.

On 27 June 2019, the trial court entered an order determining that respondent-mother's parental rights in the children were subject to termination on the basis of both of the grounds for termination alleged in the termination petition, that the termination of respondent mother's parental rights would be in the children's best interests, and that respondent-mother's parental rights in the children had been terminated. On 27 June 2019, the trial court entered an order providing that no punishment be imposed upon respondent-mother for her contemptuous conduct. Respondent-mother noted an appeal to this Court from the trial court's termination orders.

In seeking relief from the trial court's termination orders before this Court, respondent-mother argues that the trial court had erred by allowing her retained counsel to withdraw without proper notice and by allowing her to proceed *pro se* at the termination hearing without making proper inquiry into the issue of whether she wished to be represented by counsel. In respondent-mother's view, "[t]he record in this case does not show that [she] received any notice from [Mr. Dawson]

that counsel would seek to withdraw from her representation" in light of the fact that "[n]o certificates of service, subpoenas, or copies of correspondence confirm that [respondent-mother] was notified of the motion prior to the hearing," citing *In re M.G.*, 239 N.C. App. 77, 83, 767 S.E.2d 436, 441 (2015) (concluding that the respondent's right to counsel had been violated in a situation in which the respondent had no prior notice of her attorney's intent to withdraw and had not been present at the termination hearing), with Mr. Dawson's representations to the trial court that he had attempted to secure respondent-mother's presence "not [being] evidence," citing *In re D.L.*, 166 N.C. App. 574, 582, 603 S.E.2d 376, 382 (2004) (noting that "[s]tatements by an attorney are not considered evidence"). In addition, respondent-mother asserts that she had not been given notice "that either appointed or retained counsel sought to withdraw" in either "hearing where counsel was relieved," citing *In re D.E.G.*, 228 N.C. App. 381, 383–87 & n.3, 747 S.E.2d 280, 282–85 & n.3 (2013) (concluding that the respondent's right to counsel had been violated given the absence of any indication that the respondent had prior knowledge that his or her attorney intended to move to withdraw, that the respondent had not been present for the termination hearing, that the respondent had only been released from prison four days earlier, and that the respondent's counsel, rather than appearing in person, had counsel for DSS relay to the trial court that he had not heard from his client and wished to withdraw). As a result, respondent-mother contends that "[i]t was error for the trial court to relieve both attorneys."

In addition, respondent-mother asserts that the trial court failed to make proper inquiry concerning whether respondent-mother wished to waive counsel entirely. Respondent-mother asserts that, when accepting her waiver of court-appointed counsel, "the [trial court] did not indicate that this would preclude her from obtaining appointed counsel later if she still qualified," that "no one understood the waiver to mean that [respondent-mother] would at any point wish to proceed *pro se*," and that, "when she signed the waiver [form], everyone understood that it was with the intention of hiring counsel, not proceeding *pro se*." According to respondent-mother, "[t]here was never an inquiry of any kind" concerning whether respondent-mother was " 'act[ing] with full awareness of [her] rights and of the consequences of the waiver,' " quoting North Carolina Office of Indigent Defense Services Rule 1.6 (2015), with respondent-mother never having been "informed by the trial court that she had the right to receive appointed counsel even after her retained counsel withdrew."

Respondent-mother also argues that "the trial court [never] inquire[d] whether [Mr. Dawson's withdrawal] was related to a difference of opinion or due to fees owed, what 'attempts' were made to notify [respondent-mother] of the hearing, and whether [Mr. Dawson] explained to [respondent-mother] that she had the right to re-apply for court appointed counsel." In respondent-mother's view, "the trial court could not have interpreted [her] waiver as a waiver of her right to counsel," citing *In re S.L.L.*, 167 N.C. App. 362, 365 605 S.E.2d 498, 500 (2004) (concluding that "the trial court erred by equating respondent's request for new counsel with a waiver of court-appointed counsel, and requiring respondent to proceed to trial *pro se*"). After noting that N.C.G.S. § 7B-1101.1(a) provides that "[t]he court may reconsider a parent's eligibility and desire for appointed counsel at any stage of the proceeding," respondent-mother contends that the trial court "should have stopped the proceedings" when respondent-mother appeared at the termination hearing in order "to inquire whether [she] had counsel or wished to proceed *pro se*."

As a result of the fact that she did not have counsel during the termination hearing, respondent-mother claims that she was unable to adequately defend herself at the termination hearing. After pointing out that "[l]awyers know the legal standard and what evidence is necessary to present to a court to defeat termination grounds," respondent-mother asserts that she "had no realistic chance of defeating a termination hearing without demonstrating," using adequate documentation, "that she was compliant with the court's orders and had remedied the reason the girls came into care" and that, in order to make such a showing, "[s]he would have needed to be familiar with our rules of evidence and the burdens of proof," citing N.C.G.S. § 7B-1109(f). As an example, respondent-mother argues that, in spite of the fact that "she testified that she was still engaged in her mental health services, the trial court asked for documentation" which respondent-mother failed to provide, a deficiency that resulted in the trial court's finding that, "[b]ased on the years of noncompliance by [respondent-mother] with court orders for reunification, the court cannot find that she has addressed domestic violence, mental health, and substance abuse concerns without any third-party verification or documentation, which [respondent-mother] did not offer."

In urging us to uphold the trial court's termination orders, DSS argues that, "[u]ntil she walked in while the hearing on termination of parental rights was in progress on 11 June 2019," respondent-mother "had not been in the courtroom during a time that her case was being heard since 8 January 2019, a period in excess of five months." In view of the fact that

respondent-mother had absented herself from the courtroom for such a lengthy period of time, DSS contends that "there was no opportunity to advise [respondent-mother] about this because she would not come to court in a timely fashion" and argues that, had respondent-mother "shown up at 9:00 [a.m.] as directed, the court could have inquired about an attorney at the pre-trial hearing." According to DSS, "[e]ven [respondent-mother] does not argue that the [trial court] should have stopped the testimony while the hearing was underway to inquire whether or not she wished to have counsel re-appointed," with such a step being "the only way to make this happen." In DSS's view, "[t]o adopt [respondent-mother's] position . . . would be to endorse the proposition that a parent can disregard notices, deadlines, and rules of court by walking into a [termination] hearing which is underway and expect that she can bring the proceeding to a halt in the middle of testimony."

In addition, DSS points out that Mr. Dawson had informed the trial court that he had unsuccessfully "attempted to secure [respondent-mother's] presence in court" for his withdrawal motion and that the trial court had found that adequate notice of the making of that motion had been given to the parties. According to DSS, the reported decisions involving the right to counsel in termination of parental rights cases all "involve[ ] situations where the parent failed to appear for the [termination] hearing and the parent's attorney moved to withdraw without notice to the parent of their intention to withdraw." In this case, however, both of respondent-mother's attorneys sought leave to withdraw "well in advance of the [termination] hearing specifically at the request of [respondent-mother]." For that reason, DSS asserts that "[f]undamental fairness did not require the [trial court] to inquire whether [respondent-mother] had been notified of the specific date of hearing her attorney's motion to withdraw when the motion was being made at her request," citing *In re M.G.*, 239 N.C. App. at 83, 767 S.E.2d at 441; *In re D.E.G.*, 228 N.C. App. at 381, 747 S.E.2d at 280; *In re T.E.G.*, 2018 WL 4201263, at *7 (N.C. Ct. App. 2018) (unpublished); and *In re A.D.S.*, 2019 WL 1283851, at *12–13 (N.C. Ct. App. 2019) (unpublished).

Finally, DSS contends that Mr. Dawson's statements to the trial court that he had attempted to get respondent-mother to come to court for his withdrawal motion hearing are "his own" statements rather than a summary of statements describing information in the possession of others. DSS argues that, in view of the fact that attorneys are "officer[s] of the court," "[t]here is no requirement that he or she be sworn before offering information about the client's absence from court."

The guardian *ad litem* argues that, "[a]fter she chose to retain counsel, [respondent-mother] did not qualify for appointed counsel as she was not indigent" due to her SSI disability back payment in the amount of $7,440," so that "the trial court had no duty to inquire as to her representing herself *pro se* or appoint counsel for her in the [termination] proceeding," citing N.C.G.S. § 7B-1101.1(a1) for the proposition that an inquiry into a parent's indigence is only necessary when "[a] parent qualifying for appointed counsel" requests to proceed without the assistance of counsel. "Alternatively," according to the guardian *ad litem*, "if [respondent-mother] did have [a] right to counsel after her retained counsel withdrew at her request, she waived or forfeited that right by her actions."

In spite of the fact that she had notice of Mr. Dawson's withdrawal motion and of the date and time at which the termination hearing would be held, the guardian *ad litem* notes that respondent-mother made no effort to request the appointment of counsel when she arrived at the termination hearing. Moreover, the guardian *ad litem* asserts that respondent-mother's late arrival at the termination hearing constituted a "failure to appear," citing *Brenda D. v. Department of Child Safety, Z.D.*, 243 Ariz. 437, 440, 410 P.3d 419, 422, (2018).[4] The guardian *ad litem* contends that, when taken together, these actions constitute "willful conduct result[ing] in her waiver and forfeiture of the right to counsel," citing *State v. Montgomery*, 138 N.C. App. 521, 525, 530 S.E.2d 66, 69 (2000) (concluding that the defendant had forfeited his right to counsel given that he "was twice appointed counsel as an indigent"; released those attorneys from their representation of him in order to retain private counsel; was disruptive in the courtroom on two occasions, resulting in a delay in the trial proceedings; and assaulted his attorney, resulting in further delay, on the grounds that "[s]uch purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts simply cannot be condoned"); and *In re R.R.*, 180 N.C. App. 628, 636, 638 S.E.2d 502, 507 (2006) (concluding that the respondent had waived his right to counsel given that he had failed to apply for court appointed counsel prior to the termination hearing and failed to appear at the hearing).

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4. As respondent-mother correctly notes in her reply brief, the Arizona Supreme Court held in *Brenda D. v. Department of Child Safety, Z.D.*, that, while the rights to be present, participate, and testify may be waived by a parent's failure to appear at the hearing, "[t]hese waiver rules . . . do not apply to a parent's right to counsel at a termination adjudication hearing, a right that is unaffected by the parent's appearance or absence." 243 Ariz. at 440, 410 P.3d at 422.

The guardian *ad litem* contends that, once respondent-mother retained Mr. Dawson to represent her, "she had the burden to show a change in the desire for appointed counsel," citing *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999), with "the stringent statutory requirements of inquiry by the trial court when a [criminal] defendant waives counsel" being inapplicable to "parents in [termination of parental rights] proceedings," citing *In re P.D.R.*, 365 N.C. 533, 538, 723 S.E.2d 335, 338 (2012). According to the guardian *ad litem*, the facts of this case are distinguishable from those at issue in *In re S.L.L.*, which involved a parent who asked that his counsel withdraw *and* that the trial court appoint new counsel, citing 167 N.C. App. at 364, 605 S.E.2d at 499. In the guardian *ad litem*'s view, "[respondent-mother's] late appearance at the hearing did not cure her waiver of counsel or transfer the burden onto the trial court," with "[t]he trial court [being unable to] 'restart' the hearing due to [respondent-mother's] tardiness."

In addition, the guardian *ad litem* argues that "the trial court did not commit an abuse of discretion in allowing retained counsel to withdraw."[5] More particularly, the guardian *ad litem* contends that "[respondent-mother's] counsel was not required to formally serve her with the motion to withdraw" given that N.C.G.S. § 1A-1, Rule 5, which governs the service of motions, is not applicable to withdrawal motions, which require "no more than 'adequate' or 'reasonable' notice to the client," citing *Hensgen v. Hensgen*, 53 N.C. App. 331, 335, 280 S.E.2d 766, 769 (1981); *Perkins v. Sykes*, 233 N.C. 147, 152–53, 63 S.E.2d 133, 137–38 (1951); and *Trust Co. v. Morgan-Schultheiss and Poston v. Morgan-Schultheiss*, 33 N.C. App. 406, 414, 235 S.E.2d 693, 697–98 (1978). According to the guardian *ad litem*, Mr. Dawson's representations to the trial court that respondent-mother had asked him to withdraw amply demonstrated that respondent-mother "had adequate and reasonable notice" that he intended to seek leave to withdraw from his representation of respondent-mother given that trial courts "should be able to reasonably consider the statements of counsel in regards to notice to a client in a motion to withdraw," citing *Baker v. Varser*, 240 N.C. 260, 267, 82 S.E.2d 90, 95 (1954); Rule 3.3 of the N.C. Rules of Professional

5. Although the guardian *ad litem* asserts that the lawfulness of the trial court's decision to allow Mr. Dawson to withdraw is not properly before the Court given respondent-mother's failure to note an appeal from that order, citing *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156–57, 392 S.E.2d 422, 424 (1990), and N.C. R. App. P. 3(d), respondent-mother correctly notes in her reply brief that the trial court's order allowing Mr. Dawson's withdrawal was not independently appealable pursuant to N.C.G.S. § 7B-1001, so that any challenge to that order had to be brought as part of her appeal from the trial court's termination orders.

Conduct; and *State v. Choudhry*, 365 N.C. 215, 223, 717 S.E.2d 348, 354 (2011). In the event that this Court concludes that the trial court failed to make "specific findings regarding notice to [respondent-mother]" of Mr. Dawson's withdrawal motion, the guardian *ad litem* requested "the [C]ourt [to] remand this matter in order that the trial court may do so."

Finally, the guardian *ad litem* contends that, even if the trial court erred by allowing Mr. Dawson to withdraw or failing to inquire into the issue of whether new counsel should be appointed, any such error was harmless. The guardian *ad litem* suggests that, even though errors implicating constitutional rights are ordinarily presumed to be prejudicial, "at least one . . . appellate court has held that the erroneous deprivation of counsel at a [termination] proceeding can be subject to a harmless error analysis," citing *In re McBride*, 483 Mich. 1095, 766 N.W.2d 857 (2009). In the guardian *ad litem*'s view, any error that the trial court might have committed in this case was harmless given that "[a]n attorney could not have cured her failure to bring documentation to the hearing" or "changed the court's findings as to grounds for the [termination of parental rights] and the best interests determination" in light of respondent-mother's extensive child protective services history, her repeated failure to comply with her case plan and various orders of the court, her refusal to believe Khloe's claim that she had been sexually abused by respondent-mother's male friend, and the fact that the children had not been placed with respondent-mother since 2015 or visited with her since 2017.

According to well-established federal and North Carolina law, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures," *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397–98, *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992) (quoting *Santosky v. Kramer*, 455 U.S. 745, 753–54, 102 S. Ct. 1388, 71 L.Ed.2d 599, 606 (1982)), with the existence of such procedures being an inherent part of the State's efforts to protect the best interests of the affected children by preventing unnecessary interference with the parent-child relationship. N.C.G.S. § 7B-100(4) (stating that one of the purposes of the relevant statutory provisions is to "prevent[ ] the unnecessary or inappropriate separation of juveniles from their parents"). In order to adequately protect a parent's due process rights in a termination of parental rights proceeding, the General Assembly has created a statutory right to counsel for parents involved in termination proceedings. More specifically, N.C.G.S. § 1101.1(a) provides that "[t]he parent [in a termination of parental rights proceeding] has the right to counsel, and to appointed counsel in cases of indigency,

unless the parent waives the right." Although parents eligible for the appointment of counsel in termination of parental rights proceedings may waive their right to counsel, they are entitled to do so only "after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary." N.C.G.S. § 7B-1101.1(a1).

Consistently with the provisions of N.C.G.S. §7B-1101.1(a1), Rule 16 of the General Rules of Practice prohibits an attorney from withdrawing from his or her representation of a client in the absence of "(1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court." N.C. Gen. R. Pract. Super. and Dist. Ct. 16. As the Court of Appeals has correctly held, a trial court's decision concerning whether to allow the withdrawal of a parent's counsel in a termination of parental rights proceeding is discretionary in nature, with any such decision being subject to reversal on appeal only in the event that the trial court's ruling constitutes an abuse of discretion. *Benton v. Mintz*, 97 N.C. App. 583, 587, 389 S.E.2d 410, 412 (1990) (citing *Brown v. Rowe Chevrolet-Buick, Inc.*, 86 N.C. App. 222, 357 S.E.2d 181 (1987)). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re J.H.*, 373 N.C. 264, 268, 837 S.E.2d 847, 850 (2020) (quoting *In re N.G.*, 186 N.C. App. 1, 10–11, 650 S.E.2d 45, 51 (2007)). However, this "general rule presupposes that an attorney's withdrawal has been properly investigated and authorized by the court," so that, "[w]here an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion." *Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 217, 321 S.E.2d 514, 516 (1984).

Although a waiver of counsel, generally speaking, requires a knowing and intentional relinquishment of that right, *State v. Thomas*, 331 N.C. 671, 673–74, 417 S.E.2d 473, 475–76 (1992), "the trial court is not required to abide by the . . . directive to engage in a colloquy regarding a knowing waiver" where the litigant has forfeited his right to counsel by engaging in "actions [which] totally undermine the purposes of the right itself by making representation impossible and seeking to prevent a trial from happening at all." *State v. Simpkins*, 373 N.C. 530, 536–38, 838 S.E.2d 439, 446–47 (N.C. 2020). However, "[a] finding that a defendant has forfeited the right to counsel" has been restricted to situations involving "egregious dilatory or abusive conduct on the part of the [litigant]." *Id.* at 541, 838 S.E.2d at 449. 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 C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (citing *In re S.N.*, 194 N.C. App. 142, 146, 669 S.E.2d 55, 59 (2008), *aff'd per curiam*, 363 N.C. 368, 677 S.E.2d 455 (2009)).

After examining the unique circumstances that occurred in this case, we conclude that the trial court erred by allowing Mr. Dawson's motion to withdraw from his representation of respondent-mother and permitting respondent-mother to represent herself at the termination hearing without ensuring that she had knowingly and voluntarily waived her right to the assistance of counsel. Admittedly, the Court of Appeals has correctly held on a number of occasions that attorneys were properly allowed to withdraw from their representation of a parent in a termination proceeding in instances in which the parent failed to appear at scheduled proceedings or to maintain contact with his or her counsel, *see, e.g.*, *In re M.G.*, 239 N.C. App. at 77, 767 S.E.2d at 436; *In re D.E.G.*, 228 N.C. App. at 381, 747 S.E.2d at 280; *In re K.N.*, 181 N.C. App. 736, 741, 640 S.E.2d 813, 817 (2007), in light of the fact that "a lawyer cannot properly represent a client with whom [he or she] has [had] no contact." *Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999). However, these decisions also recognize that, "before allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate in a termination of parental rights proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected." *In re D.E.G.*, 228 N.C. App. at 386–87, 747 S.E.2d at 284 (2013) (citing *In re S.N.W.*, 204 N.C. App. 556, 698 S.E.2d 76 (2010)).

