381 N.C.—No. 2 **Pages 287-498**

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AUGUST 30, 2022

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 17 JUNE 2022

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the grounds in N.C.G.S. § 7B-1111(a)(1) or (a)(2), and the allegation in the motion referencing N.C.G.S. § 7B-1111(a)(7) with regard to the children's mother could not provide notice that respondent's parental rights were subject to termination on that ground. **In re D.R.J., 381.**

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SCHEDULE FOR HEARING APPEALS DURING 2022

NORTH CAROLINA SUPREME COURT

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

January 5, 6
February 14, 15, 16, 17
March 21, 22, 23, 24
May 9, 10, 11, 23, 24, 25, 26
August 29, 30, 31
September 1, 19, 20, 21, 22
October 3, 4, 5, 6

BARTLEY v. CITY OF HIGH POINT

[381 N.C. 287, 2022-NCSC-63]

BRUCE ALLEN BARTLEY
v.
CITY OF HIGH POINT AND MATT BLACKMAN IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER WITH THE CITY OF HIGH POINT, AND INDIVIDUALLY

No. 359A20

Filed 17 June 2022

1. Appeal and Error—interlocutory order—substantial right—denial of summary judgment—assertion of public official immunity

Defendant police officer was entitled to appellate review of an order denying his motion for summary judgment where, although the order was interlocutory, the denial affected a substantial right because defendant asserted the defense of public official immunity.

2. Immunity—public official immunity—police officer—individual capacity—malice—summary judgment not appropriate

Where plaintiff, in asserting civil tort claims against a police officer in his individual capacity, forecast sufficient evidence to raise genuine issues of material fact regarding whether the officer acted with malice—including whether he used unnecessary and excessive force—when he arrested plaintiff for resisting an officer, the officer was not entitled to summary judgment based on the defense of public official immunity. Evidence that the plainclothes officer acted contrary to his duty and with intent to injure plaintiff included plaintiff's claims that the officer "body slammed" him against the trunk of his car; that the officer refused to loosen the handcuffs, which were tight enough to leave marks on plaintiff's wrists; and that the officer suggested to plaintiff that if he had done as he was initially told, then he would not have been handcuffed in front of his neighbors.

Justice BERGER dissenting.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 272 N.C. App. 224 (2020), affirming a trial court order partially denying defendant's motion for summary judgment entered on 21 October 2019 by Judge Eric C. Morgan in Superior Court, Guilford County. Heard in the Supreme Court on 23 March 2022.

The Deuterman Law Group, by Seth R. Cohen, for plaintiff-appellee.

Poyner Spruill LLP, by David L. Woodard and Brett A. Carpenter, for defendant-appellant.

EARLS, Justice.

¶ 1 The sole question we consider in this appeal is whether the Court of Appeals erred in affirming the trial court's denial of Defendant Officer Matt Blackman's (Officer Blackman) motion for summary judgment with respect to Plaintiff Bruce Bartley's (Mr. Bartley) claims against him in his individual capacity based upon the defense of public official immunity, concluding that genuine issues of material fact exist as to whether Officer Blackman acted with malice when he arrested Mr. Bartley for unlawfully resisting, delaying, or obstructing a public officer in discharging or attempting to discharge a public duty in violation of N.C.G.S. § 14-223. We hold that when viewing the evidence in the light most favorable to Mr. Bartley, genuine issues of material fact do exist as to whether Officer Blackman acted with malice in the performance of his duties when he allegedly used excessive force in arresting Mr. Bartley. Therefore, Officer Blackman is not entitled to summary judgment based upon the defense of public official immunity. We affirm the Court of Appeals' affirmance of the trial court's order.

I. Background

¶ 2 Mr. Bartley was driving to his home in the afternoon on 23 August 2017 when he crossed a double yellow line to pass the pickup truck that was traveling on Old Mill Road directly in front of him. Mr. Bartley testified in his deposition that he believed passing the slow-moving truck on a double yellow line was legal because the car was traveling at a low rate of speed and impeding traffic. Officer Blackman, a police officer with the City of High Point, testified in his deposition that he was traveling behind Mr. Bartley in an unmarked patrol car when he observed Mr. Bartley pass the truck over the double yellow line. Officer Blackman testified that at that point he activated his blue strobe lights, air horn, and siren, and began catching up to Mr. Bartley's car. Mr. Bartley testified that he did not see anyone behind him when he looked in the rearview mirror, that he did not see blue lights flashing, and that he did not hear a siren or air horn as he proceeded in the direction of his home.

¶ 3 When Mr. Bartley eventually reached his driveway, he parked, got out of the car, and walked toward the back of his car to retrieve his pet cat. At that moment, he heard someone, whom he identified as a male

dressed in plainclothes, twice order him back inside his car. While Officer Blackman testified that he was wearing his departmental issued handgun on his right hip, handcuffs, and an additional ammunition magazine on his left side, that he was carrying his department issued radio in his left hand, and that his badge was on his belt and visible from the front, it is uncontested that Officer Blackman was not dressed in his police uniform and that he did not immediately identify himself as a police officer when he approached Mr. Bartley's driveway and issued commands. Mr. Bartley testified that because he had no reason to know that the person giving him a command was a police officer, he thought that he had done nothing wrong, and suspected that perhaps Officer Blackman was at the wrong address, Mr. Bartley told Officer Blackman that he was on private property and that he was not going to get back into his car.

¶ 4 Officer Blackman testified that after Mr. Bartley twice ignored his command, Officer Blackman used his hand radio to report the traffic stop to law enforcement communications. He gave a description of his location, Mr. Bartley, and Mr. Bartley's vehicle. Officer Blackman further testified that he requested backup because he believed that there was an officer safety issue based on Mr. Bartley's response to his command to get back into his vehicle "in the face of a traffic stop." Mr. Bartley testified that when he turned his back on Officer Blackman after telling Officer Blackman, who from Mr. Bartley's perspective, was an unidentified trespasser, that he was on private property and that he would not get back into his car, "the next thing" [Mr. Bartley] knew, he was "body slammed" against the trunk of his vehicle, handcuffed, and told he was being detained.

¶ 5 Mr. Bartley testified repeatedly that "[Officer Blackman] slammed me against the back trunk lid of my vehicle and handcuffed me." Officer Blackman testified that he put Mr. Bartley in handcuffs because (1) Mr. Bartley ignored his commands and told him that he was on private property, which Officer Blackman believed to create a safety issue because he had no way of knowing Mr. Bartley's intentions, and (2) Officer Blackman believed that Mr. Bartley's refusal to comply with Officer Blackman's commands to get back in the car constituted probable cause to charge Mr. Bartley with resisting, delaying, or obstructing a public officer. Officer Blackman denied that he body slammed and tightly handcuffed Mr. Bartley when he carried out the arrest.

¶ 6 Mr. Bartley testified that following his arrest, he remained in handcuffs in his driveway in full view of his neighbors for 20–25 minutes even after he was patted down by Officer Blackman and even though a backup officer had been called to the scene. Mr. Bartley further stated

that he asked Officer Blackman to loosen the handcuffs because they were too tight and were hurting his wrists, but Officer Blackman refused and insisted that if Mr. Bartley had done as he was initially told, then he would not have been in this situation. Mr. Bartley claims that the forcefully applied handcuffs left red marks and bruises on his wrists, which he photographed on the day of the incident.

¶ 7 Mr. Bartley was charged with violating N.C.G.S. § 14-233 (resisting, delaying, and obstructing a public officer) for exiting his vehicle and refusing to obey commands.[1] He also was cited for passing another vehicle in a prohibited passing zone over a double yellow line pursuant to N.C.G.S. § 20-146(a). Mr. Bartley hired an attorney who advised him to take a driving class and complete twenty hours of community service, both of which he did. It is uncontested that the charges against Mr. Bartley were dismissed.

¶ 8 On 20 December 2018, Mr. Bartley filed a civil suit against Officer Blackman, in both his official and individual capacities; and against the City of High Point; for malicious prosecution, false imprisonment/arrest, and assault and battery. Defendants answered the complaint on 25 January 2019, asserting the defenses of governmental and public official immunity, among others. In his complaint, Mr. Bartley alleged that he was forcibly thrown against the trunk of his car, handcuffed, and charged with resisting an officer in the driveway of his residence after passing a slow-moving vehicle on Old Mill Road and being followed by Officer Blackman, a plain-clothes High Point police detective driving an unmarked vehicle.

¶ 9 On 19 September 2019, defendants filed a general motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure on the grounds that there was no genuine issue as to any material fact and that defendants were entitled to judgment as a matter of law. On 21 October 2019, the trial court dismissed with prejudice Mr. Bartley's claims against the City of High Point and Officer Blackman in his official capacity on the ground that sovereign immunity barred those claims. The trial court denied defendants' summary judgment motion as to the claims against Officer Blackman in his individual capacity "finding that there are genuine issues of material fact as to these claims that preclude summary judgment as a matter of law." Officer Blackman

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1. The dissent asserts that "[i]t is undisputed that Officer Blackman had probable cause to arrest Bartley." 2022-NCSC-63, ¶ 46. However, that is disputed. Among his other claims, Mr. Bartley sued Officer Blackman for false arrest whereby he challenges the lawfulness of his detainment. The issue of whether Officer Blackman had probable cause to arrest Mr. Bartley for violating N.C.G.S. § 14-223 is not before us.

appealed from the order partially denying his motion for summary judgment as to the claims against him in his individual capacity.

II. Court of Appeals Opinion

¶ 10 On appeal, Officer Blackman argued that the trial court erred in denying his motion for summary judgment based upon the defense of public official immunity. He also asked the Court of Appeals to address the merits of the claims against him. On 7 July 2020, a divided panel of the Court of Appeals affirmed the trial court's order, concluding that Officer Blackman was not entitled to summary judgment on the ground of public official immunity, and declined to reach the merits of the underlying claims because Officer Blackman had no right to interlocutory review on the other issues he sought to raise. *Bartley v. City of High Point*, 272 N.C. App. 224 (2020). The court explained that "[p]olice officers engaged in performing their duties are public officials for the purposes of public official immunity [and] enjoy absolute immunity from personal liability for discretionary acts done without corruption or malice." *Id.* at 227–28 (cleaned up). The court noted that a police officer is therefore generally "immune from suit unless the challenged action was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt," *id.* at 228, and ultimately concluded that the facts of this case as alleged with respect to each claim were sufficient to raise an issue of genuine material fact as to whether Officer Blackman acted with malice.

¶ 11 In dissent, Judge Tyson concluded that Mr. Bartley "did not carry his 'heavy burden' to survive Officer Blackman's motion for summary judgment on the issue of his individual liability under public official immunity." *Id.* at 239–40 (Tyson, J., dissenting). Judge Tyson reasoned that some of Mr. Bartley's admissions about a civilian's right to ignore an officer's directives during an investigatory stop and his general admissions about some of his alleged movements during the encounter were "sufficient to defeat [his] claims." *Id.* at 237. The dissent further opined that Mr. Bartley had "not met his 'heavy burden' 'to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.' " *Id.* (quoting *Leete v. Cty. of Warren*, 341 N.C. 116, 119 (1995); *Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 208, 212 (2003)). In Judge Tyson's view, the majority's opinion misapplied the standard of review and purported to shift the "heavy burden" Mr. Bartley must carry to prevail in this context. *Id.* Judge Tyson concluded that "[no] genuine issues of material fact exist in the pleadings, depositions, and affidavits served and entered in this matter to overcome defendant's motions and to deny summary judgment," and that the trial court's ruling should have therefore

been reversed and remanded for entry of summary judgment in favor of Officer Blackman. *Id.* at 240.

¶ 12 Officer Blackman appealed the Court of Appeals' decision to this Court as a matter of right based on Judge Tyson's dissent.