For example, in *In re M.G.*, while DSS sent "notice of the date, time, and location of the [termination] hearing to [r]espondent" at her last known address, the parent contended that she never received the notice that had been mailed to her. 239 N.C. App. at 80, 767 S.E.2d at 439. After the respondent failed to appear at the termination hearing, the trial court allowed the parent's attorney to withdraw given that "the [r]espondent was served but has failed to appear." *Id.* at 81–82, 767 S.E.2d at 440. Following the allowance of the withdrawal motion, the parent's attorney neither participated in nor presented any evidence on the parent's behalf at the termination hearing. *Id.* After determining that the record was "devoid of any evidence whatsoever that [r]espondent received any notice from her trial counsel that counsel would seek to withdraw from her representation at the start of the [termination] hearing," *id.*

at 84, 767 S.E.2d at 441, the Court of Appeals vacated the trial court's termination order on the grounds that it "ha[d] consistently vacated or remanded [termination] orders when questions of 'fundamental fairness' have arisen due to failures to follow basic procedural safeguards." *Id.* at 83, S.E.2d at 441.

A careful examination of the record that has been presented for our review in this case indicates that neither the certificate of service attached to Mr. Dawson's withdrawal motion nor any related correspondence shows that respondent-mother was served with a copy of the withdrawal motion prior to the date upon which Mr. Dawson was allowed to withdraw. On the contrary, the certificate of service attached to Mr. Dawson's withdrawal motion appears to reflect that the only party upon whom that motion was served was DSS. Although Mr. Dawson told the trial court that respondent-mother had "requested" that he withdraw from his representation of her and that he had "attempted to secure [respondent-mother's] presence in court" at the time that his withdrawal motion was heard, the trial court does not appear to have made any inquiry into whether respondent-mother had been served with the withdrawal motion; whether Mr. Dawson had informed respondent-mother that he intended to move to withdraw on that date; why respondent-mother had requested Mr. Dawson to withdraw, including whether his withdrawal motion resulted from respondent-mother's inability to pay for his services; and what efforts Mr. Dawson had made to ensure that respondent-mother understood the implications of the action that he proposed to take or to protect her statutory right to the assistance of counsel. As a result, given the very limited inquiry that the trial court undertook before allowing Mr. Dawson's withdrawal motion, we conclude that the trial court erred by allowing that motion.

In addition, we hold that, even if the trial court did not err by allowing Mr. Dawson's withdrawal motion, it erred by allowing respondent-mother to represent herself at the termination hearing without making adequate inquiry into the issue of whether she wished to appear *pro se*. As the record clearly reflects, the waiver of counsel form that respondent-mother completed at the time that Mr. Perry was allowed to withdraw from his representation of respondent-mother in the termination proceeding was intended to facilitate her employment of privately-retained counsel and did not constitute a waiver of her right to any and all counsel. On the contrary, a careful examination of the waiver of counsel form that respondent-mother completed reflects that respondent-mother checked the box relating to a waiver of her right to court-appointed counsel and did not check the box stating that "I do

not want the assistance of any lawyer. I understand that I have the right to represent myself, and that is what I intend to do." For that reason, the record amply demonstrates that respondent-mother had generally wished to be represented by counsel, had been represented by counsel in the termination proceeding until the allowance of Mr. Dawson's withdrawal motion, and had never expressed the intention of representing herself. In light of that set of circumstances, we believe that the trial court had an obligation to make inquiry of respondent-mother concerning the issue of whether she wished to represent herself at the time that she made her tardy appearance at the termination hearing as required by N.C.G.S. § 7B-1101.1(a1).

Admittedly, respondent-mother did not ask the trial court to conduct an inquiry into the issue of whether she wished to represent herself or desired to request the appointment of counsel following her tardy arrival at the termination hearing. On the other hand, nothing in the record suggests that respondent-mother knew that she had the right to do so or that the trial court informed her that such an option was available. The fact that respondent-mother had been represented by counsel at the underlying juvenile proceeding and had been provisionally appointed counsel to represent respondent-mother in the termination proceeding provides ample basis for believing that respondent-mother was indigent at the beginning of the termination proceeding.[6] In addition, the fact that respondent-mother was able to retain counsel as the result of a one-time increase in her income and the fact that the financial status of litigants can change over time suggests that it would have been appropriate for the trial court to have made further inquiry into the issue of whether respondent-mother was indigent and wished to be represented by court-appointed counsel following the allowance of Mr. Dawson's withdrawal motion. At an absolute minimum, given that respondent-mother had never waived the right to all counsel, the trial court violated N.C.G.S. § 7B-1101.1(a1) by allowing respondent-mother to represent herself at the termination hearing without having "examin[ed] [respondent-mother] and mak[ing] findings of fact sufficient to show that" respondent-mother "knowing[ly] and voluntary[ily]" wished to appear *pro se*.

Although respondent-mother's level of engagement with the proceedings before the trial court in connection with this termination proceeding was certainly less than exemplary, nothing in

6. We note that the record on appeal presented for our consideration in this case does not contain any affidavit of indigency that had been executed by respondent-mother during the course of the trial court proceedings.

respondent-mother's conduct had the repeatedly disruptive effect necessary to constitute the "egregious" conduct that is required to support a determination that respondent-mother had forfeited her statutory right to counsel. *Simpkins*, 373 N.C. at 535, 838 S.E.2d at 446. Simply put, this is not a case in which a respondent-parent has acted to delay or disrupt the proceedings in such a manner as to work a forfeiture of the right to counsel. As a result, in addition to rejecting the argument that respondent-mother waived her right to counsel in a valid manner, we reject the guardian *ad litem*'s contention that she forfeited her right to counsel by engaging in serious misconduct.[7]

Finally, we decline to adopt the guardian *ad litem*'s suggestion that we require a showing of prejudice as a prerequisite for obtaining an award of appellate relief in cases involving the erroneous deprivation of the right to counsel. In the criminal context, no showing of prejudice is required in instances like this one, *see, e.g.*, *State v. Colbert*, 311 N.C. 283, 286, 316 S.E.2d 79, 81 (1984), and we decline to adopt a different rule for use in termination of parental rights proceedings. *See, e.g.*, *In re D.E.G.*, 228 N.C. App. at 388 n.6, 747 S.E.2d at 285 (declining an invitation by DSS and the guardian *ad litem* to "uphold the termination order on non-prejudice grounds" in light of "the absence of any information tending to show the extent, if any, to which [the respondent's] trial counsel attempted to contact [the respondent] prior to the hearing in question"); *In re N.T.S.*, 2011 WL 3891795, at *4 (N.C. App. Ct. 2011) (unpublished) (stating that, "given the fundamental nature of the right to counsel in juvenile abuse, neglect, and dependency cases, our cases have not required parents to demonstrate prejudice in order to obtain appellate relief based upon a violation of their right to counsel"). Aside from the fact that the effect of such a deprivation upon a parent involved

7. Similarly, we are not inclined to hold that respondent-mother waived her right to the assistance of counsel based upon her less-than-stellar record for attending court. Assuming, without in any way deciding, that such an implicit waiver is possible despite our admonition that a waiver of the right to the assistance of counsel involves a knowing and intentional relinquishment of that right, *Thomas*, 331 N.C. at 673–74, 417 S.E.2d at 475–76, we are unable to interpret respondent-mother's conduct as being sufficient to support a finding of implied waiver given her prior invocation of the right to counsel; the fact that she had consistently had the assistance of counsel throughout the underlying abuse, neglect, and dependency proceeding; the lack of any explanation for her request that Mr. Dawson withdraw from his representation of her in the termination proceeding; and the fact that respondent-mother had not previously failed to appear in the termination proceeding. In our view, at least, a much stronger showing than that which exists in this case is necessary to establish the existence of an implied waiver of the right to counsel in a termination of parental rights proceedings, to the extent that such an implied waiver can occur at all.

in a termination proceeding can be quite significant, it is simply impossible for a reviewing court to know what difference the availability of counsel might have made in any particular termination proceeding. For example, we cannot know whether counsel for respondent-mother in this case would have been able to provide documentation that respondent-mother did, in fact, make progress toward addressing the mental health, substance abuse, and domestic violence problems that led to the trial court's decision that grounds for terminating respondent-mother's parental rights in the children existed here. As a result, we conclude that respondent-mother is entitled to a new termination hearing in which her statutory right to counsel has been adequately protected.

Thus, for the reasons set forth above, we conclude that the trial court erred by allowing Mr. Dawson to withdraw from his representation of respondent-mother without making an adequate inquiry into the circumstances surrounding the making of that motion and by failing to inquire, at the time that respondent-mother appeared at the termination hearing, whether she was represented by counsel, whether she wished to apply for court-appointed counsel, or whether she wished to represent herself. As a result, the trial court's termination orders are reversed and this case is remanded to the District Court, Lenoir County, for further proceedings not inconsistent with this opinion, including the holding of a new termination hearing.

REVERSED AND REMANDED.

Justice MORGAN dissenting.

I respectfully dissent from the majority view in this case. While I appreciate the laudable foundation upon which my distinguished colleagues of the majority construct their determinations in this case, this foundation perilously undermines and potentially supplants more deeply fundamental aims of justice relating to the best interests of children and the integrity of the judicial process. With this concern, I disagree with the conclusion of the majority that "the trial court erred by allowing [respondent-mother's privately retained counsel] Mr. Dawson's motion to withdraw from his representation of respondent-mother and permitting respondent-mother to represent herself at the termination hearing without ensuring that she had knowingly and voluntarily waived her right to the assistance of counsel." I likewise take issue with the majority's expansion of this determination that "the trial court erred by allowing Mr. Dawson to withdraw from his representation of respondent-mother without making an adequate inquiry into the circumstances

surrounding the making of that motion and by failing to inquire, at the time that respondent-mother appeared at the termination hearing, whether she was represented by counsel, whether she wished to apply for court-appointed counsel, or whether she wished to represent herself." While I agree with the majority that respondent-mother's behavior regarding the status of her legal representation was not so egregious as to amount to her forfeiture of the right to counsel, nonetheless I am convinced that respondent-mother's conduct was sufficiently serious to constitute waiver of counsel. Therefore, I would affirm the trial court's actions in this matter and would find that there was no error committed by the trial court.

The majority is excruciatingly generous in observing that "respondent-mother's level of engagement with the proceedings before the trial court in connection with this termination proceeding was certainly less than exemplary"; indeed, the termination of parental rights hearing served as the capstone of trial court proceedings in which respondent-mother was cavalier in her interactions with her attorneys and with the judicial system. Utilizing the majority's own opinion here to chronicle examples of respondent-mother's approach to these important proceedings: 1) respondent-mother failed to appear for a permanency planning review hearing held on 16 April 2019 at which her court-appointed counsel appeared and for which respondent-mother had notice; 2) respondent-mother had not been in contact with her court-appointed counsel since the previous trial court hearing which had been conducted on 20 November 2018; 3) respondent-mother failed to appear for her contempt hearing on 30 April 2019 concerning her failure to appear for the 16 April 2019 permanency planning review hearing because she reported to a different courtroom in which her former counsel located her and aided the attainment of another court date for respondent-mother's contempt hearing; 4) respondent-mother failed to appear for her rescheduled contempt hearing on 14 May 2019, with her counsel reporting to the trial court on this occasion that the attorney "attempted to secure [respondent-mother's] presence in court today for this" but was "unable to do so"; 5) respondent-mother appeared for the 11 June 2019 termination of parental rights hearing some sixteen minutes after the matter had been called to be conducted; 6) as a participant in the 11 June 2019 termination hearing, respondent-mother abruptly left the courtroom without explanation during the proceedings.

Amidst all of this, the majority secures its view in the operation of N.C.G.S. § 7B-1101.1(a) (2019), which states, in pertinent part, that in a termination of parental rights case, "[t]he parent has the right to counsel,

and to appointed counsel in cases of indigency, unless the parent waives the right." Based on this statute, the majority cobbles together a series of acts which the trial court should have performed at certain stages of respondent-mother's maneuvers with her counsel and resulting consequences: 1) at an 8 January 2019 hearing, the trial court honored respondent-mother's desire to waive her right to the assistance of court-appointed counsel and to hire her own counsel; however, in the majority's view, "the waiver of counsel form that respondent-mother completed at the time that [respondent-mother's court-appointed counsel] Mr. Perry was allowed to withdraw from his representation of respondent-mother in the termination proceeding was intended to facilitate her employment of privately-retained counsel and did not constitute a waiver of her right to any and all counsel"; 2) at the 14 May 2019 show cause hearing at which respondent-mother failed to appear, the trial court allowed the motion of her retained counsel, Mr. Dawson, to withdraw, based on the counsel's representations that the attorney had not been able to obtain respondent-mother's presence in court for the hearing; however, in the majority's view, despite the retained counsel's status as an officer of the court and his representation to the trial court that respondent-mother had requested the retained counsel to withdraw from his representation of her, nonetheless the majority expresses concern that "neither the certificate of service attached to Mr. Dawson's withdrawal motion nor any related correspondence shows that respondent-mother was served with a copy of the withdrawal motion prior to the date upon which Mr. Dawson was allowed to withdraw" and also that,

> at the time that his withdrawal motion was heard, the trial court does not appear to have made any inquiry into whether respondent-mother had been served with the withdrawal motion; whether Mr. Dawson had informed respondent-mother that he intended to move to withdraw on that date; why respondent-mother had requested Mr. Dawson to withdraw, including whether his withdrawal motion resulted from respondent-mother's inability to pay for his services; and what efforts Mr. Dawson had made to ensure that respondent-mother understood the implications of the action that he proposed to take or to protect her statutory right to the assistance of counsel. As a result, given the very limited inquiry that the trial court undertook before allowing Mr. Dawson's withdrawal motion, we conclude that the trial court erred by allowing that motion[;]

3) at the 11 June 2019 termination of parental rights hearing at which respondent-mother made a tardy appearance after the hearing had already begun, respondent-mother had already been granted her request by the trial court to sign a waiver of counsel form to indicate that she would be responsible for hiring her own attorney for representation in these proceedings, and had already expressed her desire for her retained counsel to cease representation of her, as related to the trial court by the attorney and upon such information, the trial court granted counsel's motion to withdraw; however, while the majority frankly acknowledges that, at the 11 June 2019 termination hearing

> respondent-mother did not ask the trial court to conduct an inquiry into the issue of whether she wished to represent herself or desired to request the appointment of counsel following her tardy arrival at the termination hearing. On the other hand, nothing in the record suggests that respondent-mother knew that she had the right to do so or that the trial court informed her that such an option was available. . . . At an absolute minimum, given that respondent-mother had never waived the right to all counsel, the trial court violated N.C.G.S. § 7B-1101.1(a1) by allowing respondent-mother to represent herself at the termination hearing without having "examin[ed] [respondent-mother] and mak[ing] findings of fact sufficient to show that" respondent-mother "knowing[ly] and voluntar[ily]" wished to proceed *pro se*.

At most, these numerous requirements which the majority has imposed upon trial courts in circumstances in which N.C.G.S. § 7B-1101.1(a1) (2019) is invoked as an issue constitute best practices for a trial court to implement; however, in my estimation, the failure to follow them as detailed by the majority does not constitute error as the majority has decreed here. A trial court should not be compelled to look at the circumstances in a vacuum at the termination of parental rights hearing with regard to the sanctity of a respondent parent's right to counsel; a trial court should be allowed to look at the circumstances *surrounding* the termination of parental rights hearing with regard to a parent's right to counsel. In the present case, respondent-mother had routinely frustrated her attorneys' efforts and flouted the trial court's administration of justice in the choices that she elected to make regarding her adherence to the judicial process.

The best interests of the juvenile are of paramount consideration by the court. N.C.G.S. § 7B-100(5) (2019). This state's approach to

controversies involving child neglect is that the best interest of the child is the polar star. *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 251–52 (1984). The power of the trial judge to maintain absolute control of his courtroom is essential to the maintenance of proper decorum and the effective administration of justice. *State v. Ford*, 323 N.C. 466, 469, 373 S.E.2d 420, 422 (1988). From my vantage point, the trial court properly balanced all of the potentially competing interests before it in properly applying N.C.G.S. § 7B-1101.1(a1) on its face regarding respondent-mother's right to counsel in a termination of parental rights proceeding, promoting the best interests of the two children at issue in the present case by conducting the termination hearing in an effort to bring the juveniles to permanence rather than to yield to further upheaval of court proceedings by respondent-mother, and preserving proper decorum and the effective administration of justice by including respondent-mother as a participant in the termination hearing to represent her own interests after her desire to relieve her previous two attorneys from responsibility for her representation was allowed by the trial court. On the other hand, the new duty for a trial court which the majority creates upon its expansion of N.C.G.S. § 7B-1101.1(a1) requires, in a case like this one, that after a respondent-parent in a termination of parental rights case has signed a knowing and voluntary waiver to court-appointed counsel and subsequently gotten retained counsel to withdraw, that the trial court must halt the termination proceedings during the presentation of evidence in order to accommodate the late arrival of the respondent-parent in order to make a new inquiry of the respondent-parent's desire for counsel, thereby potentially suspending the hearing and delaying the establishment of a permanent home for the juveniles. Based upon my recognition of this needless collision of critical fundamental principles which could and should be mutually promoted, I respectfully dissent.

Justice NEWBY joins in this dissenting opinion.

IN RE MURPHY

[376 N.C. 219 (2020)]

IN RE INQUIRY CONCERNING A JUDGE,
NO. 17-318 J. HUNTER MURPHY, RESPONDENT

No. 396A19

Filed 18 December 2020

Judges—discipline—unprofessional work environment—censure

The Supreme Court censured an appellate judge for conduct in violation of Canons 1, 2B, 3A(3), and 3B(2) of the Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute and willful misconduct in office (N.C.G.S. § 7A-376) where the judge contributed to and enabled an unprofessional work environment in his office and minimized the inappropriate conduct of an employee—a longtime friend—who engaged in a pattern of lying, intimidating co-workers, making sexually inappropriate comments, and using profane language in the office.

This matter is before the Court pursuant to N.C.G.S. §§ 7A-376 and -377 upon a recommendation by the Judicial Standards Commission entered 13 September 2019 that respondent J. Hunter Murphy, a Judge of the General Court of Justice, Appellate Court Division, Court of Appeals, State of North Carolina, be censured for conduct in violation of Canons 1, 2B, 3A(3), and 3B(2) of the North Carolina Code of Judicial Conduct and for willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. Heard in the Supreme Court on 31 August 2020.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, Mark W. Merritt, Matthew W. Sawchak, and Lexi M. Fleming, Counsel for the Judicial Standards Commission.

Robert F. Orr, PLLC, by Robert F. Orr, and The Hunt Law Firm, PLLC, by Anita B. Hunt, for respondent.