III. Standard of Review

¶ 13 Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, N.C. R. Civ. P. 56(c); *see also Singleton v. Stewart*, 280 N.C. 460, 464–65 (1972). "An issue is genuine if it 'may be maintained by substantial evidence.' " *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654 (1980) (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 518, 518 (1972)). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *State v. Mann*, 355 N.C. 294, 301 (2002). An issue is material if, as alleged, facts "would constitute a legal defense, or would affect the result of the action or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz*, 280 N.C. at 518. When examining a summary judgment motion, " 'all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.' " *Caldwell v. Deese*, 288 N.C. 375, 378 (1975) (quoting 6 James Wm. Moore, *Moore's Federal Practice* § 56.15[3], at 2337 (2d ed. 1971)).[2] This standard requires us to refrain from weighing the evidence or making credibility determinations. *Howerton v. Arai Helmet, Ltd.* 358 N.C. 440, 471 (2004) (explaining that when reviewing a motion for summary judgment, it is not the function of the court to weigh conflicting record evidence and that issues "legitimately called into question" should be preserved for resolution by a jury); *see also Hensley ex rel. North Carolina v. Price*, 876 F.3d 573, 584 (4th Cir. 2017) (observing that in the summary judgment posture, courts must not credit defendant's evidence, weigh the evidence, or resolve factual disputes in the defendants' favor).

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2. The dissent's statement of the proper standard at summary judgment fails to acknowledge this principle of black letter law and disregards it. It may be true that "[i]t is a difficult time to be in law enforcement" but our task here is not to weigh the competing deposition testimony, decide whose version of the events is correct, substitute our judgment for that of a jury, give preferential consideration to law enforcement officers, or provide them absolute immunity from any liability no matter what they do. At this stage, the question is whether the evidence, taken in the light most favorable to the non-moving party, creates a disputed issue of material fact related to public official immunity. *See, e.g.*, *Ussery v. Branch Banking and Trust Co.*, 368 N.C. 325, 334 (2015) (facts must be viewed in light most favorable to the non-moving party on motion for summary judgment).

¶ 14 We review a trial court's order granting or denying summary judgment de novo. *Craig v. New Hanover Cnty. Bd. of Educ*, 363 N.C. 334, 337 (2009). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (cleaned up).

IV. Analysis

A. Jurisdiction

¶ 15 **[1]** Officer Blackman appeals from the trial court's order partially denying summary judgment on Mr. Bartley's claims against him in his individual capacity. Accordingly, we first address the threshold issue of the reviewability of an order denying Officer Blackman's motion for summary judgment.

¶ 16 Ordinarily, the denial of a summary judgment motion is not immediately appealable as an interlocutory order. *See Veazey v. City of Durham*, 231 N.C. 354, 357 (1950). An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court to settle and determine the entire controversy. *Id.* An immediate appeal does not lie to this Court from an interlocutory order unless it concerns a judicial decision affecting a substantial right claimed in the action or proceeding by the appellant. *Id.* The "substantial right" test for appealability asks whether the challenged order "will work injury to appellant if not corrected before appeal from final judgment." *Stanback v. Stanback*, 287 N.C. 448, 453 (1975); *see also* N.C.G.S. § 1-277.

¶ 17 The denial of summary judgment on the ground of public official immunity is immediately appealable because it affects a substantial right. Public official immunity is more than a mere affirmative defense to liability as it shields a defendant entirely from having to answer for his conduct in a civil suit for damages. *See Thompson v. Town of Dallas*, 142 N.C. App. 651, 653 (2001) (quoting *Epps v. Duke University, Inc.*, 122 N.C. App. 198, 201 (1996)) (explaining that an interlocutory appeal of an order denying a dispositive motion is allowed because "the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action."), *disc. review denied*, 344 N.C. 436 (1996)); *see also Summey v. Barker*, 142 N.C. App. 688, 689 (2001); *Leonard v. Bell*, 254 N.C. App. 694, 697 (2017). If the trial court erroneously precludes a valid claim of public official immunity and the case proceeds to trial, immunity from trial would be effectively lost. *Corum v. Univ. of North Carolina*, 97 N.C. App. 527, 532 (1990) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)), *rev'd in part on other grounds*, 330 N.C. 761 (1992).

¶ 18 Unquestionably, the trial court's order denying Officer Blackman's motion for summary judgment is interlocutory; it does not dispose of the action against him and leaves matters to be judicially determined between the parties which requires further action by the trial court. However, Officer Blackman asserts a claim of public official immunity, an immunity from suit that would be compromised if he were required to go to trial. Therefore, this interlocutory appeal of the denial of summary judgment on that issue is properly before this Court.

B. Public Official Immunity

¶ 19 Public official immunity, a judicially-created doctrine, is "a derivative form" of governmental immunity which shields public officials from personal liability for claims arising from discretionary acts or acts constituting mere negligence, by virtue of their office, and within the scope of their governmental duties. Since the early twentieth century, the chief function of public official immunity has long been understood to shield public officials from tort liability when those officials truly perform discretionary acts that do not exceed the scope of their official duties. *See generally Hipp v. Ferrall*, 173 N.C. 167 (1917); *Templeton v. Beard*, 159 N.C. 63 (1912). The immunity has been recognized in furtherance of two primary goals. First, it promotes the "fearless, vigorous, and effective administration" of government policies. *Pangburn v. Saad*, 73 N.C. App. 336, 344 (1985). It is presumed that in the absence of the immunity, liability concerns rather than the public interest may drive the actions of some public officials. Second, it mitigates the negative impact that trepidation about personal liability might otherwise have on the willingness of individuals to assume public office. *Id.* (observing that, without public official immunity, the "threat of suit could . . . deter competent people from taking office"). *See also Isenhour v. Hutto*, 350 N.C. 601, 610 (1999) ("Public officials receive immunity because it would be difficult to find those who would accept public office or engage in the administration of public affairs if they were to be personally liable for acts or omissions involved in exercising their discretion." (cleaned up).

¶ 20 Public official immunity has therefore never been extended to an official who, clothed with discretion, commits acts that are at odds with the protections afforded by the doctrine and which underlie its utility. An individual will not enjoy the immunity's protections if his action "was (1) outside the scope of official authority, (2) done with malice, or (3) corrupt." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 230 (2012) (citing *Smith v. State*, 289 N.C. 303, 331 (1976)), *disc. review denied and appeal dismissed*, 366 N.C. 574 (2013). Generally, public officials have been recognized as individuals who occupy offices created by statute,

take an oath of office, and exercise discretion in the performance of their duties. *Pigott v. City of Wilmington*, 50 N.C. App. 401, 403–04 (1981); *Gunter v. Anders*, 114 N.C. App. 61, 67 (1994). North Carolina courts have deemed police officers engaged in performance of their duties as public officials for the purposes of public official immunity: "a police officer is a public official who enjoys absolute immunity from personal liability for discretionary acts done without corruption or malice." *Campbell v. Anderson*, 156 N.C. App. 371, 376 (2003).

¶ 21 Our precedent instructs that "[i]t is well settled that *absent evidence to the contrary*, it will always be presumed 'that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.' " *Leete v. Cty. of Warren*, 341 N.C. 116, 119 (1995) (emphasis added) (quoting *Huntley v. Potter*, 255 N.C. 619, 628 (1961)). This Court has never regarded the presumption of good faith that attends a public officer's actions as conclusive. When read in its full context, this language creates a rebuttable presumption that loses its force when a party produces competent and substantial evidence that an officer failed to discharge his duties in good faith. *Id.*, 341 N.C. at 119 (plaintiffs have met their burden to overcome this presumption).

¶ 22 Significantly, our courts have recognized public official immunity as an affirmative defense that must be properly asserted by the defendant to receive its protection. *See generally Fullwood v. Barnes*, 250 N.C. App. 31 (2016); *Mabrey v. Smith*, 144 N.C. App. 119 (2001). In other words, the defendant must assert official immunity as an affirmative defense because

> [a]s to such defenses, he is the actor, and hence he must establish his allegations in such matters by the same degree of proof as would be required if he were plaintiff in an independent action. This is not a shifting of the burden of proof; it simply means that each party must establish his own case.

Speas v. Merchants' Bank & Trust Co. of Winston-Salem, 188 N.C. 524, 531 (1924) (citations omitted); *see also*, 1 Kenneth S. Broun, *Brandis and Broun on North Carolina Evidence* § 32 n. 29, at 120 (4th ed. 1993). If the defendant cannot meet this burden of production, "he is not entitled to protection on account of his office, but is liable for his acts like any private individual." *Gurganious v. Simpson*, 213 N.C. 613, 616 (1938).

C. Public Official Immunity Applied in this Case

¶ 23 **[2]** To survive a motion for summary judgment based on public official immunity, a plaintiff must make a prima facie showing that the

defendant-official's tortious conduct falls within one of the immunity exceptions. *Dempsey v. Halford*, 183 N.C. App. 637, 640–41 (2007). A tortious act that is malicious thus pierces the cloak of official immunity that would otherwise bar suit and liability for the tortious act. *Fox v. City of Greensboro*, 279 N.C. App. 301, 2021-NCCOA-489, ¶ 51 (2021). This Court has held that "[a] defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another." *In re Grad v. Kaasa*, 312 N.C. 310, 313 (1984). Elementally, a malicious act is one which is "(1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Wilcox*, 222 N.C. App. at 289. "An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others." *Yancey v. Lea*, 354 N.C. 48, 52 (2001). "Gross violations of generally accepted police practice and custom" contributes to the finding that officers acted contrary to their duty. *Prior v. Pruett*, 143 N.C. App. 612, 623–24 (2001), *disc. review denied*, 355 N.C. 493 (2002).

¶ 24 We have held that "the intention to inflict injury may be constructive" intent where an individual's conduct "is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of willfulness and wantonness equivalent in spirit to an actual intent." *Foster v. Hyman*, 197 N.C. 189, 192 (1929). In the context of intentional tort claims, including assault and battery, "[w]anton and reckless behavior may be equated with an intentional act." *Pleasant v. Johnson*, 312 N.C. 710, 715 (1985), and "evidence of constructive intent to injure may be allowed to support the malice exception to [public official] immunity." *Wilcox*, 222 N.C. App. at 291.

¶ 25 Mr. Bartley claims that Officer Blackman acted with malice by body slamming him against the trunk of his car and tightly handcuffing him without justification. Thus, we decide whether, viewed in the light most favorable to Mr. Bartley, the evidence raises a genuine issue of material fact concerning whether Officer Blackman acted with malice; that is, whether his actions were wanton, contrary to his duty, and intended to injure Mr. Bartley. We hold that the evidence in this case does raise an issue of material fact with respect to this question.

¶ 26 At common law, a "law enforcement officer has the right, in making an arrest and securing control of an offender, to use only such force as may be reasonably necessary to overcome any resistance and properly discharge his duties." *Lopp v. Anderson*, 251 N.C. App. 161, 172 (2016). While an officer is vested with such a right, "[a police officer] may not act maliciously in the wanton abuse of his authority or use unnecessary

and excessive force." *Myrick v. Cooley*, 91 N.C. App. 209, 215 (1988). In similar fashion, our General Statutes dictate that a law enforcement officer is justified in using force upon an individual when and to the extent that the officer reasonably believes it necessary to prevent escape from custody or to effect an arrest of an individual who the officer reasonably believes has committed a criminal offense, unless the officer knows the arrest is unauthorized. *See* N.C.G.S. § 15A-401(d). Accordingly, a civil action for damages for assault and battery is available at common law against one who, for the accomplishment of a legitimate purpose, such as justifiable arrest, uses force which is excessive under the given circumstances. *Lopp*, 251 N.C. App. at 172 (2016) (quoting *Myrick*, 91 N.C. App. at 215).

¶ 27 Mr. Bartley testified that Officer Blackman approached him from behind and "body slammed" him against the trunk of his car. Officer Blackman acknowledged during his deposition that Mr. Bartley did not resist arrest, verbally or physically threaten him, or try to evade the arrest before he placed Mr. Bartley in handcuffs. It is also undisputed that Mr. Bartley was unarmed during the encounter. Officer Blackman's actions in these circumstances, as described by Mr. Bartley, using a body slam maneuver to subdue an unarmed, nonresistant individual who posed no threat to him is evidence of malice.

¶ 28 Additional evidence of malice comes from Mr. Bartley's testimony about how tightly Officer Blackman handcuffed him, Officer Blackman's refusal to loosen the handcuffs, and the red marks and bruises that Mr. Bartley sustained to his wrist as a result. Furthermore, Mr. Bartley testified that Officer Blackman stated that if Mr. Bartley had done as he was initially told, he would not be in the situation that he was in, and that Mr. Bartley remained handcuffed for at least twenty minutes in front of neighbors, which is evidence of retaliation.