ORDER OF CENSURE

The issue before the Court is whether Court of Appeals Judge Hunter Murphy, respondent, should be censured for violations of Canons 1, 2B, 3A(3), and 3B(2) of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the

judicial office into disrepute in violation of N.C.G.S. § 7A-376(b). For the reasons that follow, this Court orders that respondent be censured.

On 21 March 2018, Counsel for the Commission filed a Statement of Charges against respondent alleging he had engaged in conduct inappropriate to his office by failing to establish, maintain, and enforce appropriate standards of conduct to ensure the integrity and independence of the judiciary; allowing his family and social relationships to influence his judicial conduct or judgment, and permitting others to convey the impression that they are in a special position to influence respondent; failing to require his staff to exhibit patient, dignified and courteous conduct to lawyers and others with whom respondent deals in his official capacity; and failing to ensure his staff observed the standards of fidelity and diligence that apply to him. In the Statement of Charges, Counsel for the Commission asserted that respondent's actions were inappropriate to his judicial office and prejudicial to the administration of justice constituting grounds for disciplinary proceedings under Chapter 7A, Article 30 of the North Carolina General Statutes.

Respondent filed his answer on 18 May 2018. Vice-Chair Judge R. Stuart Albright, acting as chair of the hearing panel, struck the answer *ex mero motu*, and respondent filed his amended answer on 14 June 2018. On 6 and 7 June 2019, the Commission heard this matter and entered its recommendation on 13 September 2019, which contains the following findings of fact:

A. Background

1. Respondent is a judge of the Court of Appeals elected to an eight-year term that commenced in January 2017.

2. As a judge of the Court of Appeals, Respondent is entitled to hire three members of his chambers staff—two "research assistants" or "law clerks" as they are commonly called, and one executive assistant or "EA." All members of a judge's chambers staff are employees at will, and can be fired by the employing judge for any reason at any time, as long as the reason is not discriminatory.

3. Law clerks are responsible for researching issues raised in appeals, preparing memoranda for their assigned judge on cases to be argued, and drafting and editing opinions. In drafting and editing opinions, law clerks are also tasked with the important job of checking every citation in draft opinions for accuracy (referred to as cite-checking).

Law clerks also perform a number of other tasks assigned by their judge.

4. For his first two law clerks, Respondent hired one female law clerk, Lauren Suber, and one male law clerk, Clark Cooper. Ms. Suber had just completed a clerkship for a justice of the Supreme Court [of North Carolina] and agreed to clerk for eight months until August 2017. Mr. Cooper had just completed a clerkship for another judge of the Court of Appeals, and prior to that, had clerked for yet another judge of the Court of Appeals and agreed to clerk for two years.

5. Respondent hired his close, personal friend from high school, Mr. Ben Tuite, to serve as both his permanent EA and a third law clerk. Respondent gave Mr. Tuite both express and implied authority to supervise and manage the term law clerks and the operations of his chambers.

6. In March 2017, Mr. Cooper suddenly resigned after less than two months as Respondent's law clerk. To replace Mr. Cooper, Respondent hired Mary Scruggs, who was highly qualified, with good academic credentials, had passed the bar and practiced with a firm before being hired by Respondent.

7. After Ms. Suber completed her clerkship in August 2017, she was replaced by Ms. Chelsey Maywalt. Ms. Maywalt's term began on August 28, 2017 and was scheduled to conclude in August 2018. Ms. Maywalt had excellent recommendations, experience and academic credentials and had just completed a clerkship for another judge of the Court of Appeals.

8. Law clerks at the Court of Appeals are expected to comply with the Law Clerk Code of Conduct. On March 21, 2017, Respondent attended training on the Code of Judicial Conduct, which included review of Respondent's duties to ensure that his law clerks adhere to the same standards of professionalism and diligence as apply to the judge. Later that day, after the training, Respondent was given a copy of the North Carolina Court of Appeals Code of Conduct for Staff Attorneys and Law Clerks to review and provide to his law clerks. Among other things, Canon 3B of the Law Clerk Code of Conduct requires a law clerk

"to be faithful to the highest standards of his or her profession and maintain professional competence in it. He or she should be patient, dignified, courteous, and fair to all persons with whom he or she deals in the performance of his or her duties. He or she should diligently discharge the responsibilities of his or her position in an efficient, fair-minded, and professional manner."

9. Mr. Tuite, Ms. Scruggs and Ms. Maywalt later attended a Court of Appeals training program on their obligations under the Law Clerk Code of Conduct.

B. The Working Environment in Respondent's Chambers

10. When Mr. Cooper announced his resignation in March 2017, Respondent reacted with a great deal of animosity that he made known to his law clerks. Respondent and Mr. Tuite willfully made belittling comments or jokes about him to the other law clerks.

11. On one occasion, in or around June 2017, Respondent participated in a group text message with Mr. Tuite, Ms. Suber and Ms. Scruggs. In the group text, Respondent and Mr. Tuite exchanged profane and inappropriate comments and jokes about Mr. Cooper, including encouraging Ms. Suber to sabotage Mr. Cooper's career plans and comparing Mr. Cooper to a member of the terrorist group ISIS.

12. Respondent's active participation in and condoning of the belittling of Mr. Cooper contributed to and enabled a toxic work environment in Respondent's chambers.

13. Mr. Tuite also regularly used profanity during the workday, belittled others and used fear and intimidation while interacting with and supervising the law clerks. Mr. Tuite frequently used the word "fuck" and referred to female law clerks on more than one occasion as "bitch" or "bitching."

14. Respondent observed and was aware of Mr. Tuite's regular use of profanity in his chambers and belittling comments about other court employees and failed to take action to address it when he observed or became aware of it. By failing to address this conduct when it occurred, Respondent condoned Mr. Tuite's workplace misconduct and therefore again contributed to and enabled a toxic work environment.

15. Mr. Tuite was dishonest and did not diligently discharge his duties as the EA or as a law clerk.

16. Respondent was aware of Mr. Tuite's dishonesty and lack of diligence. Ms. Suber in her exit interview on August 10, 2017 specifically informed Respondent that Mr. Tuite was a manipulative liar who handed off his work to others or simply did not do it (including necessary editing and cite-checking), that such conduct was impacting Respondent's reputation and would also cause him to "burn through law clerks," and that Ms. Suber had concerns that Mr. Tuite would be rude to Ms. Maywalt and take advantage of her strong work ethic. Ms. Maywalt had a meeting with Respondent on November 13, 2017 and advised Respondent that Mr. Tuite was dishonest in his communications with other employees at the Court of Appeals. Ms. Suber and Ms. Scruggs advised Respondent on December 2, 2017 that Mr. Tuite was dishonest in his communications with other employees at the Court of Appeals and that he failed to diligently discharge his duties.

17. After learning of Mr. Tuite's dishonesty and lack of diligence on multiple occasions, Respondent failed to address these issues directly with Mr. Tuite. . .

18. Mr. Tuite made comments of a sexual or inappropriate nature in the workplace.

19. In early 2017, Mr. Tuite came into the offices of Ms. Suber and Ms. Scruggs on separate occasions early in their c1erkships, and without any context closed the doors to their offices and told them that he likes to have relationships with female co-workers but that they should not misconstrue his efforts to spend time with them, and stated that he had been sexually harassed in his prior employment by a female co-worker who had pulled him into a vehicle and assaulted him after she "misconstrued" their relationship. Mr. Tuite also told Respondent about this incident, but described it in "vulgar terms."

20. Later, during a cold workday while outside with Ms. Suber, Mr. Tuite stated that he would like to see her in a "wife beater" tank top and shorts on a cold day. Mr. Tuite, on or about the following day, asked Ms. Suber to come

into Respondent's office (when Respondent was away from the office), kept the lights off and sat down beside her and told her that he "was married but not blind" or similar words in an apparent attempt to apologize for the inappropriate sexual remark from the previous day. Ms. Suber was offended and upset by the inappropriate and suggestive sexual remarks and non-apology when they occurred, felt unsafe as a result and feared it would occur again. Ms. Suber continued to be upset and uncomfortable about this incident when she warned Ms. Maywalt about it in October 2017 and when she informed Respondent about it on December 2, 2017, and continues to feel uncomfortable about it to this day. Upon learning of this incident, Respondent dismissed Ms. Suber's concerns.

21. On another occasion, during the summer of 2017, while reviewing a female law clerk's application, Mr. Tuite intentionally and in the presence of Respondent, Ms. Suber and Ms. Scruggs, repeated derogatory and belittling online comments about the female applicant comparing her breasts to "fun bags." Ms. Scruggs was offended and immediately expressed concern in Respondent's presence about Mr. Tuite's inappropriate treatment of this female law clerk applicant, but Respondent did nothing.

22. By failing to act when he observed or was informed of Mr. Tuite's pattern of making lewd or sexually inappropriate remarks in the workplace, Respondent again condoned Mr. Tuite's workplace misconduct and thus again contributed to and enabled a toxic work environment.

23. On August 11, 2017, Ms. Suber also informed Respondent about an incident in which Mr. Tuite intentionally ruined her engagement in July 2017 and stated that she was very upset about Mr. Tuite's interference in her personal life.

24. As a result of the toxic work environment, Ms. Suber was miserable and felt unsafe working in Respondent's chambers. Ms. Suber also chose to decline Respondent's offer to extend her clerkship past August 2017 in part because of the toxic work environment.

25. Mr. Tuite also engaged in profane, violent and angry outbursts in the office while Respondent was present.

26. On one occasion in September, 2017, Mr. Tuite, after being told of a problem with his work product, yelled "fuck" loud enough for everyone in Respondent's chambers, including Respondent who was in his office with the door open, to hear, and slammed his fist on a table hard enough to activate a panic alarm that was attached to that table. Respondent did nothing to address Mr. Tuite's profane and violent outburst at the time and by failing to act, condoned Mr. Tuite's workplace misconduct and therefore again contributed to and enabled a toxic work environment.

27. On another occasion, on or about Friday, October 27, 2017, during a chambers meeting to discuss hiring law clerks, Mr. Tuite, in Respondent's presence, got angry at Ms. Maywalt, slammed his fist on his chair (which was, as usual, located behind or next to Respondent) and said, "Goddamn it, Chelsey: [then told her] to shut [her] mouth, and that [her] opinion did not fucking matter." By his words and deeds, Mr. Tuite belittled and threatened Ms. Maywalt in Respondent's presence. Respondent took no immediate action against Mr. Tuite except to call for a break and never addressed the incident with Ms. Maywalt or Ms. Scruggs. Later that evening, on October 27, 2017, Respondent emailed Mr. Tuite and asked him to apologize for saying that he did not care about Ms. Maywalt's opinion. Respondent did not address Mr. Tuite's use of profanity or the anger and intimidation associated with his comments. On the following Monday, October 30, 2017, Mr. Tuite offered a non-apology to Ms. Maywalt for his actions and then threatened her with a reminder that he influences the hiring and firing in the office.

28. On or about November 13, 2017, Ms. Maywalt informed Respondent that Mr. Tuite continued to treat her in an unprofessional manner, was lying to employees in the Court of Appeals, and further, that Mr. Tuite's apology for the October 27, 2017 incident was a non-apology that resulted in worse treatment by Mr. Tuite.

29. Upon learning of Mr. Tuite's ongoing misconduct towards Ms. Maywalt and failure to follow Respondent's instructions in his email to Mr. Tuite on October 27, Respondent took no immediate action. By allowing this

type of workplace behavior to take place on October 27 and 30, 2017 without any apparent or immediate consequences, Respondent again condoned Mr. Tuite's workplace misconduct, thus contributing to and enabling a toxic work environment.

C. Interactions with AOC HR and the Commission

30. By November 2017, the toxic work environment in Respondent's chambers and concerns about potential sexual harassment got to a point where a judge of the Court of Appeals reported his concerns to the Chief Judge.

31. The Chair of the Judicial Standards Commission met with Respondent on November 29, 2017 to discuss Mr. Tuite's treatment of the female law clerks and concerns of potential sexual harassment, including an allegation that Mr. Tuite had said to Ms. Suber, who has red hair, that he wanted to "fuck a red head." The Chair advised Respondent of his obligations under the Code of Judicial Conduct with respect to the supervision of his chambers staff and suggested that Respondent contact the Administrative Office of the Courts Human Resources Department ("AOC HR") for additional guidance regarding the sexual harassment concerns.

32. As suggested by the Chair of the Judicial Standards Commission, Respondent contacted AOC HR on November 29, 2017 regarding the possible sexual harassment issue. The following day, November 30, 2017, Respondent met with Ms. Leila Jabbar, the AOC employee relations specialist, HR policy consultant and EEO officer, and Russ Eubanks, the AOC manager.

33. During this first face to face meeting with Ms. Jabbar on November 30, 2017, Ms. Jabbar asked Respondent a number of questions to evaluate any potential unlawful sexual harassment issues in his chambers. Respondent lacked candor when speaking to AOC HR and did not disclose the extent of complaints that Ms. Suber raised about Mr. Tuite on August 10 and 11, 2017, or any of the incidents he had observed prior to that date involving Mr. Tuite's regular use of profanity, angry and violent outbursts, mistreatment of Ms. Maywalt, dishonesty or lewd remarks in the workplace. Instead, Respondent affirmatively

represented to Ms. Jabbar that beyond the rumored "red head" comment, he was not aware of any other issues with Mr. Tuite's performance.

34. Respondent lacked candor and downplayed, minimized, and mischaracterized Mr. Tuite's actions in his face-to-face meeting with Ms. Jabbar on November 30, 2017. Respondent did so because his conduct and judgment were influenced by his close personal friendship with and loyalty towards Mr. Tuite.

35. Respondent's lack of candor and representations to AOC HR on November 30, 2017 impacted the advice given to Respondent. Because Respondent did not disclose the information noted in ¶ 33 above, AOC HR only advised Respondent to ensure his staff that all concerns of sexual harassment would be taken seriously and to have them review the judicial branch's workplace conduct policy and recent advice and legal news articles focused on sexual harassment in the legal profession and the judiciary. AOC HR also advised Respondent that he could reach out to both Ms. Suber and Mr. Tuite to find out if the comment was made.

36. On Saturday, December 2, 2017, Respondent decided to talk directly to Mr. Tuite, Ms. Maywalt, Ms. Scruggs and Ms. Suber. Prior to meeting with any of them, and prior to ascertaining if Mr. Tuite had made any sexually inappropriate comments to Ms. Suber, Respondent assured his friend Mr. Tuite that his job was secure.

37. During the conversations on December 2, 2017, the following occurred:

a. Mr. Tuite denied making any sexually inappropriate comment to Ms. Suber.

b. Respondent told Ms. Suber that he needed to ask her whether Mr. Tuite had made an improper sexual remark to her. Before she answered, Respondent also advised her that he had no intention of firing Mr. Tuite. Ms. Suber then told Respondent about the sexually inappropriate remark as described in ¶ 20, that such comment made her uncomfortable, and that Mr. Tuite's non-apology included the additional inappropriate remark that also made her uncomfortable.

Respondent then asked her about the "red head" comment, and she advised that Mr. Tuite had not made that comment. Respondent then advised Ms. Suber that he had spoken to AOC HR about the "red head" comment and was told that even if true, it was not sexual harassment. Ms. Suber was also upset about and informed Respondent that Mr. Tuite continued to lie and not do his work and falsely impugned her work product to other employees in the Court of Appeals regarding an opinion that had to be withdrawn because of Mr. Tuite's dishonesty and lack of diligence.

c. Ms. Maywalt told Respondent as she had previously done on November 13, 2017 that Mr. Tuite was a liar, that he mistreated her, and that his forced apology after his violent and intimidating outburst on October 27, 2017 was a non-apology that resulted in threatening her that he (Mr. Tuite) had influence over hiring and firing. Ms. Maywalt also told Respondent directly that Mr. Tuite was mistreating and bullying her and that she felt like the next Clark Cooper based on Mr. Tuite's mistreatment of her and [was] uncomfortable in Respondent's chambers. Ms. Maywalt also told Respondent that Mr. Tuite's angry outbursts were violent and personally threatening to her, including the incident when Mr. Tuite had punched a desk and yelled "fuck," and that she did not want to be left alone with Mr. Tuite in Respondent's absence the following week. Ms. Maywalt reiterated these concerns to Respondent by email and advised Respondent that she intended to take a personal week away from the office the following week because she was afraid of being alone with Mr. Tuite during Respondent's absence.

d. Ms. Scruggs told Respondent that his friendship with Mr. Tuite was making it difficult to address problems, and that Mr. Tuite was a liar, that his work product was inferior, that Mr. Tuite's actions and behavior were adversely affecting how other chambers in the Court of Appeals interacted with Respondent's chambers, that Mr. Tuite mistreated Ms. Maywalt, that Mr. Tuite's bullying of Ms. MaywaIt had a negative impact on her as well, and that all of the law clerks had an issue with Mr. Tuite. Ms. Scruggs also informed Respondent

about her concerns as to Mr. Tuite's violent and angry outbursts, citing the incident when Mr. Tuite slammed his desk and yelled "fuck" and also told Respondent of another incident in which Mr. Tuite had cursed and thrown a draft opinion across chambers.

38. After speaking with Ms. Maywalt, Ms. Scruggs and Ms. Suber, and learning about Mr. Tuite's sexually inappropriate remarks to Ms. Suber, Respondent sent an email to the Chair and Executive Director of Judicial Standards on December 2, 2017. Instead of informing the Commission about the sexually inappropriate remark disclosed by Ms. Suber and the personally threatening behavior towards Ms. Maywalt and Ms. Scruggs, Respondent represented to the Commission that any rumor of sexual harassment had been "debunked," that "there was not even a whiff of a complaint of a sexual or sexual harassment nature," that he wanted Mr. Tuite to return to work as usual on Monday, December 4, 2017, and that he wanted to find out about how the "nasty rumor" about Mr. Tuite had been spread. Respondent also dismissed the female law clerks' extensive complaints about Mr. Tuite's workplace misconduct and threatening behavior as concerns about "how things are handled" inside and outside of chambers.

39. Respondent lacked candor and downplayed, minimized, and mischaracterized Mr. Tuite's actions in his December 2, 2017 email to the Chair and Executive Director. Respondent did so because his conduct and judgment were influenced by his close personal friendship with and loyalty towards Mr. Tuite.

40. After speaking with Ms. Maywalt, Ms. Scruggs and Ms. Suber, Respondent also sent an email to Ms. Jabbar on December 3, 2017. In his December 3, 2017 email to Ms. Jabbar, Respondent reported that he had spoken to his law clerks and again downplayed and minimized Mr. Tuite's workplace misconduct as issues with Mr. Tuite's "management style" and some "negative events" in the office that Ms. Maywalt had experienced. At the time Respondent made such representations to AOC HR, Respondent knew that the workplace misconduct reported by the female law clerks was not related to "management issues" or "management style" and instead involved Mr. Tuite's ongoing

profanity, sexually inappropriate comments, angry and violent outbursts, bullying of Ms. Maywalt, dishonesty and lack of diligence.