¶ 29 Cases from the federal courts are instructive on the question of whether tight handcuffing resulting in physical injury indeed constitutes excessive force and therefore some evidence of malice. The Third Circuit and the Sixth Circuit have affirmatively recognized the general proposition that excessively tight or forceful handcuffing, particularly handcuffing that results in physical injury, constitutes excessive force. *See*, *e.g.*, *Kopec v. Tate*, 361 F.3d 772, 777 (3d Cir. 2004) (recognizing excessively tight handcuffing constitutes excessive force), *cert denied*, 543 U.S. 956 (2004); *Martin v. Hiedeman*, 106 F.3d 1308, 1313 (6th Cir. 1997) (construing "excessively forceful handcuffing" as an excessive force claim).

¶ 30 The Sixth Circuit articulated its test for evaluating whether a handcuffing claim may survive summary judgment in *Morrison v. Bd. Of Trs.*, 583 F.3d 394, 401-02 (6th Cir. 2009). To state such a claim, a plaintiff must offer sufficient evidence to create a genuine issue of material fact that: (1) the plaintiff complained the handcuffs were too tight; (2) the officer ignored those complaints; and (3) the plaintiff experienced "some physical injury" resulting from the handcuffing. *Id*. *See also McGrew v. Duncan*, 937 F.3d 664, 668 (6th Cir. 2019) (holding that allegations of bruising and wrist marks create a genuine issue of material fact regarding whether an officer violated plaintiff's right to be free from excessive force). *Cf. Brissett v. Paul*, No. 97-6898, 1998 WL 195945, at *4–5 (4th Cir. 1998) (unpublished) (affirming the district court's decision that a police officer did not use excessive force because plaintiff did not offer evidence that he sustained any physical injury from being handcuffed and arms being held in painful position).

¶ 31 Mr. Bartley's evidence establishes that he complained of his discomfort, and Officer Blackman refused to heed his complaints and loosen the handcuffs. To be sure, Officer Blackman's testimony offers an entirely different description of the material facts. He testified that he effectuated Mr. Bartley's arrest by "merely plac[ing] one hand on [Mr. Bartley's] wrist" and his other hand on [Mr. Bartley's] "[u]pper back," and leaning Mr. Bartley over the trunk lid of his car so that he was "[b]ending at the waist." Officer Blackman further testified that he "took [Mr. Bartley] by the left arm and went to extend his arm and then to put it behind his back." Officer Blackman also insisted that when Mr. Bartley refused his multiple orders to get back in his vehicle, he was authorized to place Mr. Bartley in handcuffs to protect his safety and carry out the traffic stop. He emphasized in his testimony that his use of handcuffs "remained the least intrusive means reasonably necessary to carry out the purpose of the stop." Officer Blackman's testimony certainly creates a disputed issue of material fact; however, it is not the version of events that is determinative on summary judgment, where the question before us is whether the evidence in the light most favorable to the non-moving party is sufficient to establish malice that defeats a claim of public official immunity.

¶ 32 N.C.G.S. § 15A-401(d), as does the common law, prescribes that police officers have a duty to use only the force that is reasonably necessary in detaining an individual. The use of unreasonable, unnecessary, and excessive force is prohibited by law. Considering the facts in the light most favorable to Mr. Bartley, as we must, there is a panoply of evidence which establishes that a genuine issue of material

fact exists as to whether Officer Blackman's allegedly forcible tactics were contrary to his duty for purposes of establishing the first element of malice.[3] Furthermore, Officer Blackman's alleged statement to Mr. Bartley that he would not have been "in this situation" had Mr. Bartley obeyed commands from Officer Blackman raises questions that can only be resolved by a jury. For example, is "this situation" that Officer Blackman referenced the situation of having just been body slammed and thrown into the trunk of a car, tightly handcuffed and bruised, and humiliated in front of neighbors following the commission of a traffic infraction? This statement creates a genuine issue of material fact concerning whether Officer Blackman's allegedly gratuitous tactics manifested a reckless indifference to Mr. Bartley's rights and were so reckless or manifestly indifferent to the consequences, where the safety of life and limb are involved, as opposed to being necessary for officer safety as Officer Blackman insists. *See Wilcox*, 222 N.C. App. at 291-92. Such a question is a factual one that is typically reserved for a jury. *See*, *e.g.*, *State v. McCombs*, 297 N.C. 151, 156 (1979); *Leiber v. Arboretum Joint Venture, LLC*, 208 N.C. App. 336, 348 (2010). Mr. Bartley has presented sufficient evidence of malice to create a disputed issue of material fact that prevents summary judgment on the ground of public official immunity.

V. Conclusion

¶ 33 To establish that Officer Blackman is not entitled to the defense of public official immunity, and thus to defeat his motion for summary judgment, Mr. Bartley produced evidence that Officer Blackman acted with malice when he arrested him. Viewing the facts that Mr. Bartley has proffered in support of his claim in the light most favorable to him, we conclude that there is a genuine issue of material fact as to whether Officer Blackman acted with malice in carrying out his official duties.

¶ 34 The purpose of summary judgment is to dispose of claims in which there are no disputed issues as to any material facts such that "only questions of law are involved and a fatal weakness in the claim of a party is exposed." *Dalton v. Camp*, 353 N.C. 647, 650 (2001). Attempts to make credibility determinations or to resolve disputed versions of

3. The dissent states that "Officer Blackman had probable cause to arrest Bartley." 2022-NCSC-63, ¶ 45. Whether there was probable cause for an arrest is disputed, and it is also not determinative on the question of public official immunity. Where, as here, a plaintiff comes forward with evidence that an officer used excessive force to execute an otherwise valid arrest, such evidence may be sufficient to establish a genuine dispute of material fact concerning whether the officer acted wantonly or contrary to his duty within the meaning of the malice exception to public official immunity.

events in the course of prematurely disposing of this case serves only to confuse the role of a judge and a jury. *Crocker v. Roethling*, 363 N.C. 140, 142–43 (2009) (instructing that it is error for the trial court to enter summary judgment for defendant when the evidence forecast by plaintiff established a genuine issue of material fact to be properly decided by a jury). We therefore hold that the Court of Appeals did not err in affirming the trial court's order partially denying Officer Blackman's summary judgment motion on the basis of public official immunity.

AFFIRMED.

Justice BERGER dissenting.

¶ 35 It is a difficult time to be in law enforcement. The majority today makes it even more challenging by expanding exposure to personal liability for increasingly common encounters with recalcitrant members of our society. Because the majority effectively eliminates public official immunity for law enforcement officers in North Carolina, I respectfully dissent.

¶ 36 On August 23, 2017, at approximately 3:17 pm, Officer Blackman—at the time an eight-year veteran of the High Point Police Department—was driving in his unmarked patrol car on routine patrol. At the time, Officer Blackman was wearing his department "issued handgun on [his] right side, [his] departmental issued badge on [the front of his] belt, [and his] handcuffs and additional magazine on [his] left side." Officer Blackman observed a 2017 Mercedes pass a truck "on the left over the double yellow line." The vehicle was operated by Bruce Allen Bartley, a 5'7" white male. Officer Blackman testified that he viewed Bartley's moving violation of passing the truck on the left over a double line as serious and as dangerous as the other violations he has observed and cited.

¶ 37 Officer Blackman attempted to initiate a traffic stop of Bartley's vehicle, however due to oncoming traffic and an upcoming curve, Officer Blackman could not immediately and safely pass the truck in front of him to catch up to Bartley. As he overtook the truck, Officer Blackman activated his lights and siren and began catching up with Bartley's vehicle to make the traffic stop. Bartley turned onto Yates Mill Court, and Officer Blackman testified that he "was concerned that [Bartley] was aware [Officer Blackman] was behind him and [he] was attempting to make it to the – a house."

¶ 38 Bartley pulled into the driveway at 1860 Yates Mill Court and Officer Blackman pulled in behind Bartley. Officer Blackman left his blue

strobe lights on, but "as [he] was nearing the back of [Bartley's] car," he turned off his siren. Bartley got out of his vehicle and was "[h]eading towards the back" [of the vehicle] when he saw Officer Blackman. Officer Blackman got out of his vehicle and ordered Bartley back into the Mercedes. Bartley looked directly at Officer Blackman and ignored the order.

¶ 39 Bartley testified at a deposition that, in total, Officer Blackman told him to get back in the car "[t]wice." Bartley's response was, "[I] told him I was on private property" and "I was not getting back in the car."

¶ 40 Officer Blackman testified at his deposition that he "believed that there was an officer safety issue based on [Bartley] exiting the vehicle, approaching [Officer Blackman], [and] saying he's on private property in the face of a traffic stop." Officer Blackman testified "ultimately we got within arms reach of [each] other." Because of Bartley's actions, Officer Blackman believed that handcuffing Bartley "was the safest for both of [them]." At that point, Officer Blackman had no way of knowing what Bartley's intentions were toward him or toward any other aspect of the traffic stop. Officer Blackman told Bartley he was being detained, and Bartley admitted that Officer Blackman placed one hand on his wrist and the other on Bartley's upper back. Bartley was "leaning over the vehicle . . . [b]ending at the waist," when Officer Blackman went to handcuff him. Officer Blackman "took [Bartley] by the left arm and went to extend [Bartley's] arm and then put it behind [Bartley's] back, and as [Officer Blackman] did that, [Bartley's] left arm tensed up and lifted up in a form of resistance." At this point, Officer Blackman had probable cause to arrest Bartley for resisting a public officer pursuant to N.C.G.S. §14-223.

¶ 41 According to Bartley, he was in that position for "seconds" while Officer Blackman put on the handcuffs. When asked whether Bartley felt any contact with Officer Blackman's body, Bartley responded, "[j]ust his hands."

¶ 42 Summary judgment is "a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971).

> The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in

> the claim or defense is exposed. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975). "The device used is one whereby a party may in effect force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. A party forces his opponent to give this forecast by moving for summary judgment. Moving involves giving a forecast of his own which is sufficient, if considered alone, to compel a verdict or finding in his favor on the claim or defense. In order to compel the opponent's forecast, the movant's forecast, considered alone, must be such as to establish his right to judgment as a matter of law." 2 McIntosh, N. C. Practice and Procedure, s 1660.5 (2d ed. Phillips Supp.1970).

Moore v. Fieldcrest Mills, Inc., 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979). Summary judgment is appropriate "where a claim or defense is utterly baseless in fact, [or] where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial." *Kessing*, 278 N.C. at 533, 180 S.E.2d at 829. "[N]o matter how material a fact may be to the determination of an issue in a case, if it is patently false or its existence defies all common sense and reason, it is not genuine." G. Gray Wilson, North Carolina Civil Procedure § 56-4 (3d ed. 2007).

¶ 43 This Court has held that public officials are entitled to a presumption that they will "discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." *Leete v. Cty. of Warren*, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995). The party challenging the validity of a public official's actions bears a heavy burden; competent and substantial evidence is required to defeat this presumption. *Id.* For purposes of public official immunity, law enforcement officers engaged in the performance of their duties are public officials protected from liability "for mere negligence." *See Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976). It is uncontroverted that Officer Blackman was performing his duties as a law enforcement officer when he initiated the traffic stop that led to Bartley's arrest.

> As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability. A defendant acts with malice

> when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another. An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.

Grad v. Kaasa, 312 N.C. 310, 313, 321 S.E.2d 888, 890–91 (1984) (cleaned up).

¶ 44 As such, the burden now rests with plaintiff to show that Blackman acted with malice to overcome the presumption, and the trial court must decide "whether plaintiff sufficiently forecasted evidence for each element of malice." *Brown v. Town of Chapel Hill*, 233 N.C. App., 257, 265, 756 S.E.2d 749, 755. Bartley has failed to make such a forecast of the evidence, and Officer Blackman is entitled to summary judgment because there is no genuine issue of material fact.

¶ 45 Officer Blackman had probable cause to arrest Bartley. Bartley committed a traffic infraction by crossing over a double yellow line to pass another vehicle, did not immediately pull over when Officer Blackman initiated his siren and strobe light, and resisted arrest after Officer Blackman had issued multiple commands which Bartley acknowledged he heard. Bartley admitted that refusing to obey a police officer's command is unlawful and acknowledged that he could understand Officer Blackman's perspective in arresting Bartley.

¶ 46 The majority holds that genuine issues of material fact exist as to whether Officer Blackman acted with malice in performance of his duties when he allegedly used excessive force in arresting Bartley. Specifically, the majority focuses on Bartley's deposition testimony in which he alleged that Officer Blackman approached him from behind and "body slammed" him against the trunk of his car. The term "body slam" was used just once by Mr. Bartley in his deposition and twice in a written statement Bartley prepared for his own benefit. Bartley's testimony regarding Officer Blackman's specific actions is wholly inconsistent with the definition of the term "body slam." Merriam-Webster defines body slam as "a wrestling throw in which the opponent's body is lifted and brought down hard to the mat." *Body-Slam*, *Merriam-Webster Dictionary* (11th ed. 2003); *see also*, *Body Slam*, https://www.dictionary.com/browse/body-slam (accessed June 7, 2022). While Bartley's single reference in his deposition to being body slammed may not be patently false, it appears to be baseless in fact in that it runs counter to his step-by-step testimony of Officer Blackman's actions. According to Bartley, Officer

Blackman had one hand on Bartley's wrist and the other on Bartley's upper back. It defies common sense that from this position Officer Blackman lifted Bartley's body off the ground and then hurled him onto the trunk of Bartley's vehicle, without any other part of Officer Blackman's body making contact with Bartley. In addition, Bartley testified that he suffered no harm, perceived, or otherwise, from Officer Blackman placing him on the trunk of his vehicle. The only purported harm that Bartley experienced during the entire encounter was related to the tightness of the handcuffs, not due to a body slam. It is undisputed that Officer Blackman had probable cause to arrest Bartley, and Officer Blackman was not acting contrary to his duty when he detained and handcuffed Bartley.

¶ 47 Bartley was also required to produce "competent and substantial evidence" that Officer Blackman possessed an intent to injure. To establish an intent to injure, "the plaintiff must show at least that the officer's actions were so reckless or so manifestly indifferent to the consequences as to justify a finding of willfulness and wantonness equivalent in spirit to an actual intent." *Brown*, 233 N.C. App. at 269, 756 S.E.2d at 758 (cleaned up). The majority relies on Bartley's testimony concerning how tightly Officer Blackman handcuffed him, Officer Blackman's refusal to loosen the handcuffs, and the red marks and bruises that Bartley sustained to his wrist in finding that Officer Blackman's use of force was done with an intent to injure.

¶ 48 The majority cites federal cases from the Third and Sixth Circuits recognizing the general proposition that excessively tight or forceful handcuffing, particularly handcuffing that results in physical injury, constitutes excessive force. Fourth Circuit cases tend to support the opposite conclusion. For example, in *Carter v. Morris*, the Fourth Circuit held that the plaintiff's allegation that her handcuffs were too tight would not support an excessive force claim. 164 F.3d 215, 219 n.3 (4th Cir. 1999). Additionally, in *Cooper v. City of Virginia Beach*, the Fourth Circuit affirmed an award of qualified immunity at the summary judgment stage in an excessive force claim based on unduly tight handcuffing. 817 F. Supp. 1310, 1319 (E.D. Va. 1993), *aff'd*, 21 F.3d 421 (4th Cir. 1994). In *Cooper*, the record indicated that the plaintiff was allegedly handcuffed so tightly that his hands grew numb. *Id.* The court found the excessive force claim deficient because the plaintiff failed to offer sufficient evidence of actual injury. *Id.* Notably, the court also stressed that the handcuffing in and of itself was not unreasonable, particularly in light of the plaintiff's apparent intoxication. *Id.*

¶ 49 Officer Blackman testified that Mr. Bartley's behavior was threatening and alarming, and Officer Blackman felt like he was in danger and believed that handcuffing Mr. Bartley "was the safest for both of [them]." Bartley alleged he suffered some purported redness to his wrists from the tightness of the handcuffs. One must strain to observe the purported injury in the exhibits contained in the record. Nonetheless, Bartley admitted he received no medical treatment and had no sensitivity, strange feeling, nerve damage, tingling, or lack of use of his wrists. Bartley could not even remember if the alleged redness on his wrists lasted until the next day.

¶ 50 Finally, as evidence of actual intent, the majority cites Bartley's testimony that Officer Blackman made the comment that if Bartley had done as he was instructed, he would not be in "this situation." The majority also cites the fact that Mr. Bartley remained handcuffed for at least twenty minutes in front of neighbors as evidence of retaliation.

¶ 51 This is not the "competent and substantial evidence" that plaintiff needs to overcome his heavy burden. Officers routinely make remarks to inform individuals why they have been placed into handcuffs or in the patrol vehicle. An officer acting in accordance with his training would attempt to deescalate the situation by explaining to an individual who refused to follow commands that his or her actions are the reason for their situation. It certainly is an accurate statement that had Bartley simply complied with the officer's instructions he would not have been handcuffed and arrested. At any rate, this statement is not evidence of "retaliation" and it is not sufficient for plaintiff to overcome his heavy burden.[1]

¶ 52 Bartley has not produced "competent and substantial evidence" necessary to carry his "heavy burden" to forecast specific facts constituting malice, and Officer Blackman is entitled to judgment as a matter of law. To hold otherwise would effectively eliminate public official immunity for law enforcement officers and expose them to personal liability for every encounter in which an arrest is made. Unfortunately, the majority does just that, and being a law enforcement officer in North Carolina just became even more challenging.

Chief Justice NEWBY and Justice BARRINGER join in this dissenting opinion.

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1. It is also worth noting that Officer Blackman took the time to turn the ignition of Bartley's car on so that Bartley's cat, which was in the back of his vehicle, would not overheat during the encounter. This further negates any notion that Officer Blackman was acting with malice.

BELMONT ASSOCIATION, INC.
v.
THOMAS FARWIG AND WIFE, RANA FARWIG AND NANCY MAINARD

No. 214A21

Filed 17 June 2022

Real Property—covenants—restrictive—solar panel installation —denial of application—N.C.G.S. § 22B-20

The denial by an architectural review committee (ARC) of defendant property owners' application to install solar panels on the roof of their house violated the plain and unambiguous meaning of N.C.G.S. § 22B-20, which generally prohibits restrictions on solar collectors unless either one of two exceptions is met. In this case, where the subdivision's declaration of covenants did not expressly prohibit solar panels or mention solar panels at all, but still could have had the effect of restricting their installation (by granting authority to the ARC to refuse any improvements for aesthetic reasons), the committee's restriction was void under the statute's general prohibition in subsection (b). Since the restriction prevented the reasonable use of solar panels, the exception in subsection (c) did not apply, and since there was no express restriction of solar panels, the exception in subsection (d) regarding installations visible from the ground did not apply. Defendants were therefore entitled to summary judgment on their claim for declaratory judgment.

Justice MORGAN dissenting.

Justice BERGER dissenting.

Chief Justice NEWBY joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 277 N.C. App. 387 (2021), affirming an order entered on 3 January 2020 by Judge Graham Shirley in Superior Court, Wake County. Heard in the Supreme Court on 23 March 2022.

Jordan Price Wall Gray Jones & Carlton, PLLC, by Brian S. Edlin, Hope Derby Carmichael, and Mollie L. Cozart, for plaintiff-appellee.

Thurman, Wilson, Boutwell & Galvin, P.A., by James P. Galvin, for defendant-appellants.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, and Nicholas S. Brod, Assistant Solicitor General, for the State of North Carolina, amicus curiae.

Southern Environmental Law Center, by Nicholas Jimenez and Lauren J. Bowen, for North Carolina Sustainable Energy Association, amicus curiae.

J. Ronald Jones Jr. and Bettie Kelley Sousa for Solar Industry Businesses, amicus curiae.

Law Firm Carolinas, by Harmony W. Taylor, for Community Associations Institute – North Carolina Chapter, Inc., amicus curiae.

HUDSON, Justice.

¶ 1 Thomas and Rana Farwig and Nancy Mainard (together, the Farwigs or defendants) appeal as of right based upon a dissent from a decision of the Court of Appeals, in which the majority affirmed the trial court's grant of summary judgment to plaintiff Belmont Association, Inc. (Belmont). The Court of Appeals below affirmed the grant of summary judgment to Belmont. On appeal, defendants argue the Court of Appeals erred in its interpretation of N.C.G.S. § 22B-20. We agree, reverse the decision of the Court of Appeals, and remand for further remand to the trial court for entry of summary judgment for defendants on the declaratory judgment claim and for further proceedings not inconsistent with this opinion.

I. Factual and Procedural Background

¶ 2 On 9 December 2011, developers recorded the Declaration of Protective Covenants for Belmont at Deed Book 14571, page 2528 in the Wake County Public Registry. Belmont Association was organized to administer and enforce the covenants and restrictions under the Declaration, and all covenants and restrictions contained in the Declaration run with the land of all residential units in the Belmont subdivision.

¶ 3 The Declaration, among other things, contained various restrictions on the use of property within Belmont. Although many specific uses of property were restricted by Article IX of the Declaration, including "animals," "home businesses," restrictions on "leases," "temporary structures," and "wetlands, conservation areas, and buffers," the use of residential solar panels was not specifically mentioned anywhere in the Declaration.

¶ 4 Nevertheless, Article XI of the Declaration establishes an "Architectural Review Committee" (ARC) and describes its functions. Section 3(a) of Article XI provides:

> The [ARC] shall have the right to refuse to approve any Plans for improvements which are not, in its sole discretion, suitable or desirable for the Properties, including for any of the following: (i) lack of harmony of external design with surrounding structures and environment; and (ii) aesthetic reasons. Each Owner acknowledges that determinations as to such matters may be subjective and opinions may vary as to the desirability and/or attractiveness of particular improvements.

¶ 5 On or about 17 December 2012, defendants purchased Lot 42, located at 4123 Davis Meadow Street, Raleigh, North Carolina, in the Belmont subdivision. Lot 42 is one of the properties subject to the Declaration.

¶ 6 On or about 5 February 2018, defendants installed solar panels on the roof of their house on Lot 42 at a cost of over $32,000. Five months later, the ARC sent defendants a notice of architectural violation and asked defendants to submit an architectural request form to the ARC. Defendants submitted the architectural request form on 20 July 2018 seeking approval of the solar panels along with a petition to allow solar panels on the front portion of the roof of homes in Belmont that was signed by twenty-two residents. The documentation noted that solar panels must face southward to be effective.

¶ 7 On 5 September 2018, Belmont denied defendants' application. While acknowledging the Declaration did not specifically address solar panels, Belmont cited "aesthetic" problems as the reason for its denial. It further stated that "the proposed location of the panels were not consistent with the plan and scheme of development in Belmont." Belmont suggested defendants could move the solar panels to a part of the house not visible from the road, but defendants responded that moving the solar panels would significantly reduce the energy generated by the panels and a shade report showed the location of the panels received the most light.

¶ 8 On 4 October 2018, defendants appealed the ARC's denial of their architectural request form. On 2 November 2018, Belmont denied defendants' appeal. Belmont demanded defendants remove the solar panels by 7 December 2018. The solar panels were not removed by that date and Belmont subsequently sent a notice of hearing. Following a

30 January 2019 hearing, at which Thomas Farwig presented a defense of defendants' actions, Belmont voted to impose a fine of $50 per day after 1 March 2019 if the solar panels were not removed. Belmont began imposing fines on defendants on or about 8 March 2019, and defendants began paying the fines to avoid foreclosure.

¶ 9 On 1 April 2019, Belmont filed a Claim of Lien on Lot 42, alleging a debt of $50.00. The next day, Belmont filed its complaint seeking injunctive relief and the collection of fines imposed. On 7 June 2019, defendants filed an answer, motion to dismiss, and counterclaims against Belmont for declaratory judgment, breach of contract, breach of the implied covenant of good faith and fair dealing, slander of title, and violation of N.C.G.S. § 75-1.1 *et seq*. Belmont filed a motion to dismiss, motion for judgment on the pleadings, and reply to defendants' counterclaims. Belmont filed a motion for summary judgment on 5 November 2019 following discovery.