41. Respondent also told Ms. Jabbar in the December 3, 2017 email that the sexual harassment rumor involving Ms. Suber had been "debunked and is not an issue" because Ms. Suber denied the "red head" comment had been made, and that while Mr. Tuite had made a comment about her "clothing" that made her uncomfortable, Mr. Tuite had apologized and the matter was resolved. At the time Respondent made the representations to Ms. Jabbar in the December 3, 2017 email, Respondent knew that Mr. Tuite's remark went beyond a comment about "clothing" and was in fact a sexually inappropriate remark, that Ms. Suber was uncomfortable about Mr. Tuite's sexually inappropriate remark to her, and that she did not accept Mr. Tuite's non-apology because it again made her uncomfortable.

42. Respondent downplayed, minimized and mischaracterized Mr. Tuite's workplace misconduct in his December 3, 2017 email to Ms. Jabbar. Respondent did so because his conduct and judgment were influenced by his close personal friendship with and loyalty towards Mr. Tuite.

43. On Monday, December 4, 2017, after Mr. Tuite went to work as usual per the instructions from Respondent, the Chief Judge of the Court of Appeals contacted Respondent regarding her concerns about the working environment in his chambers and suggested that Respondent close his chambers for the week he was gone. Respondent agreed to close his chambers for two days.

44. On the evening of Monday, December 4, 2017, Ms. Maywalt contacted AOC HR and reported in detail Mr. Tuite's workplace misconduct and Respondent's lack of response. On Tuesday, December 5, 2017, Ms. Scruggs also contacted Ms. Jabbar to report her concerns about Mr. Tuite's workplace misconduct and his close friendship with Respondent.

45. On Tuesday, December 5, 2017, after hearing from Ms. Maywalt and Ms. Scruggs about Mr. Tuite's extensive workplace misconduct and the close personal friendship between Respondent and Mr. Tuite, Ms. Jabbar drastically

changed her advice from the November 30, 2017 meeting and advised Respondent that Mr. Tuite should be placed on immediate investigatory leave pending the conclusion of an AOC HR investigation.

46. With Respondent's cooperation, AOC HR then investigated alleged workplace misconduct in his chambers, including the potential claim of unlawful sexual harassment. AOC HR could not fully evaluate the unlawful sexual harassment issue, however, because Ms. Suber declined to be interviewed based on Respondent's representations to her on December 2, 2017 that AOC HR had already concluded that she had not been sexually harassed even if the "red head" comment had been made.

47. Respondent displayed a reckless disregard for the truth, lacked candor, and willfully engaged in a pattern of downplaying the seriousness and extensive nature of Mr. Tuite's workplace misconduct to those charged with enforcing appropriate standards of professional conduct in the judicial branch.

48. Notwithstanding Respondent's knowledge of Mr. Tuite's extensive workplace misconduct, from the period from December 1, 2017 until January 5, 2018, Respondent regularly assured his close personal friend Mr. Tuite and indicated to others that his employment at the Court of Appeals would continue. On December 1, 2017 and prior to ascertaining if Mr. Tuite had made any sexually inappropriate comments to Ms. Suber, Respondent assured his friend Mr. Tuite that his job was secure. Mr. Tuite again texted Respondent on or about December 4, 2017 and stated to Respondent that he was "glad you have my back." On Tuesday, December 5, 2015, Mr. Tuite texted Respondent, to whom he referred to as "Dude," and expressed concern for his job security. Respondent texted back and again reassured his close friend: "You are not losing your job. This sucks tremendously for everyone, especially given what I expect to be an easy resolution when the smoke clears." On December 11, 2017, Respondent contacted Ms. Jabbar and informed her that he wanted Mr. Tuite to return to the office, to which Ms. Jabbar replied that Mr. Tuite "should not return to the office for any reason" until the investigation is complete. On January 4, 2018, Respondent

> also advised his chambers that he was planning for Mr. Tuite's return to work and intended to move Mr. Tuite's desk from the EA area into Ms. Scruggs' private law clerk office in the hallway.
>
> 49. As a result of Respondent's conduct and his protection of Mr. Tuite, and the resulting toxic work environment, Ms. Scruggs and Ms. Maywalt were miserable, felt unsafe and uncomfortable working in Respondent's chambers and did not trust Respondent to accurately portray their reports of workplace misconduct to others or to protect their well-being. Ms. Maywalt resigned on or about December 6, 2017, approximately eight months early. Ms. Scruggs also began to look for another job in December 2017 and resigned in January 2018 before her clerkship concluded.
>
> 50. After learning on January 2, 2018 that Ms. Scruggs was interviewing for another position and receiving advice from a judicial colleague about ensuring his female law clerks were not uncomfortable, Respondent ultimately asked Mr. Tuite to resign on January 5, 2018, which he did.

(alterations in original) (internal citations omitted).

Based on the foregoing findings of fact, the Commission made the following conclusions of law:

> **B. Violations of the Code of Judicial Conduct**
>
> 3. To preserve the integrity and independence of the judiciary, Canon 1 of the Code of Judicial Conduct imposes an affirmative duty on judges to establish, maintain, and enforce appropriate standards of conduct in the judiciary, and to personally observe such standards of conduct. The Commission's findings of fact establish that Respondent failed in these duties, violating Canon 1 of the Code of Judicial Conduct.
>
> 4. Canon 2B of the Code of Judicial Conduct provides that judges must not allow their social or other relationships to influence the judge's judicial conduct or judgment. The Commission's findings of fact establish that Respondent allowed his close personal friendship with Mr. Tuite to influence both his judicial conduct and judgment, violating Canon 2B of the Code of Judicial Conduct.

5. The Code of Judicial Conduct also imposes affirmative duties on judges to ensure the highest degree of professionalism among attorneys, their fellow judges, and any judicial branch employees or court officials subject to their direction and control. *See*, *e.g.*, Canon 3B(3) ("A judge should take or initiate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."); Canon 3A(3) ("A judge should be patient, dignified and courteous to [those] with whom the judge deals in the judge's official capacity, and should require similar conduct of lawyers, and of the judge's staff, court officials and others subject to the judge's direction and control"); Canon 3B(2) ("A judge should require the judge's staff and court officials subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge.").

6. With respect to young lawyers in particular, the Commission has also recognized that judges have "a compelling interest in maintaining the integrity and moral character of those seeking admission to practice law in North Carolina."

7. Moreover, in the North Carolina Court of Appeals, judges discharge their duties under Canon 3A(3) and Canon 3B(2) in part by requiring their law clerks to adhere to the standards of conduct set forth in the Law Clerk Code of Conduct. Among the obligations in the Law Clerk Code of Conduct are the duties to (1) "be faithful to the highest standards of his or her profession and maintain professional competence in it"; (2) "be patient, dignified, courteous, and fair to all persons with whom he or she deals in the performance of his or her duties"; and (3) "diligently discharge the responsibilities of his or her position in an efficient, fair-minded, and professional manner."

8. The Commission's findings of fact establish that Respondent failed to require that Mr. Tuite engage in patient, dignified and courteous conduct towards those with whom Mr. Tuite dealt in his official capacity, violating Canon 3A(3) of the Code of Judicial Conduct.

9. The Commission's findings of fact further establish that Respondent failed to require that Mr. Tuite observe the

standards of fidelity and diligence that apply to Respondent, violating Canon 3B(2) of the Code of Judicial Conduct.

C. Conduct Prejudicial to the Administration of Justice

10. The Commission further concludes that Respondent's violations of the Code of Judicial Conduct amount to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C. Gen. Stat. § 7 A- 376(b). *See also* Code of Judicial Conduct, Preamble ("[a] violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute.").

11. The Supreme Court first defined conduct prejudicial to the administration of justice in *In re Edens*, 290 N.C. 299 (1976) as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to the public esteem for the judicial office." The Supreme Court further explained in *Edens* that the focus is "on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers."

12. In evaluating Respondent's conduct, the Supreme Court also considers "fundamental principles of judicial decorum" rooted in the concept that ' "[t]he place of justice is an hallowed place; and therefore not only the bench, but the foot-pace and precincts and purpose thereof, ought to be preserved without scandal and corruption." The Supreme Court has also warned that "[a]t a time when the requirements of the Rule of Law subject the judiciary to intense and ever greater scrutiny by our citizens, the demands of respondent's judicial office require[ ] him to comport himself with dignity, reserve, and probity. The integrity of the office requires that its holder project nothing less than the high standards of character and rectitude citizens should expect from their judges."

13. Looking to fundamental principles of judicial decorum, the nature and frequency of Respondent's conduct and the results thereof, the Commission concludes that Respondent engaged in conduct prejudicial to the administration of justice. Respondent's conduct in contributing

> to and enabling a toxic work environment in his chambers and his conduct in downplaying, minimizing and mischaracterizing Mr. Tuite's workplace misconduct to AOC HR and the Commission not only undermines the dignity of the Court of Appeals, but negatively impacted the court's work product, court employees and· the reputation and integrity of the judiciary. Moreover, Respondent's reckless disregard for the truth, lack of candor, and willful pattern of misrepresenting or downplaying Mr. Tuite's workplace misconduct to AOC HR and the Commission also undermined the judiciary's ability to enforce appropriate standards of professional conduct in the judicial branch. Finally, Respondent objectively displayed an extraordinary blindness to the seriousness of the judiciary's efforts to ensure that all employees are treated respectfully and fairly in the workplace and caused two intelligent and respected young female law clerks to resign from Respondent's chambers. Based on the totality of the circumstances, such conduct undoubtedly brings the judicial office into disrepute and is conduct prejudicial to the administration of justice.

(alterations in original) (internal citations omitted). Based on the foregoing findings of facts and conclusions of law, the Commission unanimously recommended that respondent be censured.

When reviewing recommendations from the Commission, this Court "acts as a court of original jurisdiction, rather than in its typical capacity as an appellate court." *In re Badgett*, 362 N.C. 202, 207 (2008). The Court reviews the Commission's recommendation to determine whether the Commission's findings of fact are supported by clear and convincing evidence and whether those findings support the conclusions of law. Subsequently, the Court exercises its independent judgment in determining whether the Commission's proposed sanctions are appropriate. *Id.* The Court, however, is not bound by the Commission's findings or conclusions and may make its own findings. *Id.* at 206.

As an initial matter, respondent argues that the Commission's prosecution, rather than investigation, of this case exceeded its statutory authority and violated his due process rights to a fundamentally fair investigatory process. Pursuant to N.C.G.S. § 7A-377(a), the Commission may initiate an investigation on its own motion. If, after the investigation is completed, the Commission concludes that disciplinary proceedings should be instituted, notice and a statement of

charges must be filed. N.C.G.S. § 7A-377(a5) (2019). Even still, no judge or justice shall be recommended for public reprimand, censure, suspension, or removal unless he has been given a hearing affording due process of law. N.C.G.S. § 7A-377(a). Thus, the Commission's statutory authority is limited to investigating, hearing evidence, finding facts, and making recommendations.

To that end, respondent's due process rights are not violated simply because of the Commission's dual investigative and judicial functions. Indeed prior to and after the disciplinary proceedings, the judge or justice's employment is not disrupted. Furthermore, the Commission's investigator and special prosecutor are employees of the Commission, but not voting members, and any "alleged partiality of the Commission is cured by the final scrutiny of this adjudicatory body." *In re Nowell*, 293 N.C. 235, 244 (1977). This Court, too, confirmed that "[i]t is well settled by both federal and state court decisions that a combination of investigative and judicial functions within an agency does not violate due process. An agency which has only the power to recommend penalties is not required to establish an independent investigatory staff." *Id.* Thus, respondent's argument that the Commission violated his due process rights is without merit.

Respondent further contends that the Commission's findings of fact lack a sufficient evidentiary basis. Specifically, respondent argues that the key findings do not implicate respondent, are premised on the assumption that the Code of Judicial Conduct dictates managerial standards to which a judge or justice must comply, are conclusory mischaracterizations, or are irrelevant. Respondent does not, however, contest the validity of the findings as they relate to the working environment in his chambers. As such, the Court will not address respondent's general challenge that findings of fact 10 through 29 do not implicate respondent or amount to violations of the Code of Judicial Conduct.

Respondent, however, specifically argues that findings of fact 13, 15, 16, 25, 26 and 27 are based on conclusory and over-exaggerated statements of witnesses. These specific findings, relating to Mr. Tuite's regular use of profanity, dishonesty, and angry outbursts, are all supported by clear and convincing evidence. Indeed, all three clerks consistently complained of Mr. Tuite's profanity, lying, and deceit. Respondent verified that he witnessed respondent yelling "fuck" loud enough for everyone in his chambers to hear. Respondent also indicated that there was an issue with excessive use of profanity by Mr. Tuite in the chambers. To that end, there was no reason for the Commission panel to believe that the clerks' testimony was anything less than truthful.

Ms. Jabbar testified that she believed the law clerks' testimony and that she did not find Mr. Tuite credible because his recount of events was inconsistent, and he constantly attacked the character of his colleagues. Ms. Jabbar testified that Mr. Tuite also called the day after his interview and informed her that while he had denied an incident in his interview, after speaking with respondent, he "kind of recalled it."

Lastly, respondent contends that there is no evidentiary basis for finding that respondent misled or lied to either AOC HR or the Commission. To the contrary, the record and testimony indicates otherwise. During his initial meeting with Ms. Jabbar, respondent reported only the alleged "red head" comment. When asked if there were any other issues with Mr. Tuite outside of this alleged comment, respondent indicated that there were no further issues. Respondent made this claim after being a witness to Mr. Tuite's loud outbursts and inappropriate behavior and after both Ms. Suber and Ms. Maywalt had indicated, in private meetings with respondent, their concerns about Mr. Tuite during respondent's absences.

Additionally, on 1 December 2017, after speaking with Ms. Jabbar, respondent sent an email to the Commission Chair. The email stated that AOC HR had suggested that because the "red head" comment was "based on hearsay and there was not any formal complaint, there [was] no reason to reach out to [Ms. Suber] to get confirmation or address head on with [Mr. Tuite] as it may upset the overall working relationships without need." Ms. Jabbar, however, testified that she did not relay to respondent that the incident was not serious but that she actually suggested he reach out to Mr. Tuite and Ms. Suber to do his own investigation. Thus, after carefully reviewing the record and transcript, we conclude that the Commission's findings are supported by clear and convincing evidence, and we hereby adopt them as our own.

Respondent also argues that the Commission's conclusions of law are not supported by the evidence. We, however, agree with the Commission's conclusion that respondent's actions violated Canons 1, 2B, 3A(3), and 3B(2) of the North Carolina Code of Judicial Conduct amounting to conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376(b).

Canon 1 of the North Carolina Code of Judicial Conduct provides that "[a] judge should uphold the integrity and independence of the judiciary. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall

be preserved." The abundance of evidence establishes that respondent did not uphold these principles. Respondent casually used profanity and allowed Mr. Tuite to aggressively use profanity while in the workplace. And while use of profanity alone may not amount to a violation, such conduct, especially when directed toward employees, is unprofessional and poses great risk to the integrity of the judiciary.

The evidence shows that respondent willfully engaged in vindictive behavior. As the Commission indicated in finding of fact 11, respondent actively engaged in a group text with Mr. Tuite, Ms. Suber and Ms. Scruggs, where he exchanged inappropriate comments. During the group message, the following exchange occurred:

> **[Ms. Suber:]** Well Clark's firm just called me about a civil litigation associate interview and my concealed carry permit came in. It's been a big day for this girl.
>
> **[Respondent:]** That is great, I am assuming that those two things would go hand in hand.
>
> **[Mr. Tuite:]** Well, shit. Your dreams could come true and you could work arm to arm with lark while armed. Seriously though, take every interview.
>
> **[Mr. Tuite:]** Okay, I got this. You go to Clark's firm. Work hard for several years/decades. Get to be Clark's boss. Call him in and be like: "You're fucking done son." It's probably worth the effort.
>
> **[Respondent:]** I concur in part. Alternatively, wait until he files to run for some judicial seat. Then primary his ass.

In addition to making these remarks, respondent ostracized Mr. Cooper while he was still employed by respondent by purposely excluding him from a chambers lunch. While it is understandable for respondent to be frustrated by Mr. Cooper's decision to resign after only two months, respondent's behavior is not justified.

As a judge respondent should, at all times and in all places, uphold "the integrity and independence of the judiciary." A judge's behavior not only reflects upon the court but also sets the tone for his chambers. To that end, respondent's vindictive behavior and his failure to reprimand Mr. Tuite for engaging in similar conduct does not "ensure the integrity and independence of the judiciary." Respondent allowed Mr. Tuite to make inappropriate and unprofessional jokes about Mr. Cooper in the presence of Ms. Suber and Ms. Scruggs, without consequence. Such implied approval did, in fact, create a toxic work environment in which the other clerks testified that they feared similar mistreatment.

The evidence also shows that respondent violated his duties under Canon 1 by being dismissive of and turning a blind eye to comments and incidents that took place both within and outside of his presence. A judge cannot "establish, maintain and enforce appropriate standards of conduct" if he chooses to ignore egregious misconduct. Specifically, respondent was present for the following: (1) Mr. Tuite making inappropriate jokes about Mr. Cooper; (2) Mr. Tuite making comments about a female applicant's "fun bags"; (4) Mr. Tuite yelling "Goddamn it Chelsey. Your fucking opinion doesn't matter"; and (5) Mr. Tuite yelling "fuck" and slamming his fist on the desk with such force that he triggered a security alarm. In addition, respondent was not only present for, but participated in, a conversation with Mr. Tuite about Mr. Tuite possibly having illegitimate children from high school relations.

Respondent was also informed about Mr. Tuite's dishonesty, poor work ethic, and bullying tactics at least twice: in Ms. Suber's exit interview in August 2017 and in a meeting with Ms. Maywalt in November 2017. Still, respondent chose not to address these issues with Mr. Tuite. By failing to correct Mr. Tuite's conduct, respondent implicitly condoned it and, as a result, the conduct continued. Respondent's active participation in these events and his witnessing of demeaning events without taking corrective action amount to a violation of Canon 1 of the North Carolina Code of Judicial Conduct.

Canon 2B provides, in pertinent part, that

> [a] judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment. The judge should not lend the prestige of the judge's office to advance the private interest of others except as permitted by this Code; nor should the judge convey or permit others to convey the impression that they are in a special position to influence the judge.