¶ 10 After a hearing on 11 December 2019, the Superior Court, Wake County, Judge Graham Shirley presiding, granted in part Belmont's motion for summary judgment as to Belmont's first claim for injunctive relief and defendants' first counterclaim for declaratory judgment. The trial court issued its order on 3 January 2020, in which it ruled that N.C.G.S. § 22B-20(d) applied to the action; that "this action involves a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors as described in N.C.G.S. § 22B-20(b) that are visible by a person on the ground on a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces"; and that N.C.G.S. § 22B-20(c) is not applicable "because subsection (d) is applicable." Defendants appealed the trial court's order granting Belmont's motion for summary judgment to the Court of Appeals.

¶ 11 On appeal to the Court of Appeals, defendants argued the trial court erred in concluding that N.C.G.S. § 22B-20(d) applied because the Declaration did not expressly cover solar panels and, furthermore, that it erred in concluding the Declaration as applied was not void under N.C.G.S. § 22B-20(b).

¶ 12 In a divided opinion authored by Judge Gore, the Court of Appeals affirmed the trial court's order granting in part summary judgment to Belmont. The majority held that "[s]ubsection (d) of N.C.[G.S.] § 22B-20 is applicable in this action because the Declaration has the effect of prohibiting the installation of solar panels '[o]n a roof surface that slopes downward toward the same areas open to common or public access

that the façade of the structure faces.' " *Belmont Ass'n v. Farwig*, 277 N.C. App. 387, 2021-NCCOA-207, ¶ 21 (third alteration in original). Judge Jackson dissented from the majority opinion, arguing that the majority's holding "ignores precisely what the statutory ban forbids" by misconstruing a restriction that effectively prohibits the installation of solar panels even if it does not do so expressly. *Id.* ¶ 22 (Jackson, J., dissenting).

¶ 13 Defendants timely appealed to this Court under N.C.G.S. § 7A-30 on the basis of the dissenting opinion.

II. Analysis

¶ 14 On appeal, defendants argue the Court of Appeals erred in its interpretation of N.C.G.S. § 22B-20 in two ways. First, they argue the Court of Appeals erred in its application of N.C.G.S. § 22B-20(b) by failing to invalidate restrictions that effectively prohibit the installation of solar panels. Second, they argue the Court of Appeals erred in its application of N.C.G.S. § 22B-20(d) by failing to require an existing "deed restriction, covenant, or similar binding agreement" that affirmatively seeks to regulate solar panels in order for plaintiff to avail itself of the exception therein. We agree and reverse the decision of the Court of Appeals affirming the trial court's order granting summary judgment to Belmont.

¶ 15 "Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573 (2008) (cleaned up); *see* N.C.G.S. § 1A-1, Rule 56(c) (2021). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651 (2001). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337 (2009) (cleaned up).

¶ 16 This case presents a question of statutory interpretation of first impression. "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144 (1992). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614 (2005). "However, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative intent. Canons of statutory interpretation are only employed if the language of the statute is ambiguous or lacks precision, or is fairly susceptible

of two or more meanings." *JVC Enters., LLC v. City of Concord*, 376 N.C. 782, 2021-NCSC-14, ¶ 10 (cleaned up).

¶ 17 Section 22B-20 provides as follows:

> (b) Except as provided in subsection (d) of this section, any deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit, or have the effect of prohibiting, the installation of a solar collector that gathers solar radiation as a substitute for traditional energy for water heating, active space heating and cooling, passive heating, or generating electricity for a residential property on land subject to the deed restriction, covenant, or agreement is void and unenforceable. As used in this section, the term "residential property" means property where the predominant use is for residential purposes. The term "residential property" does not include any condominium created under Chapter 47A or 47C of the General Statutes located in a multi-story building containing units having horizontal boundaries described in the declaration. As used in this section, the term "declaration" has the same meaning as in G.S. 47A-3 or G.S. 47-1-103, depending on the chapter of the General Statutes under which the condominium was created.
>
> (c) This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would regulate the location or screening of solar collectors as described in subsection (b) of this section, provided the deed restriction, covenant, or similar binding agreement does not have the effect of preventing the reasonable use of a solar collector for a residential property. . . .
>
> (d) This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors as described in subsection (b) of this section that are visible by a person on the ground:
>
> (1) On the façade of a structure that faces areas open to common or public access;

(2) On a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces; or

(3) Within the area set off by a line running across the façade of the structure extending to the property boundaries on either side of the façade, and those areas of common or public access faced by the structure.

N.C.G.S. § 22B-20 (2021).

¶ 18 First, defendants argue the Court of Appeals erred in its interpretation of N.C.G.S. § 22B-20(b). By its plain terms, N.C.G.S. § 22B-20(b) applies not just to "any deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit . . . the installation of a solar collector" but also to "any deed restriction, covenant, or similar binding agreement that runs with the land that would . . . *have the effect of prohibiting*[ ] the installation of a solar collector." N.C.G.S. § 22B-20(b) (emphasis added). Based on the plain and unambiguous meaning of subsection (b), the ARC's restriction of the use of solar panels under provisions of Article XI of the Declaration is void unless there is some exception, because even though the Declaration does not *expressly* prohibit the installation solar panels, the provisions of Article XI of the Declaration which treat the installation of solar panels as an "improvement" subject to aesthetic regulation by the ARC *effectively* prohibit their installation. Accordingly, under N.C.G.S. § 22B-20(b), the restriction is prohibited unless there is some exception.

¶ 19 Subsection (c) provides one exception for a "deed restriction, covenant, or similar binding agreement [that] does not have the effect of preventing the reasonable use of a solar collector for a residential property." N.C.G.S. § 22B-20(c). Subsection (d) provides another exception, which permits a "deed restriction, covenant, or similar binding agreement that runs with the land that *would prohibit* the location of solar collectors as described in subsection (b) of this section that are visible by a person on the ground" subject to certain restrictions. N.C.G.S. § 22B-20(d) (emphasis added). By its plain terms, subsection (d) applies only to such restrictions "that *would prohibit*" solar panels as described in subsection (b).

¶ 20 Here, the restriction at issue prevents the reasonable use of solar panels, and accordingly, the exception contained in subsection (c) would not apply. Subsection (d) also does not apply here because while

it provides an exception to subsection (b) allowing restrictions to prevent the installation of solar panels in certain locations, that subsection applies only to restrictions "that would prohibit" the installation of solar panels. The language describing restrictions that "have the effect" of prohibiting such installation in subsections (b) and (c) is not contained in subsection (d). Nevertheless, the Court of Appeals treats this plain language as ambiguous and proceeds to read subsection (d) to apply also to restrictions that have such an effect even though this language is not contained therein. *Belmont Ass'n*, ¶¶ 15–20. The Court of Appeals reaches this conclusion by looking not only to the text of the statute but also to the title of the legislation and the legislative history. *Id.* ¶¶ 16–17. In so doing, the Court of Appeals contravenes our rules of statutory interpretation by applying canons of construction where the plain meaning of the statute is clear. It is a bedrock rule of statutory interpretation that "[i]f the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *Beck*, 359 N.C. at 614. Accordingly, the Court of Appeals erred in declining to give the words of subsection (d) their plain and definite meaning and by reading the subsection to apply also to restrictions that "have the effect" of prohibiting the installation of solar panels based on sources outside the text. The Court of Appeals necessarily also erred in concluding that the restriction at issue here satisfies subsection (d), because as previously noted, the Declaration does not expressly prohibit the installation of solar panels in any manner.

III. Conclusion

¶ 21 We conclude the Court of Appeals erred in affirming the order granting summary judgment in part to Belmont on the basis that the restrictions at issue, which do not expressly prohibit the installation of solar panels but only have the effect of doing so as applied by the ARC, fall under the safe harbor exception contained in N.C.G.S. § 22B-20(d). We hold that the restriction at issue here does have the effect of prohibiting the installation of solar panels and the reasonable use of solar panels and, accordingly, the exception contained in subsection (c) of the statute does not apply. Since neither statutory exception applies, we hold the restriction violates N.C.G.S. § 22B-(20)(b). Accordingly, defendants are entitled to summary judgment on the declaratory judgment claim. We reverse the decision of the Court of Appeals with instructions to remand to the trial court for further proceedings not inconsistent with this decision.

REVERSED AND REMANDED.

Justice MORGAN dissenting.

¶ 22 While I agree with the recognition and recitation by my learned colleagues in the majority of the pertinent provisions that govern the principles of statutory construction which are germane to this case, I disagree with the majority's application of these established guidelines of interpretation to the facts and circumstances existent here. The manner in which these interpretative directives were employed in the present case has led, in my view, to an erroneous outcome. I would affirm the decision of the Court of Appeals majority that the trial court properly granted summary judgment in favor of plaintiff Belmont Association, Inc.

¶ 23 As cited by the Court's majority, the salient clause of the Belmont residential subdivision's Declaration of Protective Covenants is the authorization for the subdivision's Architectural Review Committee to

> have the right to refuse to approve any Plans for improvements which are not, in its sole discretion, suitable or desirable for the Properties, including for any of the following: (i) lack of harmony of external design with surrounding structures and environment; and (ii) aesthetic reasons. Each Owner acknowledges that determinations as to such matters may be subjective and opinions may vary as to the desirability and/or attractiveness of particular improvements.

This Court has been beckoned to consider the Committee's authorization in light of N.C.G.S. § 22B-20 and its governance of protective covenants as they purport to regulate the installation of solar panels.

¶ 24 In interpreting a statute, the Court must first ascertain the legislative intent in enacting the legislation. The first consideration in determining legislative intent is the words chosen by the Legislature. When the words are clear and unambiguous, they are to be given their plain and ordinary meanings. *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 267–68 (2006). "The goal of statutory interpretation is to determine the meaning that the [L]egislature intended upon the statute's enactment." *State v. Rankin*, 371 N.C. 885, 889 (2018).

¶ 25 The intent of the legislative body which enacted N.C.G.S. § 22B-20 is expressly stated in the first passage of the statute, and is contained in the law's subsection (a):

> The intent of the General Assembly is to protect the public health, safety, and welfare by encouraging

> the development and use of solar resources and by prohibiting deed restrictions, covenants, and other similar agreements that could have the ultimate effect of driving the costs of owning and maintaining a residence beyond the financial means of most owners.

N.C.G.S. § 22B-20(a) (2021).

¶ 26 In determining legislative intent, the words and phrases of a statute must be interpreted contextually, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 215 (1990). "All parts of the same statute dealing with the same subject are to be construed together as a whole, and every part thereof must be given effect if this can be done by any fair and reasonable interpretation." *State v. Tew*, 326 N.C. 732, 739 (1990).

¶ 27 Guided by these admonitions of proper statutory construction regarding the requirement that all of the provisions of N.C.G.S. § 22B-20 are to be reconciled with one another in order to maintain the sanctity of the statute while guided by the Legislature's clear intent embodied in the law's subsection (a), the next subsection of the statute—N.C.G.S. § 22B-20(b)—*immediately* begins with a deferential reference to N.C.G.S. § 22B-20(d). Subsection 22B-20(b) states the following, in pertinent part:

> *Except as provided in subsection (d) of this section*, any deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit, or have the effect of prohibiting, the installation of a solar collector that gathers solar radiation as a substitute for traditional energy for water heating, active space heating and cooling, passive heating, or generating electricity for a residential property on land subject to the deed restriction, covenant, or agreement is void and unenforceable.

N.C.G.S. § 22B-20(b) (emphasis added).

¶ 28 In ascribing the plain and ordinary meaning to the phrase "[e]xcept as provided in subsection (d) of this section," as these words are individually selected and collectively joined by the General Assembly in this introductory passage of N.C.G.S. § 22B-20(b), this prelude to the substance of subsection (b) explicitly notes that the content of N.C.G.S. § 22B-20(b) yields to the operation of N.C.G.S. § 22B-20(d) to the extent

that N.C.G.S. § 22B-20(b) contains conflicting or differing content in an area also addressed by N.C.G.S. § 22B-20(d). Such conflict and difference would then be resolved by the subservience of subsection (b) to subsection (d) in the given area, and subsection (d) would control. Otherwise, if there is no subject area of conflict or difference between N.C.G.S. § 22B-20(b) and N.C.G.S. § 22B-20(d), then the provisions of N.C.G.S. § 22B-20(b) stand alone and are operative.

¶ 29 Before determining if, and to what extent, there is any incompatibility between N.C.G.S. § 22B-20(b) and N.C.G.S. § 22B-20(d), the intervening subsection of (c) must be consulted after subsection (b) and before subsection (d), since the Legislature has constructed the statutory enactment in the manner that the Legislature deemed appropriate. Reading the five subsections of N.C.G.S. § 22B-20[1] in sequential order comports with the aforementioned dictate of *Burgess*, that the words and phrases of a statute must be interpreted contextually. In pertinent part, N.C.G.S. § 22B-20(c) reads:

> This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would regulate the location or screening of solar collections as described in subsection (b) of this section, provided the deed restriction, covenant, or similar binding agreement does not have the effect of preventing the reasonable use of a solar collector for a residential property. If an owners' association is responsible for exterior maintenance of a structure containing individual residences, a deed restriction, covenant, or similar binding agreement that runs with the land may provide that (i) the title owner of the residence shall be responsible for all damages caused by the installation, existence, or removal of solar collectors; (ii) the title owner of the residence shall hold harmless and indemnify the owners' association for any damages caused by the installation, existence, or removal of solar collectors; and (iii) the owners' association shall not be responsible for maintenance, repair, replacement, or removal of solar collectors unless expressly agreed in a written agreement that is recorded in the office of the register of deeds in the county or counties in which the property is situated.

1. Subsection 22B-20(e) addresses the "award [of] costs and reasonable attorneys' fees to the prevailing party" and is irrelevant to the dissent's analysis.

N.C.G.S. § 22B-20(c). Subsection 22B-20(c), while expressly stating that it does not prohibit covenants such as those mentioned in Belmont's Declaration which plaintiff could choose to apply in order to "regulate the location or screening of solar collectors as described in subsection (b)," nonetheless could ban the operation of the covenant if it would "have the effect of preventing the reasonable use of a solar collector for a residential property." *Id.* On its face, the Declaration's covenant language does not operate to this extent, and the majority recognizes in its written opinion that this exception contained in N.C.G.S. § 22B-20(c) does not apply in the instant case. Hence, N.C.G.S. § 22B-20(c) does not impact this case with respect to defendants' installation of solar panels.

¶ 30 Subsection 22B-20(d), which preempts the operation of N.C.G.S. § 22B-20(b) to the extent that subsection (b) and subsection (d) are incompatible with one another due to conflicting or differing content in light of the plain and ordinary meanings of the introductory words of N.C.G.S. § 22B-20(b), "Except as provided in subsection (d) of this section," which render N.C.G.S. § 22B-20(b) subservient to N.C.G.S. § 22B-20(d) as described, is composed entirely of the following provisions:

> This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors as described in subsection (b) of this section that are visible by a person on the ground:
>
> (1) On the façade of a structure that faces areas open to common or public access;
>
> (2) On a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces; or
>
> (3) Within the area set off by a line running across the façade of the structure extending to the property boundaries on either side of the façade, and those areas of common or public access faced by the structure.

N.C.G.S. § 22B-20(d). Although under N.C.G.S. § 22B-20(b), a covenant such as the one at issue in the current case which plaintiff could deem to apply to the installation of solar panels in plaintiff's potential interpretation of the Declaration would be "void and unenforceable" because subsection (b) does not allow any such covenant to operate "that would

prohibit, or have the effect of prohibiting, the installation of" solar panels as performed by defendants in the present case. Subsection 22B-20(d), however, "does not prohibit" the operation of a covenant "that would prohibit the location of solar collectors *as described in subsection (b) of this section* that are visible by a person on the ground: (1) On the façade of a structure that faces areas open to common or public access; [or] (2) On a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces." N.C.G.S. § 22B-20(d) (emphasis added).

¶ 31 In giving the clear and unambiguous words of N.C.G.S. § 22B-20 their plain and ordinary meanings as this Court has directed in *O & M Industries*, I conclude that the principles of statutory construction support plaintiff's determination to deny defendants' application to install solar panels on their residential home, in plaintiff's words, "because the installation can be seen from the road in front of the home, and is not able to be shielded," with said justification being grounded in two places in N.C.G.S. § 22B-20 where the guidelines governing statutory interpretation are readily exercised: (1) the introductory clause of N.C.G.S. § 22B-20(b)—"Except as provided in subsection (d) of this section"—which establishes in clear and unambiguous words that subsection (b) yields to the operation of N.C.G.S. § 22B-20(d) to the extent that N.C.G.S. § 22B-20(b) contains conflicting or differing content in an area also addressed by N.C.G.S. § 22B-20(d), wherein subsection (d) would then supersede subsection (b) and thus subsection (d) would then control the outcome of the issue; and (2) the sole sentence of N.C.G.S. § 22B-20(d) which begins, "This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors as described in subsection (b) of this section that are visible by a person on the ground," and which establishes in clear and unambiguous words that restrictions on the placement of solar panels which are generally disallowed by subsection (b) are authorized by subsection (d) to be allowed in circumstances where, as in the present case, the placement of the solar panels causes them to be visible from ground level from the façade of a structure that faces areas open to common or public access, or on a roof surface that slopes downward toward the same areas which are open to common or public access that the façade of the structure faces. Here, plaintiff denied defendants' application for the installation of solar panels because plaintiff determined that "the installation can be seen from the road in front of the home, and is not able to be shielded." There is evidence in the record that defendants placed the solar panels at issue on the front area of their home's roof which sloped southward and

was visible from the street in front of the home. As I see it, N.C.G.S. § 22B-20(d), which supersedes N.C.G.S. § 22B-20(b) in this aspect of the statute, therefore lawfully empowered plaintiff to deny defendants' application to install the solar panels.

¶ 32 From my perspective, the application of the well-settled principles of statutory interpretation to N.C.G.S. § 22B-20 readily shows that plaintiff had the authority to deny defendants' application. This implementation of standard statutory construction would not thwart the intent of the General Assembly which undergirds the statute and which was expressed in N.C.G.S. § 22B-20(a), because the interaction between and among the various subsections of the law operates to eradicate any pervasive or arbitrary prohibitions of the development and use of solar resources by limiting the availability of deed restrictions, covenants, and other similar agreements that could have the ultimate effect of driving the costs of owning and maintaining a residence beyond the financial means of most owners.

¶ 33 Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2021). "A ruling on a motion for summary judgment must consider the evidence in the light most favorable to the non-movant, drawing all inferences in the non-movant's favor. The standard of review of an appeal from summary judgment is de novo." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018) (citation omitted).

¶ 34 While I agree with the majority that summary judgment is the proper disposition of this case, I would render it in favor of plaintiff instead of defendants. Therefore, I would affirm the determination of the Court of Appeals in this case that the trial court correctly granted summary judgment for plaintiff.

Justice BERGER dissenting.

¶ 35 There is a predictable and certain outcome for this case provided the rules of statutory construction, as enunciated by the majority, are followed. Because a decision of the Architectural Review Committee is not a "deed restriction, covenant, or similar binding agreement" under N.C.G.S. § 22B-20, I respectfully dissent.

¶ 36 The facts and law of this case are not complicated. Defendants purchased a lot in a subdivision which was subject to the Declaration

of Protective Covenants for Belmont properly recorded with the Wake County Register of Deeds. The Declaration established an Architectural Review Committee (ARC). Pursuant to the Declaration, homeowners were required to request and obtain approval for improvements to their properties from the ARC prior to making any such improvements.

¶ 37 A little over five years after purchasing the property, defendants installed solar panels on the roof of their house without submitting a request to, or obtaining approval from, the ARC. The ARC responded by sending defendants a notice of violation. Ultimately, the ARC rejected defendants' untimely request but gave defendants the option to relocate the solar panels to a part of the house not visible from the road. Defendants refused and this action followed.

¶ 38 Defendants argue plaintiff's denial of their request to install solar panels violated N.C.G.S. § 22B-20, entitled "Deed restrictions and other agreements prohibiting solar collectors." Pursuant to that section,

> (b) Except as provided in subsection (d) of this section, any deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit, or have the effect of prohibiting, the installation of a solar collector that gathers solar radiation as a substitute for traditional energy for water heating, active space heating and cooling, passive heating, or generating electricity for a residential property on land subject to the deed restriction, covenant, or agreement is void and unenforceable. . . .
>
> (c) This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would regulate the location or screening of solar collectors as described in subsection (b) of this section, provided the deed restriction, covenant, or similar binding agreement does not have the effect of preventing the reasonable use of a solar collector for a residential property. . . .
>
> (d) This section does not prohibit a deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit the location of solar collectors as described in subsection (b) of this section that are visible by a person on the ground:
>
> (1) On the façade of a structure that faces areas open to common or public access;

(2) On a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces; or

(3) Within the area set off by a line running across the façade of the structure extending to the property boundaries on either side of the façade, and those areas of common or public access faced by the structure.

N.C.G.S. § 22B-20(b)–(d) (2021).

¶ 39 By its plain language, the statute prohibits "any deed restriction, covenant, or similar binding agreement that runs with the land that would prohibit, or have the effect of prohibiting, the installation of a solar collector." N.C.G.S. § 22B-20(b). It is uncontested that defendants' lot was subject to the Declaration described above. The Declaration is the only document in the record that would contain any such "deed restriction, covenant, or similar binding agreement." As the majority notes, "the use of residential solar panels was not specifically mentioned anywhere in the Declaration." The majority further acknowledges that "the Declaration does not expressly prohibit the installation of solar panels in any manner." Thus, there is no restriction set forth in the Declaration that prohibits or would have the effect of prohibiting the installation of solar panels that is at play in this scenario. Rather, it was the decision of the ARC that prohibited the installation of the solar panels by defendants.

¶ 40 A deed restriction, or "restrictive covenant," is defined as "[a] private agreement . . . in a deed . . . that restricts the use or occupancy of real property, esp. by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put." *Restrictive Covenant*, *Black's Law Dictionary* (11th ed. 2019). Further, the term "covenant" is "[a] formal agreement or promise . . . in a contract or deed, to do or not do a particular act; a compact or stipulation." *Covenant*, *Black's Law Dictionary* (11th ed. 2019). And a "covenant running with the land" is "[a] covenant intimately and inherently involved with the land and therefore binding subsequent owners and successor grantees indefinitely." *Covenant Running with the Land*, *Black's Law Dictionary* (11th ed. 2019).

¶ 41 A decision by the ARC is not a deed restriction, as it is not an agreement found in defendants' deed; is not a covenant, as it is not an agreement or promise found in a contract or deed; and is not

an agreement that runs with the land, as it does not bind subsequent owners and successor grantees indefinitely. Indeed, counsel for defendants conceded at oral argument that a decision by the ARC does not qualify as a deed restriction, covenant, or similar binding agreement.

¶ 42 However, the majority, citing no authority and acknowledging that the language of the statute is "plain and unambiguous," simply concludes that the decision of the ARC "*ha[s] the effect of prohibiting*[ ] the installation of a solar collector." The majority claims, in spite of counsel's concession, that "the provisions of . . . the Declaration which treat the installation of solar panels as an 'improvement' subject to aesthetic regulation by the ARC *effectively* prohibit their installation." This approach, however, ignores the fact that the ARC has the "sole discretion" to approve or reject any requested improvement. Stated another way, the establishment of the ARC does not effectively preclude any improvement, it merely enables a group of individuals to make decisions on "the desirability and/or attractiveness of particular improvements."

¶ 43 The majority looks solely to the effect of the ARC's decision, not the source of the restriction, and in so doing, ignores the plain language of N.C.G.S. § 22B-20.

¶ 44 However, even assuming the action by the ARC is covered under subsection (b) in that it "ha[s] the effect of" prohibiting the installation of solar collectors, the majority errs in concluding that subsection (d) does not apply. Here the trial court found that the solar collectors on defendants' property "are visible by a person on the ground on a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces." Therefore, as noted by Justice Morgan in his dissenting opinion, subsection (d) applies so long as the relevant deed restriction or covenant "would prohibit the location of solar collectors as described in subsection (b)." N.C.G.S. § 22B-20(d).