Here, it is undisputed that respondent and Mr. Tuite were good friends outside of the workplace. It is also undisputed that respondent was aware of Mr. Tuite's inability to present good work product. Respondent, himself, testified that he constantly had to remind Mr. Tuite of his duties. Respondent also knew that Mr. Tuite was not cite checking—resulting in an opinion being withdrawn. Respondent informed Ms. Suber on the phone that he was aware that she was not to blame for the withdrawn opinion, yet Mr. Tuite faced no repercussion as a result of any of his failure to competently complete work assignments. According to Ms. Jabbar, throughout the investigation respondent also continued to

show a sense of concern for Mr. Tuite, yet respondent never expressed concerns about the wellbeing of the law clerks in his chambers.

Furthermore, after AOC HR became involved and respondent took the time to individually speak with all three of his law clerks, respondent continued to overlook the severity of the allegations against Mr. Tuite. To that end, respondent also attempted to minimize their concerns by relaying to AOC HR and the Commission that any issue of sexual harassment had been "debunked" and the only concerns to be addressed dealt with management style.

Additionally, throughout the investigation, respondent seemed more concerned with discounting the importance of actions that occurred while he was absent instead of understanding the effect of Mr. Tuite's behavior on his coworkers. Respondent was relieved to hear that Mr. Tuite did not make the "red head" comment, despite hearing from Ms. Suber that an equally inappropriate comment was made. Respondent then informed AOC HR that the issue was resolved when it was not.

By failing to take action in preventing future misconduct, respondent caused his staff to lose faith in his ability to be impartial when Mr. Tuite's inappropriate actions were apparent, regardless of the severity of their concerns. As such, respondent violated Canon 2B by allowing his personal relationship with Mr. Tuite to influence his conduct and judgment.

Canon 3A(3) of the North Carolina Code of Judicial Conduct provides that "[a] judge should be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in the judge's official capacity, and should require similar conduct of lawyers, and of the judge's staff, court officials and others subject to the judge's direction and control." Canon 3B(2) of the North Carolina Code of Judicial Conduct similarly provides that "[a] judge should require the judge's staff and court officials subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge."

Because many of the instances of misconduct in this case were performed by Mr. Tuite, respondent argues that he cannot be held accountable for actions of others in his chambers. However, Canons 3A(3) and 3B(2) provide otherwise. These canons specifically provide that respondent should require "dignified and courteous" behavior of his staff. Here, respondent did not uphold these standards or require similar conduct from the individuals in his chambers. And while respondent asks the Court to look past his participation in several incidents as mere "fun,"

respondent fails to understand the role his actions played in encouraging unacceptable behavior.

Respondent's vindictive behavior toward Mr. Cooper immediately before and after his resignation violates these canons. Respondent was neither courteous nor dignified, nor did he require courteous or dignified behavior from his staff. Similarly, respondent's failure to address Mr. Tuite's inappropriate comments about a female applicant, angry outbursts, and frequent use of profanity against law clerks in the chambers amount to violations of Canons 3A(3) and 3B(2).

The Court recognizes that respondent was not immediately made aware of the entirety of Mr. Tuite's misconduct in chambers. The incidents for which respondent was present, however, were sufficient to warrant corrective action with regard to Mr. Tuite. Instead, respondent continued to turn a blind eye. This shortcoming is not, as respondent contends, simply a matter of managerial style. Rather, it is a failure to recognize the gravity of Mr. Tuite's sexually explicit language and profane and suggestive language directed toward respondent's law clerks and the impact on the law clerks of such unprofessional behavior.

Respondent's final argument is that the Commission's conclusion that his conduct was "prejudicial to the administration of justice" cannot be sustained. Subsection 7A-376(b) of the North Carolina General Statutes is referenced in the Preamble to the Code of Judicial Conduct but is not a specific canon. It provides, in pertinent part:

> Upon recommendation of the Commission, the Supreme Court may issue a public reprimand, censure, suspend, or remove any judge for willful misconduct in office, willful and persistent failure to perform the judge's duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The Commission concluded that respondent's conduct was prejudicial to the administration of justice, because, among other things, he contributed to and enabled a toxic work environment in his chambers, and because his interactions with AOC Human Resources undermined the dignity of the Court of Appeals. We agree.

The Preamble to the Code of Judicial Conduct provides that "[a] violation of this Code of Judicial Conduct may be deemed conduct prejudicial to the administration of justice that brings the judicial office into disrepute." This Court explained that "wil[l]ful misconduct in office

is improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence." *In re Edens*, 290 N.C. 299, 305 (1976). Furthermore, conduct that is prejudicial to the administration of justice that brings the judicial office into disrepute is "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." *Id.* at 305. Thus, the propriety of a judge's conduct under the Judicial Code of Conduct depends on both the actual conduct and the impact such conduct might have on knowledgeable bystanders. *Id.* at 305-06.

Judges play an important role in ensuring an "independent and honorable judiciary." It is, therefore, essential that anyone who holds this title understand the magnitude of their influence. Indeed, a judge's title alone carries a presumption that the individual possesses the ability to ensure order and fairness. Here, respondent fell short of these expectations.

We find that respondent's conduct in contributing to and enabling an unprofessional work environment in his chambers and his conduct in minimizing Mr. Tuite's workplace misconduct not only undermined the dignity of the Court of Appeals but negatively impacted the work product of his clerks and ultimately the court and denigrated the reputation and integrity of the judiciary as a whole. Based on the totality of the circumstances, such conduct undoubtedly brings the judicial office into disrepute and is conduct prejudicial to the administration of justice.

Because respondent has violated several canons of the North Carolina Code of Judicial conduct and N.C.G.S. § 7A-376, we must now decide whether to accept the Commission's recommendation of censure or impose a different penalty. The Commission's recommendation is that the Court censure respondent based on a finding that he "willfully engaged in misconduct prejudicial to the administration of justice that brings the judicial office into disrepute." N.C.G.S. § 7A-374.2(1).

Censure is appropriate where the judge's willful misconduct "does not warrant the suspension of the judge from the judge's judicial duties or the removal of the judge from judicial office." N.C.G.S. § 7A-374.2. The Court finds that the Commission's findings of fact establish that respondent did, in fact, willfully engage in misconduct prejudicial to the administration of justice. However, respondent's conduct did not rise to the level of incurring suspension or removal as contemplated in other decisions of this Court.

IN RE MURPHY

[376 N.C. 219 (2020)]

The Supreme Court of North Carolina orders that respondent J. Hunter Murphy be CENSURED for conduct in violation of Canons 1, 2B, 3A(3), and 3B(2) of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute and willful misconduct in office in violation of N.C.G.S. § 7A-376.

By order of the Court in Conference, this the 15th day of December 2020.

Justice DAVIS did not participate in the consideration or decision of this case.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

IN RE R.D.

[376 N.C. 244 (2020)]

IN THE MATTER OF R.D.

No. 268A19

Filed 18 December 2020

1. Termination of Parental Rights—guardian ad litem—evidence—admissibility of report

During the disposition phase of a termination of parental rights proceeding, the trial court did not abuse its discretion by allowing the admission of the guardian ad litem's report because trial courts are allowed to consider any evidence that they deem to be relevant, reliable, and necessary without making specific findings as to admissibility during this stage of the proceeding.

2. Termination of Parental Rights—evidence—guardian ad litem report—right to confront and cross-examine guardian ad litem

During the disposition phase of a termination of parental rights proceeding, the trial court did not abuse its discretion by declining to subject the guardian ad litem, who also served as the attorney advocate, to cross-examination regarding the report she submitted because a disposition proceeding is not adversarial in nature, N.C.G.S. § 7B-1110(a) allows trial courts to consider hearsay evidence, and a potential ethical conflict existed pursuant to Rule 3.7 of the Rules of Professional Conduct.

3. Termination of Parental Rights—best interests of the child—statutory factors—findings as to each factor

The trial court did not err when it failed to make explicit findings for each statutory factor listed in N.C.G.S. § 7B-1110(a) during a termination of parental rights proceeding because trial courts are not required to make specific findings as to each statutory factor and the trial court properly considered all factors and made written findings for those factors that were relevant.

4. Termination of Parental Rights—best interests of the child—findings of fact—evidentiary support

The trial court's finding of fact during the best interest determination of a termination of parental rights proceeding that children who are adopted often face harm was not supported by competent evidence and was prejudicial, warranting remand, because of the possibility it improperly influenced the trial court's best interest determination.

Justice EARLS concurring in part and dissenting in part.

Chief Justice BEASLEY and Justice HUDSON join in this opinion concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 6 March 2019 by Judge Elizabeth Trosch in District Court, Mecklenburg County. Heard in the Supreme Court on 2 September 2020.

Thurman, Wilson, Boutwell & Galvin, P.A., by W. David Thurman and Thomas J. Thurman, for petitioner-appellant Bethany Christian Services.

Wendy C. Sotolongo, Parent Defender, by J. Lee Gilliam, Assistant Parent Defender, for respondent-appellee father.

DAVIS, Justice.

In this case, we address several issues relating to the manner in which dispositional hearings in termination of parental rights cases are conducted and the factors that a trial court may properly consider in making a determination as to whether termination is in the best interests of the juvenile. For the reasons set out below, we affirm in part and vacate and remand in part for the entry of a new dispositional order.

Factual and Procedural Background

This case involves a private termination of parental rights proceeding initiated by petitioner Bethany Christian Services (BCS), a private adoption agency, against the father (respondent) of the juvenile. The minor child "Ryan"[1] was born in October 2017 to respondent and "Brittany." Respondent and Brittany met at school in 2016 when they were 15 and 14 years of age, respectively. The two were family friends and lived in the same neighborhood. In January 2017, respondent and Brittany began a sexual relationship that lasted until March 2017.

Brittany discovered that she was pregnant in March 2017. Later that month, respondent blocked Brittany from contacting him on social media—the primary means that the two had used to communicate with each other. The two offered differing accounts in their testimony as to

1. Pseudonyms are used throughout this opinion in order to protect the identity of the minor child.

why this occurred. Brittany testified that respondent blocked her immediately after she informed him of the pregnancy, but respondent testified that he did so because "[s]he was becoming annoying."

Brittany changed schools while she was pregnant, and respondent's family moved away from Brittany's neighborhood. Respondent did not see Brittany over the summer of 2017, and, according to respondent, no discussion took place between them during that time as to whether she might be pregnant.

Brittany gave birth to Ryan in October 2017 in Mecklenburg County. The day after Ryan's birth, Brittany signed a document relinquishing her parental rights over Ryan to BCS and also signed an affidavit naming respondent as the father of Ryan. Brittany selected Jason and Demi Dowdy as the prospective adoptive parents for Ryan, and Ryan was placed with the Dowdys on 1 November 2017. Ryan has lived exclusively with the Dowdys since that time. Following Ryan's placement with the Dowdys, BCS attempted to contact respondent by sending letters to the address listed in Brittany's affidavit. However, Brittany had mistakenly written down the wrong house number when listing respondent's address, and respondent never received the letters.

Respondent testified that he was not aware of Brittany's pregnancy or the birth of Ryan until 2018. He stated that in January of 2018 he heard rumors at school that Brittany had given birth, and respondent's sister testified that she had seen a photo of Brittany with Ryan on social media. Nevertheless, respondent did not take any steps to investigate whether he might be the father of Brittany's child and did not make any attempt to contact Brittany until after he was served with BCS's termination petition several months later.

BCS filed its petition to terminate respondent's parental rights on 21 November 2017, alleging that respondent had neglected Ryan under N.C.G.S. § 7B-1111(a)(1) and had failed to establish paternity under N.C.G.S. § 7B-1111(a)(5). After several unsuccessful efforts to locate respondent both by mail and via the internet, BCS finally served respondent at his new address on 6 March 2018. After receiving the petition, respondent's mother paid for a paternity test. Upon confirming that respondent was, in fact, the father of Ryan, respondent's mother began the process of challenging BCS's custody of Ryan.

At a pretrial hearing on 30 May 2018, the trial court appointed Rhonda Hitchens—a local attorney—to serve as the guardian *ad litem* (GAL) for Ryan in the termination proceeding. The adjudication stage of the termination proceeding was held on 24 August 2018. During

the adjudication stage, the trial court dismissed the ground of neglect but found the existence of a ground for termination under N.C.G.S. § 7B-1111(a)(5) due to respondent's failure to establish paternity.

The dispositional stage of the termination proceeding was subsequently held over the course of two dates—31 October 2018 and 9 January 2019. During the dispositional hearing, the trial court directed Hitchens to take the witness stand in order to testify about the GAL's report she had prepared. The GAL's report contained summaries of interviews with twenty individuals connected with the case, an assessment of Ryan's needs and interests, and Hitchens' ultimate recommendation that respondent's parental rights not be terminated.

Respondent objected to Hitchens being called as a witness on the ground that allowing her to testify about her report would create a conflict of interest by requiring her to act as both a lawyer and witness in violation of Rule 3.7 of the North Carolina Rules of Professional Conduct.[2] In response, BCS argued that it would not be improper for Hitchens to testify and that BCS should have the right to cross-examine Hitchens about the contents of her report.

The trial court ultimately presented Hitchens with two options—either to (1) testify as a witness and withdraw as Ryan's attorney advocate; or (2) remain as his attorney advocate and submit her written report to the trial court without testifying. Hitchens chose the second option, and her report was admitted into evidence without her testimony. BCS objected to the admission of Hitchens' report on the grounds that the report presented an improper expert opinion on the ultimate issue of whether termination would be in Ryan's best interests and that it had been denied its right to cross-examine her. The trial court overruled this objection and also denied BCS's request to present an offer of proof regarding the testimony Hitchens would have given had she testified.

At the conclusion of the hearing, the trial court determined that termination of respondent's parental rights was not in Ryan's best interests. The trial court entered a written order dismissing BCS's petition to terminate parental rights on 6 March 2019. BCS appealed to this Court pursuant to N.C.G.S. § 7B-1001(a1)(1).

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2. Rule 3.7(a) provides that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client." N.C. Rev. R. Prof. Conduct 3.7(a).

Analysis

Our Juvenile Code provides for a two-step process for the termination of parental rights—an adjudication stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). At the adjudication stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence that one or more grounds for termination exist under N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(e), (f). If the trial court finds the existence of one or more grounds to terminate the respondent's parental rights, the matter proceeds to the dispositional stage where the trial court must determine whether terminating the parent's rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

"We review a trial court's adjudication 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 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984)). With regard to the trial court's assessment of a juvenile's best interests at the dispositional stage, however, we review that decision "solely for abuse of discretion." *In re A.U.D.*, 373 N.C. 3, 6 (2019). "[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." *Id.* at 6–7 (alteration in original) (quoting *In re T.L.H.*, 368 N.C. 101, 107 (2015)).

BCS raises a number of arguments on appeal, which essentially raise two primary issues. First, BCS contends that the trial court's admission of the GAL's report during the dispositional stage of the termination proceeding without allowing Hitchens to be cross-examined about the report constituted an abuse of discretion. Second, BCS asserts that the trial court's written order contained key findings of fact that lacked evidentiary support in the record. We address each argument in turn.

I. Admission of the GAL's Report Without the Opportunity for Cross-Examination

BCS initially argues that the trial court should not have admitted the GAL's report into evidence during the dispositional stage without affording its counsel the opportunity to cross-examine Hitchens about the contents of the report. In order to fully analyze this issue, it is necessary to review the legal framework governing the role of the GAL in termination of parental rights proceedings. Our Juvenile Code provides for the appointment of a GAL in a termination proceeding as follows:

> (b) If an answer or response denies any material allegation of the petition or motion, the court shall appoint a guardian ad litem for the juvenile to represent the best interests of the juvenile, unless the petition or motion was filed by the guardian ad litem pursuant to G.S. 7B-1103, or a guardian ad litem has already been appointed pursuant to G.S. 7B-601. A licensed attorney shall be appointed to assist those guardians ad litem who are not attorneys licensed to practice in North Carolina. . . .
>
> (c) In proceedings under this Article, the appointment of a guardian ad litem shall not be required except, as provided above, in cases in which an answer or response is filed denying material allegations, or as required under G.S. 7B-1101; but the court may, in its discretion, appoint a guardian ad litem for a juvenile, either before or after determining the existence of grounds for termination of parental rights, in order to assist the court in determining the best interests of the juvenile.

N.C.G.S. § 7B-1108(b)–(c) (2019).

Our Juvenile Code also states the following with respect to the GAL's duties:

> [t]he duties of the guardian ad litem program shall be 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 facilitate, when appropriate, the settlement of disputed issues; to offer evidence and examine witnesses at adjudication; to explore options with the court at the dispositional hearing; 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.G.S. § 7B-601(a) (2019).

This Court has recognized that in termination cases where a respondent-parent files an answer denying material allegations in a termination petition, "the trial court (1) must appoint a GAL for the juvenile, and (2) must appoint a licensed attorney . . . if the appointed GAL is not an

attorney." *In re C.J.C.*, 374 N.C. 42, 44 (2020). It is therefore clear that in some cases a GAL may be appointed to serve in a dual role as both the juvenile's GAL and attorney advocate. *See In re J.H.K.*, 365 N.C. 171, 175–76 (2011) ("Thus, if the GAL is an attorney, that person can perform the duties of both the GAL and the attorney advocate. . . . [The Juvenile Code] recognizes that in TPR proceedings the [GAL] attorney advocate is to perform the traditional role of a lawyer . . . ."). Moreover, subsection (c) of N.C.G.S. § 7B-1108 provides that even when the trial court is not expressly required to appoint a GAL, the trial court may still do so in its discretion "in order to assist the court in determining the best interests of the juvenile." N.C.G.S. § 7B-1108(c). This language makes clear that one of the statutorily enumerated functions of a GAL is to assist the trial court in making its best interests determination during the dispositional stage.

In light of the specific argument BCS asserts in this appeal, we must also address the evidentiary distinctions between the adjudication and dispositional stages of termination proceedings. The portion of the Juvenile Code governing the adjudication stage of termination proceedings provides, in pertinent part, that

> [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. *The rules of evidence in civil cases shall apply.* No husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights.

N.C.G.S. § 7B-1109(f) (emphasis added).

With regard to the dispositional stage, however, the General Assembly has stated the following:

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

N.C.G.S. § 7B-1110(a) (emphasis added).

These statutes make clear that during the adjudication stage of a termination proceeding, the trial court must apply the provisions of the

North Carolina Rules of Evidence that apply in all civil cases. During the dispositional stage, conversely, the trial court retains significantly more discretion in its receipt of evidence and may admit *any* evidence that it considers to be relevant, reliable, and necessary in its inquiry into the child's best interests—even if such evidence would be inadmissible under the Rules of Evidence.