¶ 45 According to the majority, the "deed restriction, covenant, or similar binding agreement" in this case is "the ARC's restriction of the use of solar panels under provisions of Article XI of the Declaration." Based upon the majority's own characterization, the ARC's decision certainly "would prohibit the location of solar collectors" within the meaning of subsection (d) since it did in fact prohibit defendants from placing solar panels on the street-facing side of their roof. In other words, if the majority believes that the ARC's *decision* constitutes a "deed restriction, covenant, or similar binding agreement" under subsection (b), then logically it must also conclude that the decision falls under subsection (d)'s exception.

¶ 46 Despite the majority's overbroad reading of subsection (b), it narrowly reads subsection (d). It appears to limit the application of subsection (d) to situations where a deed restriction, covenant, or similar binding agreement contains express language prohibiting the installation of solar collectors. Such a result clearly is not what the General Assembly intended. It is puzzling why the majority would interpret subsection (b) so broadly but subsection (d) so narrowly. A better reading of the plain language is that a restriction which falls under subsection (b) is not void if it meets one of the criteria enumerated in subsection (d).

¶ 47 Lastly, even if the majority's application of subsections (b) and (d) was correct, the appropriate remedy still would not be to grant summary judgment in defendants' favor. Rather, the case should be remanded to the trial court to determine whether subsection (c) applies. The trial court summarily concluded that "subsection (c) . . . is not applicable because subsection (d) is applicable." Thus, the trial court never found that the ARC's decision prevented "the reasonable use of a solar collector" under subsection (c). N.C.G.S. § 22B-20(c). This factual determination is for the trial court, not an appellate court. Therefore, this case should be remanded to the trial court to make this factual determination.

Chief Justice NEWBY joins in this dissenting opinion.

FUND HOLDER REPS., LLC v. N.C. DEP'T OF STATE TREASURER

[381 N.C. 324, 2022-NCSC-65]

FUND HOLDER REPORTS, LLC
v.
NORTH CAROLINA DEPARTMENT OF STATE TREASURER

No. 45A21

Filed 17 June 2022

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 470, 854 S.E.2d 64 (2020), affirming an order entered on 26 November 2019 by Judge Vinston Rozier in Superior Court, Wake County. Heard in the Supreme Court on 9 May 2022.

Stam Law Firm, PLLC, by R. Daniel Gibson, for petitioner-appellant.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, Marc X. Sneed, Special Deputy Attorney General, S. Luke Morgan, Fellow, Office of the General Counsel, and Samuel W. Magaram, Solicitor General Fellow, for respondent-appellee.

PER CURIAM.

AFFIRMED.

Justice MORGAN did not participate in the consideration or decision of this case.

IN RE A.A.

[381 N.C. 325, 2022-NCSC-66]

IN THE MATTER OF A.A.

No. 441A20

Filed 17 June 2022

1. Termination of Parental Rights—subject matter jurisdiction—standing—petition filed by stepmother—statutory requirements

A stepmother had standing to file a private termination of parental rights action against a child's mother pursuant to N.C.G.S. § 7B-1103(a)(5), thereby giving the trial court subject matter jurisdiction over the matter, where there was sufficient evidence that the child had resided with her stepmother continuously far in excess of the required statutory length of time immediately preceding the filing of the petition. The trial court was not required to make an explicit finding of fact establishing petitioner's standing, particularly where the mother did not raise the issue at the hearing.

2. Termination of Parental Rights—grounds for termination—abandonment—sufficiency of evidence and findings

The trial court properly terminated a mother's parental rights to her daughter based on abandonment (N.C.G.S. § 7B-1111(a)(7)) where clear, cogent, and convincing evidence showed that, during the relevant six-month period, the mother had no visitation or communication with the child; sent no gifts, cards, or clothing; did not inquire about the child's well-being; and was aware that her child support payments, which were garnished from her wages, went to the child's father, with whom the child did not reside, and were not used for the child's benefit.

3. Termination of Parental Rights—best interests of the child—guardian ad litem recommendation—no termination of other parent's rights

The trial court did not abuse its discretion by concluding that termination of a mother's parental rights to her daughter was in her daughter's best interest where the court made specific findings as to each criteria found in N.C.G.S. § 7B-1110(a) and was not bound by the guardian ad litem's report, in which termination was not recommended. Further, although the court terminated the mother's rights but not the father's, its decision was not arbitrary since the best interests determination focuses on the child and not on the equities between the parents.

Justice EARLS concurring.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 12 August 2020 by Judge Marion Boone in District Court, Surry County. Heard in the Supreme Court on 5 October 2021.

James N. Freeman Jr. for petitioner-appellee.

No brief for appellee Guardian ad Litem.

Peter Wood for respondent-appellant mother.

MORGAN, Justice.

¶ 1 In this private termination of parental rights case, we consider issues of the trial court's subject matter jurisdiction and its substantive determinations in the proceeding. First, we address the question of whether petitioner, as the stepmother of the juvenile who is the focus of this matter, had standing to bring a private termination of parental rights action against respondent-mother, the child's biological mother. If we conclude that petitioner had standing to initiate the termination action, then we must additionally consider respondent-mother's arguments that the trial court erred (1) in finding that the ground of abandonment existed for termination of parental rights, and (2) in concluding that termination of respondent-mother's parental rights was in the child's best interests.

¶ 2 Upon careful review, we hold that petitioner satisfied the relevant statutory requirements to file a private petition for termination of parental rights. We further conclude that clear, cogent, and convincing evidence of abandonment, as defined in both statutory law and case law, was presented at the adjudication hearing to establish that this ground existed for the termination of respondent-mother's parental rights. Lastly, the trial court did not abuse its discretion in concluding that it was in the child's best interests to terminate the parental rights of respondent-mother. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

I. Factual Background and Procedural History

¶ 3 Respondent-mother gave birth to a daughter "Amy" on 5 August 2010.[1] Amy's father was granted primary custody of Amy in 2012. Petitioner

1. We employ a pseudonym for the juvenile to protect her privacy and for ease of reading.

and Amy's father became involved in a romantic relationship in October 2013, and petitioner, Amy's father, and Amy began residing together later in the year. On 30 April 2015, petitioner and Amy's father married each other; the couple had two children together: a son born in April 2015 and a daughter born in March 2017. Petitioner and Amy's father separated in October 2017 and became divorced on 14 January 2019.

¶ 4 On 31 May 2018, petitioner filed an action against respondent-mother and Amy's father in District Court, Surry County, seeking full custody of Amy. In the custody complaint, petitioner alleged that respondent-mother and Amy's father were incarcerated in the Surry County Jail at the time of the filing of the action and that Amy had continued to live with petitioner since petitioner's marriage to the father, even after petitioner and Amy's father separated. Petitioner further alleged the occurrence of two incidents of domestic violence by Amy's father toward petitioner in the presence of one or more of the children. Petitioner stated that after the father exercised visitation with Amy and one of Amy's half-siblings on 22 January 2018, petitioner and Amy's father had a verbal argument which resulted in a "physical outburst" by the father and his destruction of petitioner's kitchen table and chairs in the presence of their youngest child. Petitioner also described an altercation on 1 May 2018 between the father and their two biological children which transpired during a visit to a fast-food restaurant, leading petitioner to seek criminal charges against the father and to seek a domestic violence protective order. Amy's father was arrested later in the day after picking up Amy early from school and then, with Amy in his car, circling the domestic violence office in Surry County where petitioner was discussing the domestic violence incident at the fast-food restaurant which had occurred.

¶ 5 On 31 May 2018, petitioner was granted temporary legal and physical custody of Amy, and on 23 July 2018, petitioner was granted exclusive legal and physical custody of Amy upon the trial court's finding that respondent-mother and Amy's father had "acted contrary to their constitutionally protected status as biological parents." Respondent-mother was granted two hours of supervised visitation with Amy weekly. However, respondent-mother did not utilize the visitation with the juvenile which was available to her and had only one in-person visit with Amy over the course of the next eleven months. Although respondent-mother requested a visit with Amy on 6 August 2018—the day after Amy's birthday—respondent-mother was not punctual in her arrival for the visit at the location where petitioner and respondent-mother had agreed that the visit would occur, which was a local library. Respondent-mother also failed to attend a court-ordered custody mediation regarding Amy

in late September 2018. Respondent-mother did have a visit with Amy on 23 September 2018. On 25 September 2018, respondent-mother requested another visit with the child, but when petitioner asked respondent-mother to send a text message to petitioner during the following week in order to arrange details of the proposed visit, respondent-mother did not do so. The next contact which petitioner had with respondent-mother occurred on 12 May 2019, which was Mother's Day. On this occasion, respondent-mother sent the following text message to petitioner: "This is [respondent-mother]. Happy Mother's Day. Thank you for always loving mine and treating mine as your own."

¶ 6 On 13 May 2019, petitioner filed a private petition to terminate respondent-mother's parental rights to Amy, alleging willful abandonment of the minor child within the meaning of N.C.G.S. § 7B-1111(a)(7) as the grounds for termination. Petitioner alleged that respondent-mother did not exercise respondent-mother's visitation rights with Amy at any time after 23 September 2018, that respondent-mother also chose not to send Amy any gifts, cards, or other correspondence from this identified juncture, and that respondent-mother never attempted to communicate with Amy by telephone or any other means.

¶ 7 During the adjudication hearing which took place on 24 July 2020,[2] petitioner testified that she had heard nothing from respondent-mother for eight months after September 2018 until respondent-mother sent petitioner the aforementioned Mother's Day text message on 12 May 2019. On this occasion, however, respondent-mother did not ask to speak to Amy or inquire about Amy's wellbeing. Although respondent-mother had a mailing address for Amy and knew petitioner's telephone number, nonetheless Amy never received any cards, gifts, food, clothing, or other items from respondent-mother; respondent-mother never assisted with Amy's school, medical, or emotional needs; and in the handful of text messages that respondent-mother sent to petitioner—in August 2019, March 2020, April 2020, and May 2020—respondent-mother never requested a visit with Amy or asked to speak with the child after Amy's birthday on 5 August 2019. In her August 2019 birthday telephone call to Amy, respondent-mother told the juvenile that respondent-mother had gifts and a card for Amy and confirmed a mailing address with petitioner, but no such gifts or card were ever received.

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2. At the start of the adjudication hearing, petitioner's counsel asked the trial court "to take judicial notice at this time of the files . . . that were handed up before court began this morning . . . [a] child support file, custody files, and . . . a Domestic Violence Protective Order." Counsel for respondent-mother stated that respondent-mother had no objection to the trial court taking judicial notice of these court files.

¶ 8 Amy's father testified at the adjudication hearing that he did not believe that respondent-mother had any contact with Amy after September 2018 but acknowledged that his information was limited in light of the fact that he had been incarcerated for eighteen months out of the three years which preceded the adjudication hearing. The father also acknowledged that he had maintained control of the financial card onto which child support payments made by respondent-mother for the benefit of Amy were deposited and that he was using the funds himself which were deposited on the card, even though Amy had been in petitioner's sole custody for two years. Amy's father explained that while he was aware that the funds were intended for Amy's support, he believed that the State—not the father—had the responsibility to ensure that the child or her custodian was receiving the money which was paid for child support.

¶ 9 Respondent-mother testified that "at the end of 2018" she moved from Surry County, where Amy resided with petitioner, to Raleigh "to better [her] life." Respondent-mother related that she had been previously incarcerated on drug charges but represented that at the time of the adjudication hearing she had been "clean" for six months. Respondent-mother acknowledged that "[t]here isn't much of a relationship" between petitioner and her. When asked during her testimony why she had not tried to contact petitioner about Amy more than once after September 2018, respondent-mother replied, "Honestly, I just had just kind of given up at that point. And I didn't want to cause any more issue or drama or stress." Respondent-mother also testified that her wages had been garnished for six or seven years to provide child support for Amy, but respondent-mother admitted that she was aware that these funds were going to the father even though respondent-mother also knew that petitioner had obtained sole custody of Amy in 2018.