* * *

[1] Applying these principles to the present case, we must first decide whether the GAL's report was admissible—that is, whether the trial court erred in its implicit determination that the report was "relevant, reliable, and necessary to determine the best interests of the juvenile." N.C.G.S. § 7B-1110(a). We agree with respondent that the trial court did not abuse its discretion in determining that the report provided by Hitchens met each of these criteria. The report contained summaries of interviews with twenty different persons having some connection with the case, an analysis of the needs of Ryan, and Hitchens' ultimate recommendation that the trial court not terminate respondent's parental rights. The report detailed the basis of Hitchens' opinion and thoroughly set out both the pros and cons of terminating respondent's parental rights. This report was therefore directly related to the trial court's task during the dispositional stage. Thus, the trial court possessed the discretion to determine that the report was, in fact, "relevant, reliable, and necessary" to determine the best interests of Ryan.

We also observe that the admission of a GAL's report at the best interests stage of a termination proceeding is a commonplace occurrence and that such reports are frequently introduced in order to aid the trial court in determining the juvenile's best interests. *See, e.g.*, *In re N.G.*, 374 N.C. 891, 905 (2020) (noting that the trial court admitted a "detailed [GAL] report" during the dispositional stage and that "[n]o objection was made and said report was received into evidence and considered by the [trial court] on the issue of best interest"); *In re A.L.L.*, 254 N.C. App. 252, 261 (2017) ("In the dispositional phase, the trial court received the report of the guardian ad litem . . . ."); *In re M.A.I.B.K.*, 184 N.C. App. 218, 221 (2007) (noting that during the best interests determination the trial court "considered a report on the child's best interests submitted by her guardian ad litem").

BCS argues, however, that the trial court was required to make explicit findings setting out *why* it found the GAL's report to be "relevant, reliable, and necessary" pursuant to N.C.G.S. § 7B-1110(a) before admitting it into evidence. This argument is unavailing. This Court has

never interpreted N.C.G.S. § 7B-1110(a) to impose such a requirement, and nothing in the statutory text indicates that the General Assembly intended that such express findings be required. By way of contrast, we note that other portions of the Juvenile Code do require explicit factual findings in certain contexts. *See*, *e.g.*, N.C.G.S. § 7B-1101 (2019) ("[T]he court *shall find* that it has jurisdiction to make a child-custody determination . . . .") (emphasis added)). The absence of any analogous language in N.C.G.S. § 7B-1110(a) demonstrates that no explicit findings are necessary when a trial court deems it appropriate to consider evidence that would otherwise be inadmissible under the Rules of Evidence.

[2] Having determined that the trial court did not abuse its discretion in admitting the GAL's report, we must next determine whether the trial court committed reversible error in declining to require that Hitchens be subject to cross-examination after her report was admitted into evidence. During the dispositional stage of the termination proceeding, the trial court initially asked Hitchens to take the witness stand to testify regarding her report. Respondent, however, objected to Hitchens being called as a witness, contending that her dual role as an attorney advocate and as a factual witness would create an impermissible ethical conflict under Rule 3.7 of the North Carolina Rules of Professional Conduct. After hearing arguments on this issue from both parties and consulting the North Carolina Rules of Professional Conduct, the trial court ultimately ruled that Hitchens "being compelled to testify or giving testimony as a witness would constitute a violation of Rule 3.7 and necessitate her withdrawal." The trial court then gave Hitchens the option either to testify and withdraw as Ryan's advocate or—alternatively—to introduce her written report without giving any testimony at all. Hitchens chose the latter option.

BCS argues that it was improperly deprived of its right to cross-examine Hitchens by the trial court's ruling. BCS asserts that a party has the absolute right to "an opportunity to fairly and fully cross-examine a witness who has testified for the adverse party." *Citizens Bank & Tr. Co. v. Reid Motor Co.*, 216 N.C. 432, 434 (1939). Because the GAL's report in this case contained relevant evidence—including interviews with persons who did not appear in court and a recommendation from Hitchens regarding Ryan's best interests—BCS contends that it should have been allowed to question her regarding the basis for her opinion and the methods she used to conduct these interviews. Similarly, BCS challenges the trial court's characterization of the ethical conflict that would exist under Rule 3.7 if Hitchens had been required to testify, contending that there is no legal authority in this state preventing a party

from compelling a material witness to testify. Finally, BCS argues that the trial court committed prejudicial error by denying its offer of proof regarding Hitchens' anticipated testimony.

In response, respondent contends that BCS was not entitled to cross-examine Hitchens as a matter of right because the dispositional stage of a termination proceeding is inherently non-adversarial in nature. Respondent further asserts that the relaxed evidentiary standards applicable to dispositional hearings under N.C.G.S. § 7B-1110(a) do not lend themselves to bright-line rules regarding the manner in which evidence may be admitted by a trial court during this stage of a termination proceeding.

As a preliminary matter, we first address BCS's contention that the trial court's ruling amounted to a deprivation of its constitutional due process right to cross-examine an opposing witness. Because BCS made no constitutional argument before the trial court, this issue is not properly before us. *See State v. Golphin*, 352 N.C. 364, 411 (2000) ("Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal."). As a result, the only issue for our determination is whether the trial court acted within its discretion by refusing to allow cross-examination of Hitchens. On these facts, we cannot say that an abuse of discretion occurred.

While it is axiomatic that cross-examination of an adverse witness is an essential right in adversarial proceedings, *see*, *e.g.*, *Brewer v. Garner*, 264 N.C. 384, 386 (1965), the dispositional stage of a termination proceeding is not adversarial. *See Stephens v. Stephens*, 213 N.C. App. 495, 503 (2011) (quoting *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 78 (1992)) (" '[T]he best interest' question is thus more inquisitorial in nature than adversarial . . . ."). Instead, the focus during the dispositional stage is entirely on ascertaining the best interests of the child by utilizing whatever evidence the trial court believes is most "relevant, reliable, and necessary." N.C.G.S. § 7B-1110(a). This statute gives the trial court broad discretion regarding the receipt of evidence in its quest to determine the best interests of the child under the particular circumstances of the case. Although this reservoir of discretion is not limitless, we are satisfied that here the trial court's ruling on this issue was within its discretion.[3]

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3. For example, we are not confronted with a scenario in which the trial court allowed the GAL to testify on direct examination for respondent but then refused to allow cross-examination by BCS. Instead, the trial court allowed the GAL's report to speak for itself.

Our conclusion is supported by the language of N.C.G.S. § 7B-1110(a) itself, which—as noted above—expressly allows the trial court to consider hearsay evidence. *See* N.C.G.S. § 7B-1110(a) ("The court may consider any evidence, including hearsay evidence . . . ."). Hearsay, by definition, is an out-of-court statement that is not subject to cross-examination. *See State v. Baymon*, 336 N.C. 748, 759 (1994) (quoting N.C.G.S. § 8C-1, Rule 801(c)). Accordingly, because the statute expressly allows the admission of evidence which inherently cannot be subject to cross-examination, our legislature has made clear that no absolute right to cross-examination exists during the dispositional stage.[4]

We deem instructive this Court's decision in *In re J.H.K.* In that case, the trial court appointed the juveniles a GAL and a separate attorney advocate shortly after DSS obtained custody of them. *J.H.K.*, 365 N.C. at 172. At the subsequent termination proceeding, the attorney advocate was present, but the juveniles' GAL was absent from the courtroom. *Id.* at 173. On appeal, the respondent-parent argued that the trial court erred by conducting the termination proceeding without the children's GAL being physically present. *Id.* We disagreed, holding that a "nonlawyer GAL volunteer is not required to be physically present at the TPR hearing." *Id.* at 178. In explaining our ruling, we emphasized the "separate in-court and out-of-court responsibilities" of the nonlawyer GAL—such as investigation and observation of the needs of the children. *Id.* at 176. We noted that "[a]lthough the GAL's presence at the TPR hearing may be preferable," nothing in the Juvenile Code explicitly requires the GAL's attendance. *Id.*

We further held that it was clear that the GAL had fulfilled her statutory duties by "regularly fil[ing] reports describing the children's needs . . . and her recommendations concerning the best interests of the children in light of her ongoing investigation of their case." *Id.* at 177. Meanwhile, the attorney advocate had, in turn, complied with her respective duties by "appear[ing] at every hearing documented in the record" and by examining witnesses and introducing the GAL's report at the termination proceeding. *Id.* Thus, we concluded that "[t]hrough the work of its team members appointed to th[e] case, the GAL program satisfied its out-of-court investigatory duties as well as its in-court representational duties." *Id.* at 178.

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4. Although BCS contends that cross-examination was particularly warranted because the GAL's report contained Hitchens' expert opinion regarding Ryan's best interests, Hitchens made clear to the trial court that she was not holding herself out as an expert witness or purporting to offer an expert opinion.

Although *In re J.H.K.* did not involve the specific issue raised by BCS in the present case, it is nevertheless consistent with our ruling today. If the GAL is not even required to be present in the courtroom at the termination proceeding, then logically there is no absolute right to cross-examine the GAL in cases where she is present but does not testify for the adverse party. *In re J.H.K.* further demonstrates that a GAL can fulfill her "out-of-court investigatory duties" simply by submitting her written report to the trial court—which is what ultimately happened here. *Id.*

Moreover, the existence of the potential for an ethical conflict pursuant to Rule 3.7 of the Rules of Professional Conduct makes the trial court's refusal to require Hitchens to testify even more reasonable. After becoming aware of the possible ethical conflict, the trial court (1) heard arguments on this issue from both parties; (2) reviewed Rule 3.7, the relevant portions of the Juvenile Code, and case law regarding the duties of the GAL; and (3) made a phone call to the North Carolina State Bar seeking guidance on this ethical issue. The trial court then offered Hitchens the option to either testify as a witness and withdraw as Ryan's advocate or submit her written report without testifying and continue to serve as Ryan's advocate. In so doing, we are satisfied that the trial court acted within its authority in attempting to resolve this issue. Accordingly, BCS's argument is overruled.

II. Best Interests Determination

BCS next makes several arguments regarding the trial court's dispositional findings of fact in its written order. Specifically, BCS contends that the trial court (1) improperly placed a burden of proof upon BCS during the dispositional stage; (2) failed to properly consider the statutory factors relevant to the best interests determination; and (3) made several material findings of fact that were unsupported by the evidence including, most notably, a finding about alleged harms associated with adoption generally.

We first address BCS's argument regarding the burden of proof during disposition. BCS argues that the trial court's order incorrectly (1) conflated the applicable burden of proof with the statement of legislative purpose set out in the Juvenile Code; and (2) suggested that BCS bore the burden of proving that respondent was not a capable parent.

In its written order, the trial court looked to the stated legislative purpose contained in the section of the Juvenile Code governing termination proceedings for guidance in making its dispositional findings. The trial court's order noted that

> [t]he court, in making its [best interests] determination, has considered the general purpose of Article 11, which is to provide judicial procedures for terminating the legal relationship between a child and the child's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.

The trial court also framed several of its dispositional findings in terms of whether or not respondent had "demonstrated an inability or unwillingness to provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child."

As noted by BCS, this language in the trial court's order is drawn directly from N.C.G.S. § 7B-1100, which sets out the underlying legislative intent with regard to the statutory scheme governing termination of parental rights proceedings. *See* N.C.G.S. § 7B-1100(1) (2019) ("The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a juvenile and the juvenile's biological or legal parents when the parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the juvenile.").

However, we do not believe that it is improper for a trial court to look to the General Assembly's intent as set out in the Juvenile Code for guidance when making its dispositional findings of fact. In fact, this Court has similarly examined statements of legislative intent contained within the Juvenile Code in reviewing orders involving the termination of a party's parental rights. *See*, *e.g.*, *In re F.S.T.Y.*, 374 N.C. 532, 540 (2020). Moreover, although it is true that the trial court's order does not recite *all* of the legislative policies contained in N.C.G.S. § 7B-1100, we are unaware of any rule that required it to do so.

BCS further contends that the trial court improperly suggested that BCS bore the burden of proof during the dispositional stage. BCS is correct that—unlike during the adjudication stage—no burden of proof should be imposed upon either party at the dispositional stage. *Compare* N.C.G.S. § 7B-1109(f) ("The burden in [adjudication] proceedings shall be upon the petitioner or movant . . . ."), *with* N.C.G.S. § 7B-1110 (containing no burden of proof requirement). *See also In re Anderson*, 151 N.C. App. 94, 96 (2002) ("There is no burden of proof on the parties at disposition."). However, our reading of the trial court's order does not reveal any indication that the trial court actually imposed a burden of proof upon BCS.

[3] BCS also argues that the trial court erred by either minimizing or ignoring altogether the five statutory factors required to be considered in the best interests analysis under N.C.G.S. § 7B-1110(a). Most notably, BCS contends that the trial court failed to sufficiently consider Ryan's high likelihood of adoption, his lack of a bond with respondent, and whether termination would aid in accomplishing Ryan's permanent plan of adoption. BCS also claims that the trial court placed too much weight on the statutory "catchall" provision under N.C.G.S. § 7B-1110(a)(6). Section 7B-1110 states, in pertinent part, as follows:

> In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a).

We have held that the five enumerated factors are not exclusive, as subsection (a)(6) expressly authorizes a trial court to rely on any other "relevant consideration" it deems pertinent to the best interests determination. *See In re A.R.A.*, 373 N.C. 190, 200 (2019) ("In addition to the statutory factors set out in N.C.G.S. § 7B-1110(a)(1)–(5), the district court considered other relevant factors, as it was permitted to do under N.C.G.S. § 7B-1110(a)(6) . . . .").

We previously rejected an argument similar to that made by BCS in *In re A.U.D.* There, the respondent-parent contended that "the trial court did not make sufficient findings regarding the factors set forth in N.C.G.S. § 7B-1110(a)" and that the trial court improperly weighed these factors by relying too heavily on the "catchall" provision under (a)(6). *A.U.D.*, 373 N.C. at 10. We disagreed, explaining that while "[i]t is clear that a trial court must *consider* all of the factors in section 7B-1110(a)," a court need not make explicit "written findings as to each factor." *Id.* Because the transcript indicated that the trial court considered each of

the five statutory factors, we held that there was no violation of N.C.G.S. § 7B-1110(a). *Id.* We further determined that it was permissible for the trial court to "consider[ ] other relevant circumstances . . . under N.C.G.S. § 7B-1110(a)(6)" in making its best interests determination—such as the circumstances surrounding the children's adoption and the respondent's recent "strides in self-improvement." *Id.* at 12. As for the respondent's argument regarding the allegedly erroneous weighing of the statutory factors, we noted that while some "evidence existed that would have supported a contrary decision . . . . this Court lacks the authority to reweigh the evidence that was before the trial court." *Id.*

Here, as in *In re A.U.D.*, we are satisfied that the trial court properly considered each of the statutory factors. Indeed, the trial court's order stated that "[t]he court has considered each of the six criteria set out in subsection 1110, and makes written findings on those factors that are relevant, placing significant weight on the sixth criteria which addresses any relevant consideration." Furthermore, to the extent that BCS is contending that the trial court improperly weighed and balanced the six factors in reaching its conclusion, such balancing is uniquely reserved to the trial court and will not be disturbed by this Court on appeal. *See In re A.U.D.*, 373 N.C. at 12 ("[T]his Court lacks the authority to reweigh the evidence that was before the trial court.").

Finally, we address BCS's various challenges to the trial court's factual findings in its written order. During the dispositional stage, we review the trial court's factual findings to determine if they are supported by competent evidence. *In re K.N.K.*, 374 N.C. 50, 57 (2020) ("The trial court's dispositional findings of fact are reviewed under a 'competent evidence' standard."). In making findings of fact, "it is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn from the testimony." *In re T.N.H.*, 372 N.C. 403, 411 (2019). Moreover, findings of fact are binding "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. at 110–11.

BCS first challenges Finding of Fact 14, which discusses Brittany's attendance at a birthday party held by respondent's sister. Finding of Fact 14 states as follows:

> 14. [Brittany] attended a birthday party in May, 2017 for Respondent-Father's sister. This was a pool party to which [Brittany] wore a bikini. [Brittany] initially denied attending the party, but acknowledged her participation when

> confronted with photographic evidence of her presence. [Brittany] was not obviously pregnant and she did not disclose her pregnancy to any member of the father's family. Respondent-Father did not attend the birthday party.

BCS asserts that this finding is incorrect because the transcript demonstrates that Brittany never denied attending the party—rather, she simply stated that she did not recall whether she had attended the party.

The transcript reveals that, when Brittany was asked whether she had "any contact or communication" with anyone in respondent's family after becoming pregnant in March 2017, Brittany responded "[n]o." When initially asked about her attendance at the May 2017 pool party, Brittany stated that she "[didn't] recall" whether or not she had attended. After being asked about the pool party again on cross-examination and after being confronted with a photograph of her at the party, Brittany admitted that she was "the person wearing a pink bikini" in the photograph. To the extent that a portion of Finding of Fact 14 contained an inaccurate recitation of the evidence, we do not deem any such inaccuracy prejudicial. Indeed, the transcript reveals that Brittany initially denied having any contact with respondent's family after becoming pregnant but later admitted attending the party for respondent's sister while pregnant.

Second, BCS challenges Findings of Fact 42, 52, and 53, which discuss the "barriers" that prevented respondent from visiting Ryan and forming a bond with him after becoming aware of his birth. These findings state, in relevant part, as follows:

> 42. . . . . Additionally, in this case, the Respondent-Father was innocent in his ignorance of the pregnancy. . . .
>
> . . . .
>
> 52. That the only reason this child does not have a strong reciprocal bond with Respondent-Father is because of barriers that were erected after his birth which the Father could not, despite his efforts, overcome.
>
> 53. Immediately after he became aware of the existence of this child, Respondent-Father expressed his desire to visit with and establish a bond with his son. He was prohibited from doing so, both by [BCS] and the Court.

BCS asserts that no "barriers" were erected to deny respondent access to Ryan because it was respondent who (1) blocked Brittany on social media; (2) failed to ever inquire about whether Brittany was

pregnant (despite knowing where she lived); and (3) heard rumors of her pregnancy in January 2018 but still did nothing to assert his parental rights until March 2018. For these same reasons, BCS argues that respondent was not "innocent in his ignorance of the pregnancy" and that he did not express a desire to visit Ryan "immediately" after becoming aware of Ryan's birth. BCS asserts that respondent knew about the pregnancy two months before service of the termination petition yet still took no action.

There was conflicting evidence in the record regarding respondent's knowledge of Brittany's pregnancy. Brittany testified that she informed respondent that she was pregnant in March 2017, but respondent denied this assertion and testified that he did not learn about the pregnancy until 2018—having first heard rumors about her pregnancy in January 2018 and receiving confirmation of her pregnancy when he was served with BCS's termination petition in March 2018. The trial court found respondent's account of these events to be credible and found Brittany's testimony "not believable"—as was its province as the trier of fact.

Moreover, the evidence of record permitted the trial court to conclude that barriers were erected after Ryan's birth that prevented respondent from bonding with Ryan. It is undisputed that Brittany relinquished her parental rights to Ryan one day after his birth and that Ryan was shortly thereafter placed with a prospective adoptive family without respondent's knowledge. Thus, the circumstances surrounding Ryan's adoption alone were enough to allow the trial court to infer that barriers existed that made it difficult—if not impossible—for him to bond with Ryan.

BCS next challenges the portions of Findings of Fact 15, 30, and 38 that discuss Brittany's "active efforts to conceal" her pregnancy from respondent. These findings provide as follows:

> 15. [Brittany's] guardians engaged in active efforts to conceal [her] pregnancy in that they withdrew her from the school she attended with Respondent-Father and sent her to a school outside of their community of residence.
>
> . . . .
>
> 30. . . . . The Respondent-Father's failure to provide an adequate standard of care for this minor child could not be willful because . . . [Brittany] and her guardians intentionally concealed her pregnancy from Respondent-Father [and] engaged in a process of planning for the child's future at the exclusion of the minor father . . . .

. . . .

> 38. A fourteen year old child, with the counsel and assistance of her legal guardians, made a decision to conceal this pregnancy from a fifteen year old father, his family and the world . . . . All of these decisions were carried out by a minor child who intentionally excluded the father of her unborn child from the process.

BCS argues that none of the actions in which Brittany engaged were motivated by an intent to conceal her pregnancy from respondent. BCS asserts that (1) her family moved Brittany to a different school to prevent her from being bullied because of her pregnancy; (2) she informed respondent of her pregnancy; (3) she posted a picture of herself with Ryan on social media; and (4) she told BCS the correct name of the baby's father. BCS asserts that the lack of communication between the two was respondent's fault, as it was respondent who knew where Brittany lived at all times but chose not to contact her.

We reject BCS's argument as we believe that these findings were likewise supported by competent evidence. Given that the trial court disbelieved Brittany's claim that she informed respondent of the pregnancy, the remaining evidence could have led a reasonable trier of fact to conclude that Brittany and her family were intentionally concealing her pregnancy from respondent. First, Brittany changed schools while pregnant. She testified that she changed schools in order to avoid being bullied or harassed, but the trial court was free to reject her testimony and to infer that her true motivation for changing schools was to avoid contact with respondent. Second, Brittany listed the wrong address for respondent on her affidavit. While this could have been a simple mistake, it also would have been permissible for the trial court to infer that this inaccuracy was intentional given the trial court's unchallenged finding that Brittany gave "inconsistent, self-serving and untruthful testimony . . . concerning a number of substantive matters." Third, as noted above, there was evidence that Brittany and her family never attempted to contact respondent after Ryan's birth, and it is uncontested that respondent was not consulted regarding the decision to relinquish Ryan for adoption.

Additionally, BCS challenges the portion of Finding of Fact 23 stating that BCS did not "engage in meaningful efforts to ascertain the proper address of the minor Respondent." BCS asserts that it asked Brittany for respondent's address and that BCS had no reason to believe that the address provided by Brittany would be inaccurate. BCS notes that it was unable to verify respondent's address through county property records

because his family did not own the residence. BCS argues that it never gave up the search for respondent, claiming that it was not until after several months of undelivered letters as well as searches conducted through the internet, social media, criminal records, and Division of Motor Vehicles records that BCS could finally locate a current address for respondent's mother, who lived in a different county. Likewise, BCS also challenges the trial court's refusal to admit into evidence BCS's affidavit of service—a record that BCS contends documented its diligent efforts to search for respondent.

Although it is true that BCS took a number of steps to attempt to locate respondent—such as sending letters to the address for respondent listed in Brittany's affidavit and searching for respondent on social media and on the internet—the trial court noted that there were several other commonsense steps that BCS could have taken to find respondent but that it did not do so. For example, BCS did not seek additional information from Brittany or her family, who were known to be acquainted with respondent's family. Nor did BCS attempt to obtain an address for respondent from the high school that he was known to attend.[5]

[4] Finally, BCS challenges the portion of Finding of Fact 57 discussing the alleged "harm" associated with adoption generally. In the trial court's oral findings at disposition, the trial court not only emphasized the "need to protect all children from the unnecessary severance of relationship[s] with biological parents" but also went on to discuss the "harm or the challenges that children who are adopted often face." This concern was also reflected in Finding of Fact 57 of the written order, which states as follows:

> 57. There is insufficient evidence that changing primary care givers and homes at fourteen months of age would be traumatic and should be considered a primary or compelling factor on best interests to terminate parental rights. A change in caregivers, routine and home must be balanced against *the harm that children who are adopted often face as they try to understand who they are*, *where*

5. We also reject BCS's argument that the trial court committed reversible error by refusing to admit the affidavit of service, which described BCS's various efforts to contact respondent via mail, the internet, and through public records searches. The trial court received extensive testimony from BCS's representative Robyn Johnson regarding BCS's efforts to contact respondent. Given the broad amount of discretion that trial courts possess in making evidentiary rulings during the dispositional stage coupled with the fact that the majority of this information was described in Johnson's testimony, we do not believe that the trial court abused its discretion by declining to admit the affidavit of service.

> *they came from, and why they were not raised by their biological parents.*

(Emphasis added). BCS argues that this finding is unsupported by the evidence and that if the finding is allowed to stand, it will signal that adoptive families are deemed by courts in this state to be inherently inferior to biological families for purposes of conducting a best interests determination.

We agree with BCS that the italicized portion of Finding of Fact 57 and the above-quoted oral findings by the trial court not only lack support in the record but can also be read as reflecting an inappropriate bias against adoption. At oral argument, counsel for respondent conceded that the trial court heard no evidence from the GAL or any other witness regarding any "harm" associated with adoption as a general proposition. Additionally, although it is true that our Juvenile Code states a preference for avoiding the dissolution of the biological parent-child relationship except when absolutely necessary, *see, e.g.*, N.C.G.S. § 7B-1100(2) (recognizing "the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents"), this does not mean that adoption is contrary to the public policy of our state or that our law deems adoptive parental relationships to be any less valuable than biological parental relationships.

As articulated elsewhere in our General Statutes, the legislature has stated that "it is in the public interest to establish a clear judicial process for adoptions, [and] to promote the integrity and finality of adoptions." N.C.G.S. § 48-1-100(a) (2019). The General Assembly has further declared "as a matter of legislative policy" that it is desirable to "advance the welfare of minors by . . . facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support." N.C.G.S. § 48-1-100(b). This Court recognized eighty years ago that

> [t]he institution of adoption is a very worthy response of the law to social needs . . . . Instances of its beneficent effect may be found in the history of men and women who have been aided to become prominent in all lines of private and public service, and in the consolation it has given to hundreds of childless homes.

Ward v. Howard, 217 N.C. 201, 208 (1940).

In response, respondent argues that even if there was no evidence in the record about harm suffered generally by adopted children, it was nevertheless permissible for the trial court to make such an inference

based on its own personal experience pursuant to the doctrine of judicial notice. We disagree.

We have held that "[a] matter is the proper subject of judicial notice only if it is 'known,' well established and authoritatively settled." *Hughes v. Vestal*, 264 N.C. 500, 506 (1965). Conversely, "[a]ny subject . . . that is open to reasonable debate is not appropriate for judicial notice." *Greer v. Greer*, 175 N.C. App. 464, 472 (2006). Here, it can hardly be said that it is "well established" or "authoritatively settled" that children who are adopted often face "harm" while growing up and attempting to understand their identity. *Hughes*, 264 N.C. at 506.

Accordingly, because no evidence existed in the record to support the trial court's finding on this issue and because the doctrine of judicial notice is inapplicable, we hold that the challenged portion of Finding of Fact 57 was erroneous. Furthermore, we deem this inappropriate finding to be prejudicial because of the possibility that it influenced the trial court's ultimate best interests determination. Although there were factors in this case suggesting that Ryan's interests were likely to be best served by the termination of respondent's parental rights—such as Ryan's close bond with his prospective adoptive parents, the extremely high likelihood of adoption, his lack of any bond with respondent, and the very young age of respondent himself—the trial court ultimately found that these factors were outweighed not only by the importance of maintaining the biological parental bond between respondent and Ryan but also by the trial court's perception of the "harm" that adopted children face simply by virtue of the fact that they are adopted.

We are therefore unable to determine whether the trial court would have reached the same result in its best interests analysis but for the consideration of this improper finding. Thus, we remand this case to the trial court for the entry of a new dispositional order. We express no opinion as to the ultimate result of the best interests determination on remand, as that decision must be made by the trial court. The trial court shall have the discretion on remand to determine whether a new dispositional hearing is necessary.[6]

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6. BCS also argues that the trial court erred in dismissing the ground of neglect during the adjudication stage. Because the trial court found that a separate ground for termination existed—i.e., respondent's failure to establish paternity—we need not address the trial court's determination regarding the ground of neglect. *See In re D.W.P.*, 373 N.C. 327, 340 (2020) ("Because there is sufficient evidence to support one ground for termination of respondent-mother's parental rights, the Court need not address the second ground for termination . . . ."); *In re E.H.P.*, 372 N.C. 388, 395 (2019) ("[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights.").

Conclusion

For the reasons set out above, we affirm in part and vacate and remand in part for the entry of a new dispositional order.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Justice EARLS concurring in part and dissenting in part.

I join the entirety of Part I of the majority opinion, which correctly resolves BCS's challenge to the trial court's admission of the GAL report. I also join Part II, except as to the majority's disposition of this appeal. In contrast to the majority, I believe there is sufficient evidence in the record to support the trial court's conclusion that terminating respondent-father's parental rights was not in the juvenile's best interests, even without the portion of the court's finding that it must consider "the harm that children who are adopted often face as they try to understand who they are, where they came from, and why they were not raised by their biological parents."[1] Accordingly, I dissent from the majority's decision to remand to the trial court for the entry of a new dispositional order and would instead affirm.

The trial court made specific findings of fact relating to all six enumerated factors provided by N.C.G.S. § 7B-1110(a) (2019). First, regarding "[t]he age of the juvenile," N.C.G.S. § 7B-1110(a)(1), the trial court found that because Ryan "is only fourteen months old . . . the establishment of a new primary care giver would not cause such a significant disruption in social and emotional well-being and development[ ] that it should preclude preservation of the relationship between this child and his father." Second, regarding "[t]he likelihood of adoption of the juvenile," N.C.G.S. § 7B-1110(a)(2), and "[w]hether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile," N.C.G.S. § 7B-1110(a)(3), the trial court found that because

1. The majority is correct that there was no expert witness testimony in this case documenting the impact of adoption on the adoptee, but I do not agree that its factual finding reflects "an inappropriate bias against adoption" on behalf of the trial court as asserted by the majority. There is a large body of academic research addressing this question. *See*, *e.g.*, David M. Brodzinsky et al., *Being Adopted: The Lifelong Search for Self* (1993) (describing seminal research on the unique stages of adoptee development); *Psychological Issues in Adoption* (David M. Brodzinsky & Jesús Palacios eds., 2005) (collecting works from psychologists engaged in adoption research, including issues of adoptive adjustments). While the existence of this body of research does not justify the trial court taking judicial notice of an adjudicative fact in this regard, it does demonstrate some basis for the trial court's concern.

"the likelihood of adoption of this Juvenile is extremely high and the Dowdy's are absolutely committed to providing a permanent home through adoption, this is one of many counter-balancing considerations made by the Court." Third, regarding the "bond between the juvenile and the parent," N.C.G.S. § 7B-1110(a)(4), the trial court determined that this factor should be given "limited weight because the Mother's act of placing the child in the custody of Petitioner twenty-eight (28) days after birth combined with no clear statutory right to visitation pending this action, resulted in a limited opportunity for Respondent-Father [to] nurture and parent his son." The trial court further found that "the only reason this child does not have a strong reciprocal bond with Respondent-Father is because of barriers that were erected after his birth which the Father could not, despite his efforts, overcome." Fourth, regarding "[t]he quality of the relationship between the juvenile and the proposed adoptive parent[s]," N.C.G.S. § 7B-1110(a)(5), the trial court found that while "[t]his child has a very strong and reciprocal bond and attachment with the proposed adoptive parents and the extended family members, and their entire circle of friends[,] . . . [t]he quality of the relationship with the prospective adoptive parents should not be the prevailing factor resulting in the deprivation of a relationship with Respondent-Father."

If the findings recounted above reflected the sum total of the trial court's dispositional findings, I might agree with the majority that a remand for further factfinding is appropriate. However, the trial court also expressly stated that, in reaching its ultimate conclusion at the dispositional stage, it was "placing significant weight on the sixth criteria which addresses any relevant consideration," referring to N.C.G.S. § 7B-1110(a)(6). Regarding this factor, the trial court made numerous findings of fact relating to "[t]he circumstances surrounding the [mother's] pregnancy and [Ryan's] birth," which tended to show that despite "fac[ing] extraordinary constraints to establishing his biological, legal[,] and personal relationship with his son," the respondent-father had "on service of the petition and learning of the existence of his son, contacted petitioner to request custody and visitation," and immediately "purchased and collected items to provide care for his son and unequivocally expressed his desire to exercise his parental rights and duties." The trial court found that the evidence presented "do[es] not also demonstrate that Respondent-Father will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of his child." Thus, in light of "the general purpose of Article 11, which is to provide judicial procedures for terminating the legal relationship between a child and the child's biological or legal parents when the parents have demonstrated that they will not provide the degree of

care which promotes the healthy and orderly physical and emotional well-being of the child," the trial court weighed the evidence against the statutorily enumerated factors and concluded that terminating respondent-father's parental rights did not serve Ryan's best interests.

The trial court's express statement that it was relying most heavily on findings related to N.C.G.S. § 7B-1110(a)(6) suggests that its consideration of the potential harms of adoption was not a basis for its ultimate conclusion. Further, absent this finding, the trial court's order bears substantial similarities to the order at issue in a recently decided case involving substantially similar facts, *In re A.U.D.*, 373 N.C. 3, 832 S.E.2d 698 (2019). In that case, we concluded that the trial court did not abuse its discretion in concluding that termination of parental rights was not in the best interests of the juveniles, reasoning that it was appropriate for the trial court to emphasize the importance of preserving ties between the children and their biological father and to consider the circumstances of the mother's relinquishment of the children which had deprived the respondent-father of an opportunity to develop a parental bond:

> Here, the trial court carefully weighed the competing goals of (1) preserving the ties between the children and their biological relatives; and (2) achieving permanence for the children as offered by their prospective adoptive family. In addition to the statutory factors set out in N.C.G.S. § 7B-1110(a)(1)–(5), the trial court also considered other relevant circumstances—as it was permitted to do under N.C.G.S. § 7B-1110(a)(6)—such as the fact that (1) [the juveniles] were relinquished to BCS solely at the behest of their mother; (2) respondent was never afforded the opportunity to parent [the juveniles] or provide for their care prior to their relinquishment; (3) upon learning of [the juveniles'] birth, respondent "proactively" attempted to establish paternity.

Id. at 12, 832 S.E.2d at 703–04. For similar reasons, I believe that the trial court's appropriate findings in this case are adequate to support its conclusion that termination of parental rights is unwarranted.

Our decision in *In re A.U.D.* reflected a recognition that "[o]ne of the stated policies of the Juvenile Code is to prevent 'the unnecessary or inappropriate separation of juveniles from their parents.' " *Id.* at 11, 832 S.E.2d at 703 (quoting N.C.G.S. § 7B-100(4) (2019)). Whatever the state of the evidence here regarding the potential impact on this child from being adopted, the trial court was entitled to conclude that because

there was "substantial evidence that Respondent-Father is willing and capable of providing the degree of care that is necessary to promote the healthy and orderly physical and emotional well-being of his son," terminating respondent-father's parental rights was "unnecessary" to achieving an outcome that served the juvenile's best interests. An unwarranted skepticism of adoption is inconsistent with our Juvenile Code, but a belief that preserving the relationship between a child and a fit parent serves that child's best interests is perfectly appropriate. Although the trial court had no specific evidence of the impact of adoption generally, the trial court was well within its discretionary authority to conclude that it served Ryan's best interests to preserve his relationship with a respondent-father who was ready and able to provide appropriate care.

Further, our decision in *In re A.U.D.* and other cases also reflect an appropriate respect for and deference to the judgment of trial courts tasked with weighing the often contradictory evidence presented during termination proceedings. As we indicated in that case, our sole task on appeal is to review the trial court's order and the underlying record to determine whether the trial court's conclusion that termination of respondent's parental rights was not in the children's best interests was either arbitrary or manifestly unsupported by reason. *See id.* at 12, 832 S.E.2d at 704; *see also In re I.N.C.*, 374 N.C. 542, 550, 843 S.E.2d 214, 220 (2020) ("[T]he responsibility for weighing the relevant statutory criteria delineated in N.C.G.S. § 7B-1110(a) lies with the trial court, which 'is permitted to give greater weight to other factors,' rather than with this Court.") (quoting *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 66 (2019)).

In the present case, it does not appear that the trial court's conclusion that termination of parental rights was not in Ryan's best interests rested upon its unsupported factual finding regarding the impact of adoption, nor was its ultimate conclusion "arbitrary" or "manifestly unsupported by reason" given the trial court's other findings at the dispositional stage of the proceeding. Upon close review of the trial court's order and the record, I cannot agree with the majority that the trial court's finding regarding the harms of adoption was so central to its determination that respondent-father's parental rights should not be terminated as to permit us to disturb the trial court's reasoned judgment.

Therefore, I respectfully dissent from the majority's decision to remand to the trial court for the entry of a new dispositional order.

Chief Justice BEASLEY and Justice HUDSON join in this opinion concurring in part and dissenting in part.

IN RE W.K.

[376 N.C. 269 (2020)]

IN THE MATTER OF W.K. AND N.K.

No. 458A19

Filed 18 December 2020

1. Termination of Parental Rights—competency of parent—guardian ad litem—Rule 17—duties of guardian ad litem

The trial court did not abuse its discretion by terminating respondent-father's parental rights where the performance of respondent's guardian ad litem was legally sufficient. There was no evidence that the guardian ad litem failed to meet or interact with respondent and there was no evidence of actions the guardian ad litem could have taken which would have increased the probability of a favorable ruling for respondent.

2. Termination of Parental Rights—grounds for termination—neglect—findings—evidentiary support

The trial court's unchallenged findings of fact were sufficient to support termination of respondent-father's parental rights on the ground of neglect given respondent's extensive history of substance abuse, failure to follow his case plan, and his lack of contact with his children over several years, and any of the challenged findings that were not supported by evidence had no impact on the trial court's ultimate determination that a ground for termination existed.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 12 September 2019 by Judge Christine Underwood, in District Court, Alexander County. Heard in the Supreme Court on 13 October 2020.

Thomas R. Young for petitioner-appellee Alexander County Department of Social Services.

Elisabeth C. Kelly for appellee Guardian ad Litem.

Kathleen M. Joyce for respondent-appellant father.

MORGAN, Justice.

In this matter, respondent-father appeals from the trial court's orders terminating respondent-father's parental rights to his biological children,

"Wesley" and "Natasha."[1] Respondent-father's primary challenge to the termination orders is that his guardian *ad litem* (GAL), appointed pursuant to Rule 17 of the North Carolina Rules of Civil Procedure and N.C.G.S. § 7B-1101.1, did not participate sufficiently to satisfy the statutory requirements of his role and, thus, that the trial court abused its discretion in advancing the adjudication and disposition proceedings which ultimately resulted in the termination of respondent-father's parental rights. *See* N.C.G.S. § 1A-1, Rule 17 (2019); N.C.G.S. § 7B-1101.1 (2019). We disagree and therefore affirm the trial court's orders.

Factual Background and Procedural History

Wesley and Natasha each tested positive for the presence of controlled substances at birth. In juvenile petitions filed by the Alexander County Department of Social Services (DSS) on 3 March 2016, the children's mother was alleged to have "a sustained addiction to controlled substances which ha[d] impaired her ability to provide appropriate care" for Wesley and Natasha. Respondent-father was not living with the mother and the children, but he was named in the petition as the father of Wesley and Natasha. Wesley and Natasha were adjudicated to be neglected juveniles in April 2016 and placed in the custody of DSS. Following a review hearing on 12 January 2017, the trial court entered an order on 2 February 2017 relieving DSS of reunification efforts and establishing adoption as the sole plan. On 10 October 2017, DSS filed motions to terminate the parental rights of respondent-father and the mother, alleging the grounds of neglect and failure to make reasonable progress to correct the conditions which led to removal of the juveniles. *See* N.C.G.S. § 7B-1111(a)(1)–(2) (2019). Following a 29 March 2018 hearing, the trial court entered orders on 10 May 2018 terminating respondent-father's and the mother's parental rights after adjudicating the existence of both grounds alleged in the motions for termination. Both parents filed notices of appeal.[2] At that stage, respondent-father's sole appellate issue was that the trial court erroneously deprived him of his right to be represented by counsel at the termination hearing. Upon review, the Court of Appeals agreed and vacated those portions of the orders terminating respondent-father's parental rights to the juveniles and remanded for a new hearing on the motions to terminate

1. The minor children will be referred to throughout this opinion as Wesley and Natasha, which are pseudonyms used to protect their identities and for ease of reading.

2. The children's mother is not a party to this appeal.

respondent-father's parental rights. *In re K.S.K.*, No. COA18-814, 2019 WL 1472981 (N.C. Ct. App. Apr. 2, 2019) (unpublished).[3]

On remand, respondent-father was appointed new counsel, and the trial court made the following findings:

> Respondent has previously admitted to being diagnosed with bi[-]polar disorder, depression, and schizophrenia. He previously received special education classes. He received a psychiatric evaluation on October 17, 2017, in which he admitted having auditory hallucinations in the past. He receives disability for psychiatric issues, and has an alternate payee. His intellectual function is well below normal. He has poor insight and judgment. He is a poor historian. He had hydrocephalus as a child. He did not graduate high school. He has previously had his IQ evaluated and was placed on the scale at 71. He has difficulty with information processing skills. A Rule 17 hearing was held in October 2017. Respondent presents today in court with a blank and confused look on his face. On December 17, 2009 he received a diagnosis of schizophrenia and mental retardation[.]

Accordingly, respondent-father was appointed a GAL pursuant to Rule 17. N.C.G.S. § 1A-1, Rule 17(b)(2) ("In actions or special proceedings when any of the defendants are . . . incompetent persons, . . . the court in which said action or special proceeding is pending . . . may appoint some discreet person to act as guardian ad litem, to defend in behalf of such . . . incompetent persons . . . ."). Thereafter, a termination hearing was held in July and August 2019.

Prior to the termination hearing, respondent-father met with both his counsel and his Rule 17-appointed GAL, Edward Hedrick, both of whom jointly discussed the case with respondent-father. At the 25 July 2019 hearing, respondent-father's counsel reported to the trial court that respondent-father wanted his counsel to withdraw because respondent-father did not believe his counsel was working on his behalf. The Rule 17 GAL was asked for any thoughts, and he expressed that he had none at that moment. The trial court denied counsel's motion to withdraw. Testimony from a DSS social worker was received during which counsel

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3. Wesley and Natasha's half-sibling, "K.," was the first named party in the previous appeal but is not a subject of this appeal.

for respondent-father objected and then moved for and received a continuance to review pertinent records. Respondent-father's Rule 17 GAL was not directly consulted in regard to the motion to continue, but he had joined with respondent-father's counsel in making two objections to the evidence, and he also assisted in identifying a date for the new hearing.

On 15 August 2019 when the termination hearing resumed, respondent-father did not appear. Respondent-father's GAL was silent at this hearing but did confer with respondent-father's counsel. Counsel for respondent-father moved to continue the matter, which was denied. Respondent-father's counsel again moved for a continuance at the close of DSS's evidence. The trial court denied the second motion to continue. No evidence was presented on respondent-father's behalf. The trial court proceeded to the disposition stage and again denied a motion to continue by counsel for respondent-father. Orders terminating respondent-father's parental rights on both grounds were entered on 12 September 2019. Respondent-father's direct appeal is now before our Court.[4]

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4. Respondent-father's notice of appeal states that he is appealing from "the Order Terminating Parental Rights that was filed on August 15, 2019." The termination hearing concluded on 15 August 2019, and the trial court stated that termination was in the best interests of the juveniles and provided written findings to counsel on that date. The trial court subsequently filed two orders terminating respondent-father's parental rights on 12 September 2019. The notice of appeal thus does not properly designate the orders from which respondent-father appeals.

Rule 3(d) of the North Carolina Rules of Appellate Procedure provides that a notice of appeal "shall designate the judgment or order from which appeal is taken . . . ." N.C. R. App. P. 3(d). "Compliance with the requirements for entry of notice of appeal is jurisdictional." *State v. Oates*, 366 N.C. 264, 266, 732 S.E.2d 571, 573 (2012) (citing *Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co.*, 362 N.C. 191, 197–98, 657 S.E.2d 361, 365 (2008)). "As such, 'the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken.' " *Sellers v. Ochs*, 180 N.C. App. 332, 334, 638 S.E.2d 1, 2–3 (2006) (citation omitted). An exception exists where "a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake." *Evans v. Evans*, 169 N.C. App. 358, 363, 610 S.E.2d 264, 269 (2005) (citation omitted).

In this matter, DSS and the children's guardian *ad litem* have fully participated in the appeal, do not challenge this Court's jurisdiction, and do not appear to have been misled by the mistake. Respondent-father's inclusion of the correct lower-court numbers and his characterization of the order at issue as terminating his parental rights make sufficiently clear his intent to appeal the orders entered on 12 September 2019, and we thus address the merits of respondent-father's appeal.

Analysis

In his appeal before this Court, respondent-father's first argument is that his Rule 17 GAL did not appropriately represent him. Respondent-father and DSS agree that this question is a matter of discretion for the trial court. "An '[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) (alteration in original).

In his second argument, respondent-father challenges several of the trial court's findings of fact as unsupported by the evidence produced during the adjudication stage. Because a finding of only one ground is necessary to support a termination of parental rights, *see In re T.N.H.*, 372 N.C. 403, 413, 831 S.E.2d 54, 62 (2019), we only address respondent-father's argument regarding alleged error in the trial court's ultimate finding as to the existence of the basis for termination of neglect. *See* N.C.G.S. § 7B-1111(a)(1). We review

> trial court orders in cases in which a party seeks to have a parent's parental rights in a child terminated by determining whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the trial court's conclusions of law. 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 B.O.A., 372 N.C. 372, 379, 831 S.E.2d 305, 310 (2019) (citations omitted).

Here we hold that the ground of neglect was so supported. Grounds exist to terminate parental rights when "[t]he parent has . . . neglected the juvenile . . . within the meaning of G.S. 7B-101." N.C.G.S. § 7B-1111(a)(1). A neglected juvenile is defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare . . . ." N.C.G.S. § 7B-101(15) (2019). When termination of parental rights is based on neglect, "if the child has been separated from the parent for a long period of time, there must be a showing of . . . a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708,

713–15, 319 S.E.2d 227, 231–32 (1984)).[5] "When determining whether such future neglect is likely, the district court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing." *In re Z.V.A.*, 373 N.C. 207, 212, 835 S.E.2d 425, 430 (2019) (citing *Ballard*, 311 N.C. at 715, 319 S.E.2d at 232).

I. Sufficiency of performance by respondent-father's Rule 17 GAL

[1] Respondent-father's first contention is that the trial court abused its discretion when it proceeded through the adjudication and disposition hearings without the active participation of respondent-father's Rule 17 GAL. We disagree with respondent-father's characterization of his GAL's performance.

Under Rule 17(e),

> [a]ny guardian ad litem appointed for any party pursuant to any of the provisions of this rule shall file and serve such pleadings as may be required within the times specified by these rules, unless extension of time is obtained. After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party so represented as effectually and in the same manner as if said party had been under no legal disability, had been ascertained and in being, and had been present in court after legal notice in the action in which such final judgment, order or decree is entered.

N.C.G.S. § 1A-1, Rule 17(e); *see also In re T.L.H.*, 368 N.C. 101, 106, 772 S.E.2d 451, 454 (2015). Appointed counsel and an appointed Rule 17 GAL serve different roles.

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5. The Court in *In re Ballard* held that an adjudication of past neglect is admissible in subsequent proceedings to terminate parental rights, but is not, standing alone, enough to prove that a ground exists to terminate parental rights on the basis of neglect. 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984). The Court in *In re Ballard* did not suggest that a showing of past neglect is necessary in order to terminate parental rights in every case. Indeed, N.C.G.S. § 7B-1111(a)(1) does not require a showing of past neglect if the petitioner can show current neglect as defined in N.C.G.S. § 7B-101(15). To the extent other cases have relied upon *In re D.L.W.* as creating such a requirement, we disavow such an interpretation.

> The parent's counsel shall not be appointed to serve as the guardian ad litem and the guardian ad litem shall not act as the parent's attorney. Communications between the guardian ad litem appointed under this section and the parent and between the guardian ad litem and the parent's counsel shall be privileged and confidential to the same extent that communications between the parent and the parent's counsel are privileged and confidential.

N.C.G.S. § 7B-1101.1(d).

While acknowledging that Rule 17 and N.C.G.S. § 7B-1101.1 do not specify exact duties of a GAL appointed under those provisions, respondent-father contends that the trial court abused its discretion by proceeding to judgment on these circumstances, asserting that Rule 17 permits a trial court to proceed against a party only after a GAL performs his or her necessary duties. N.C.G.S. § 1A-1, Rule 17(e) ("After the appointment of a guardian ad litem under any provision of this rule and after the service and filing of such pleadings as may be required by such guardian ad litem, the court may proceed to final judgment, order or decree against any party [represented thereby] . . . .").

Respondent-father asserts that the performance of his Rule 17 GAL was insufficient in that (1) he could not immediately refer to his GAL by name during the July 2019 hearing and (2) the Rule 17 GAL spoke on the record only five times during the July 2019 hearing and did not speak on the record at the August 2019 hearing. In regard to the first assertion, given respondent-father's mental health status and the pressure which the hearing would present for any respondent, we cannot infer from respondent-father's query in reference to the Rule 17 GAL asking "what's your name?", standing alone, that the Rule 17 GAL had failed to fulfill his statutory duties. Respondent-father cites no evidence that respondent-father's question indicated that the GAL had not met with respondent-father or that the Rule 17 GAL had failed to appropriately interact with and adequately represent respondent-father's interests during the termination-of-parental-rights process. As to the Rule 17 GAL's participation during the August 2019 hearing, respondent-father now contends that the Rule 17 GAL could have been more active by making statements in support of respondent-father's counsel's motion for a continuance and could have "worked with" respondent-father's counsel to present evidence in respondent-father's favor at the August 2019 hearing after the motion for a continuance was denied.

We disagree given that respondent-father has not identified any actions his Rule 17 GAL could have taken that would have improved his chances to obtain a decision in his favor, has not shown the Rule 17 GAL did not guard his due-process rights, and has not shown his Rule 17 GAL did not otherwise adequately assist him in executing his legal rights. It is well-established that "we will not presume error from a silent record." *State v. Bond*, 345 N.C. 1, 26, 478 S.E.2d 163, 176 (1996); *see also Wall v. Timberlake*, 272 N.C. 731, 733, 158 S.E.2d 780, 782 (1968) ("The appellate courts approve when the evidence is sufficient to warrant the findings and when error of law does not appear on the face of the record."). For example, there is no evidence of what, if anything, the Rule 17 GAL could have offered in support of respondent-father's arguments to the trial court regarding the potential replacement of respondent-father's trial counsel. Similarly, respondent-father argues his GAL should have addressed the trial court in support of his counsel's multiple motions to continue, but there is no evidence that the Rule 17 GAL could have offered anything beyond repeating counsel's arguments. Respondent-father contends his Rule 17 GAL could have worked with his counsel to present evidence favorable to him, but respondent-father does not show his GAL had any such evidence. Moreover, the record establishes that the evidence needed by respondent-father's counsel could only come from respondent-father, not from his GAL.

Respondent-father's arguments are founded on unwarranted assumptions that presume error where none is shown on the record. *Bond*, 345 N.C. at 26, 478 S.E.2d at 176; *see also Wall*, 272 N.C. at 733, 158 S.E.2d at 782. We therefore reject respondent-father's first appellate argument because he has failed to show any reversible error by his Rule 17 GAL in the execution of his role in respondent-father's case.

II. Findings of Fact 9, 32, 38, and 39

[2] Respondent-father next asserts that portions of Finding of Fact 9 (respondent-father was appropriately represented by a Rule 17 GAL) and Finding of Fact 32 (respondent-father received a high-school diploma or GED, and respondent-father made poor financial choices in spending disability payments on drugs), and the entirety of Finding of Fact 38 (the ultimate finding of fact of the existence of the ground for termination of neglect) and Finding of Fact 39 (the ultimate finding of fact of the existence of the ground for termination of failure to make reasonable progress) were not supported by clear and convincing evidence. We affirm the trial court's termination orders on the basis of its finding that the statutory ground for termination of neglect existed, having determined that any errors in the challenged underlying findings

of fact are not necessary to the trial court's ultimate finding regarding neglect.[6] Accordingly, we do not consider respondent-father's challenge to Finding of Fact 39.

Findings of fact used to support the termination of a parent's parental rights must be proven by "clear and convincing evidence." N.C.G.S. § 7B-1111(b). This Court has defined this standard as "greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." *In re Montgomery*, 311 N.C. 101, 109–10, 316 S.E.2d 246, 252 (1984). As explained above, Finding of Fact 9—that the Rule 17 GAL provided appropriate representation—is supported by clear and convincing evidence here given the facts and circumstances as previously discussed.

As to the challenged portion of Finding of Fact 32 that respondent-father received "either a diploma or a GED," we agree with respondent-father that the documentary evidence before the trial court indicated that while respondent-father sometimes self-reported that he had graduated from high school or had received his GED, respondent-father actually finished high school with either a "certificate of completion" or a "certificate of attendance," designations given to students in an Exceptional Child Program. However, respondent-father does not explain how this relatively minor error in the characterization of respondent-father's educational history would have had any impact on the trial court's ultimate findings that grounds existed to terminate respondent-father's parental rights, and we likewise perceive none.

In regard to the portion of Finding of Fact 32[7] which states that respondent-father "makes poor choices with the financial resources that are made available to him [and w]ith his disability payments, aside from taking care of his personal needs, [respondent-father] purchases a large amount of marijuana and some amounts of cocaine," respondent-father acknowledges that evidence presented at the hearing did indicate his use of marijuana and cocaine, but respondent-father contends that no evidence was presented in the trial court revealing how

6. In light of our holding regarding neglect, we do not address respondent-father's argument regarding the trial court's ultimate finding regarding the existence of the ground for termination of failure to make reasonable progress in correcting the conditions that led to the removal of the children. *See* N.C.G.S. § 7B-1111(a)(2) (2019).

7. A separate order was entered for each child, which are virtually identical. For ease of reading, we quote from the order as to Wesley.

respondent-father may have paid for the illegal controlled substances. The trial court appears to have made an inference based upon such evidence that respondent-father, having no other apparent source of income beyond his disability payments and having admitted to having used the aforementioned controlled substances, must have paid for those controlled substances with the funds he received for his disability. To the extent that this portion of Finding of Fact 32 is unsupported or represents an unsupported inference, it is not necessary or relevant to the trial court's ultimate finding of the existence of neglect as a basis for termination of respondent-father's parental rights.

As noted above, Wesley and Natasha were adjudicated to be neglected juveniles in April 2016. In order to correct the conditions that led to the children's neglect adjudication and to prevent future instances of neglect, respondent-father was ordered to: (1) complete a Comprehensive Clinical Assessment and comply with all recommendations; (2) complete a domestic violence evaluation and comply with all recommendations; (3) submit to random drug screens; (4) not use or possess alcohol, illegal controlled substances, or drug paraphernalia; (5) use all medications in the amount and manner prescribed; (6) not associate with known substance abusers; (7) not engage in acts of domestic violence; (8) complete parenting classes and demonstrate skills learned during interactions with the juveniles; (9) submit to inpatient substance abuse treatment; (10) refrain from incurring additional criminal charges; and (11) complete a sexual abuse prevention services assessment and follow all recommendations. However, the unchallenged adjudicatory findings of fact establish that respondent-father (1) entered into a case plan to address issues related to those which led to the removal of the children and the potential for future additional neglect of the children; (2) had a long and serious history of substance abuse involving both marijuana and cocaine; (3) never followed the recommendations of his substance abuse assessments and had not taken serious attempts to achieve sobriety; (4) admitted to continuing to use marijuana, had continued to test positive for that substance, and had repeatedly refused to complete drug screens; (5) failed to complete parenting classes; (6) had no contact with his children in years, including his failure to send cards or gifts despite being able to do so; (7) never procured reliable transportation or availed himself of transportation assistance offered to him; (8) never demonstrated that he had obtained and maintained an appropriate home and refused to allow the social worker to visit the premises; (9) continued to accumulate serious criminal charges including various drug-related offenses and four charges of sex offense with a child by an adult; and (10) had been largely unavailable to his social worker. Based

on respondent-father's failure to follow his case plan and the trial court's orders and his continued abuse of controlled substances, the trial court found that there was a likelihood the children would be neglected if they were returned to his care.

These findings of fact, *inter alia*, provide support for the trial court's ultimate finding of the existence of the ground for termination of neglect. Respondent-father has not challenged the trial court's conclusion that termination of his parental rights was in the children's best interests, and we thus affirm the trial court's orders.

AFFIRMED.

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