¶ 10 In a termination order filed on 12 August 2020, the trial court made findings of fact regarding, *inter alia*, the custody complaint filed by petitioner and the resulting award of custody, of which the trial court took judicial notice; respondent-mother's repeated failure to attend mediation sessions which were ordered as part of the custody proceedings; respondent-mother's failure to exercise visitation with Amy with the sole exception of a visit on 23 September 2018; respondent-mother's only telephone call to Amy after July 2018 which occurred on 6 August 2019; respondent-mother's failure to provide clothing, food, gifts, or involvement with Amy's school, counseling, or medical care; respondent-mother's awareness that her child support payments obtained through garnishment of her wages were actually going to the

father and not to petitioner as Amy's custodian for the care and support of the child; respondent-mother's choice to move her residence from Surry County to Raleigh, far from Amy's home; and respondent-mother's acknowledgment that she "basically gave up" with regard to contacting petitioner about Amy and was grateful to petitioner for loving Amy and "treating her like [petitioner's] own." Based upon these findings of fact, the trial court concluded that petitioner had proven "by clear, cogent, and convincing evidence that [r]espondent has abandoned the minor child within the meaning of North Carolina General Statute § 7B-1111(a)(7)."

¶ 11 The trial court then moved to the disposition stage and ultimately entered an order which included, *inter alia*, the following finding of fact addressing statutory considerations as specified in N.C.G.S. § 7B-1110(a):

> 2. The [trial c]ourt evaluated the evidence by the standard of the best interest of the minor child, and considered the statutory criteria located in [N.C.G.S.] § 7B-1110:
>
> a. Age of the juvenile: The minor child is almost ten years old.
>
> b. The likelihood of adoption of the juvenile: There is strong evidence that the minor child will be adopted by [p]etitioner.
>
> c. Whether termination will aid in a permanent plan: Adoption of the minor child by [p]etitioner would aid in a plan of adoption and provide permanence for the minor child.
>
> d. Bond between the juvenile and the parent: The [trial c]ourt finds that there is a familiarity between the minor child and the memory of her biological mother, but there is no bond as a mother and child.
>
> e. Quality of relationship between the child and the adoptive parent: The [trial c]ourt finds this relationship is very strong.
>
> f. Any other relevant consideration: The [trial c]ourt incorporates the findings of fact from the Adjudicatory hearing, and finds that [p]etitioner has been the minor child's mother for all intents and purposes.

The trial court then concluded that it was in the juvenile Amy's best interests to terminate respondent-mother's parental rights to the child. Respondent-mother entered written notice of appeal to this Court on 27 August 2020, and the matter was heard by this Court on 5 October 2021.

II. Analysis

¶ 12 Respondent-mother advances three arguments in her appeal to this Court: first, that petitioner did not establish that petitioner had standing to file a petition for termination of respondent-mother's parental rights to Amy; second, that the trial court erred in finding the existence of the ground of abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) which provided the basis for the termination of respondent-mother's parental rights; and third, that the trial court abused its discretion in concluding that termination of the parental rights of respondent-mother was in the juvenile Amy's best interests where the guardian ad litem did not recommend termination and Amy did not wish for respondent-mother's parental rights to be terminated. As discussed below, we find each of respondent-mother's arguments to be unpersuasive, and as a result, this Court affirms the order terminating her parental rights.

A. Standing

¶ 13 **[1]** Respondent-mother contends that petitioner lacked standing to file a petition for the termination of respondent-mother's parental rights to the juvenile Amy. Respondent-mother claims that the termination of parental rights petition did not specifically allege that Amy had lived with petitioner for the two years immediately preceding the filing of the petition and that the trial court made no finding of fact in the termination of parental rights order about petitioner's standing to initiate the action or the duration of time that Amy had lived with petitioner. Respondent-mother also suggests that Amy might have lived with someone other than petitioner at some point during the relevant statutory time period. For these reasons, respondent-mother asserts that the trial court erred in allowing petitioner's termination of parental rights action to proceed. After thoughtful consideration of respondent-mother's arguments, the pertinent statutory law and case law, and the record in this case, we disagree with respondent-mother's position.

> "Whether or not a trial court possesses subject-matter jurisdiction is a question of law that is reviewed de novo. 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 A.L.L.*, 376 N.C. 99, 101, 852 S.E.2d 1 (2020)

> (extraneity omitted). However, "[t]his Court presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise." *In re L.T.*, 374 N.C. 567, 569, 843 S.E.2d 199 (2020).

In re M.R.J., 378 N.C. 648, 2021-NCSC-112, ¶ 19 (alteration in original). One issue that could implicate subject matter jurisdiction is the standing of a party to initiate a particular action. *Id.* ¶¶ 21, 41. On the matter of standing, the North Carolina Juvenile Code provides that "[a] petition or motion to terminate the parental rights of either or both parents to his, her, or their minor juvenile may only be filed by," *inter alia*, "[a]ny person with whom the juvenile has resided for a continuous period of two years or more next preceding the filing of the petition or motion." N.C.G.S. § 7B-1103(a) (2019).[3] Where challenged, "the record must contain evidence sufficient to sustain a finding [of standing]." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 647 (2008); *see also In re L.T.*, 374 N.C. 567, 569 (2020).

¶ 14 In the petition for termination of parental rights, petitioner alleged that she and Amy's father "had primary legal and physical custody of" Amy "during their marriage," which the petition further alleged existed from 30 April 2015 to 14 January 2019. The petition alleged that Amy continued to reside with petitioner after the end of petitioner's marriage to the father and that the juvenile still resided with petitioner as of the 13 May 2019 date of the petition's filing. In the 31 May 2018 complaint seeking custody of Amy that petitioner filed against respondent-mother and the father, of which the trial court took judicial notice in its decision in the instant case, petitioner alleged that Amy had resided with petitioner since the separation of petitioner and the child's father in October 2017. These filings alone provide a sufficient foundation to support a determination that petitioner had standing to initiate the termination of parental rights action based upon the allegations of petitioner, and buttressed by the judicial notice of documentation by the trial court, that the juvenile Amy had resided with petitioner for a continuous period of two years or more next preceding the filing of petitioner's petition.

¶ 15 In addition to the allegations contained in the termination of parental rights petition and in the custody complaint, several trial court orders

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3. This subsection was amended, effective 1 October 2021, while applying to actions filed or pending on or after that date, to reduce the pertinent time period of the juvenile's residence with a petitioner from "two years" to "18 months." Act of Sept. 1, 2021, S.L. 2021-132, § 1(*l*), 2021 N.C. Sess. Laws 165, 170. Hence, the law, in its amended form, does not apply to the present case.

of which the trial court in this case took judicial notice and which are included in the record on appeal in this case also show that petitioner's allegations demonstrate her standing to bring this action. The custody order, which was filed on 23 July 2018 and issued by the same trial court in which the instant case was pending, awarded full custody of the juvenile Amy to petitioner; this custodial arrangement has continued since that date. That custody award, in turn, followed an order entered on 31 May 2018 in which petitioner was granted temporary legal and physical custody of Amy. These court orders established that petitioner had sole physical custody of Amy for at least one year of the pertinent two-year period preceding the filing of the termination petition, and the trial court orders corroborate the position of petitioner.

¶ 16 Furthermore, respondent-mother did not introduce *any* evidence at the adjudication hearing which suggested that the child Amy resided with anyone other than petitioner during the two years preceding the filing of the termination of parental rights petition. Indeed, there was no evidence presented by any party at the adjudication hearing, or otherwise introduced into the record, to suggest that Amy resided outside of petitioner's home at any point during the statutory time period. On appeal, respondent-mother does not cite any evidence which would support a determination by the trial court that petitioner lacked standing to file the petition for termination of parental rights and instead relies solely upon an argument that standing was not established due to the lack of express statements regarding the subject of standing in the termination order. To the contrary, petitioner testified that petitioner and Amy's father began living together in late 2013, along with Amy, who was three years old at the time and in the sole custody of her father.

¶ 17 In sum, the record in this case indicates that Amy continuously resided with petitioner—whether with or without the father—from at least late 2013 through 13 May 2019, the date on which the petition to terminate parental rights was filed. This period of more than five years not only encompasses but clearly exceeds the "continuous period of two years" preceding the filing of the petition as specified in the statute which defines those persons who have standing to file a petition for termination of parental rights. N.C.G.S. § 7B-1103(a)(5). Nothing in the Juvenile Code requires a petitioner to utilize any specific language in a petition for termination of parental rights to establish the party's standing to bring the termination proceeding. Similarly, no authority in the Juvenile Code or precedent from this Court requires the trial court to make a specific finding of fact regarding a petitioner's standing; therefore, it is of no consequence that the trial court did not elect to enter

an explicit recognition of petitioner's standing to initiate the case, especially since respondent-mother did not raise the issue during either the adjudication or the disposition hearing.

¶ 18 In light of the evidence of record in this matter, we conclude that petitioner had standing to file a petition for termination of respondent-mother's parental rights to Amy because Amy had been residing with petitioner "for a continuous period of two years or more next preceding the filing of the petition or motion." N.C.G.S. § 7B-1103(a)(5). Accordingly, respondent-mother's argument on this issue is unpersuasive.

B. Abandonment as a ground for termination of parental rights

¶ 19 **[2]** In her second argument, respondent-mother contends that the evidence in this case did not support the trial court's Findings of Fact 14, 15, 20, 21, and 28. She also asserts that Finding of Fact 29 and Conclusion of Law 3 were not proven by clear, cogent, and convincing evidence and that both erroneously establish that the ground of abandonment existed for the potential termination of her parental rights. *See* N.C.G.S. § 7B-1111(a)(7) (2021) (providing that a person's parental rights may be terminated if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition"). Specifically, respondent-mother submits that her testimony at the adjudication hearing that she maintained communication with petitioner and Amy's father through text messages and telephone calls and "paid child support every month, as court ordered, for Amy" was sufficient to prevent the trial court from determining the existence of abandonment as a ground for termination of respondent-mother's parental rights. We disagree with this argument.

¶ 20 In an action seeking termination of parental rights, adjudication is the first stage of a two-stage process. N.C.G.S. § 7B-1109 (2021). At this initial stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of at least one ground for termination as specified under subsection 7B-1111(a) of the General Statutes of North Carolina. N.C.G.S. § 7B-1109(f). We review a trial court's adjudication of the existence of a ground for termination as provided in N.C.G.S. § 7B-1109 "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 (1984). The trial court's conclusions of law are reviewed de novo on appeal. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 21 In the context of a termination of parental rights proceeding, the ground of "[a]bandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275 (1986)). Where "a parent withholds [her] presence, [her] love, [her] care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501 (1962). Although a parent's acts and omissions, which are at times outside of the statutorily provided period, may be relevant in assessing a parent's intent and willfulness in determining the potential existence of the ground of abandonment, the dispositive time period is the six months preceding the filing of the petition for termination of parental rights. *In re C.B.C.*, 373 N.C. at 22–23; *see also* N.C.G.S. § 7B-1111(a)(7). Here, the six-month time period preceding the filing of the petition for the termination of parental rights extends from 13 November 2018 to 13 May 2019.

¶ 22 Respondent-mother offers that there was evidence adduced at the adjudication hearing indicating that respondent-mother: contacted petitioner and Amy's father regarding Amy such that petitioner did not fail to "act[ ] as a normal parent would," which is pertinent to Finding of Fact 14; paid child support in good faith during the relevant time period and did not know or willfully intend that those funds would go to the father rather than to petitioner to support Amy, which is pertinent to Findings of Fact 14, 15, and 20; had no duty to act affirmatively to modify the governing child support order to redirect her garnished wages to petitioner, which is pertinent to Finding of Fact 21; and did not fail to "act[ ] in any other manner consistent with being a parent," which is pertinent to Finding of Fact 28. Respondent-mother is correct that such evidence appears in the record; it was introduced at the adjudication hearing by means of respondent-mother's own testimony. However, respondent-mother conveniently fails to acknowledge or otherwise address the fact that petitioner, Amy's father, and even respondent-mother herself all provided testimony during the adjudication hearing that contradicted respondent-mother's claims of involvement with Amy during the relevant statutory period for abandonment and which could support the challenged findings of fact.

¶ 23 For example, petitioner testified at the adjudication hearing that: respondent-mother's last in-person visit with Amy was in September 2018, which is a point in time outside of the pertinent six-month statutory timeframe for determining abandonment; respondent-mother's last

telephone conversation with Amy was on 6 August 2019, also outside of the six-month time period addressed by the statute; respondent-mother did not ask petitioner about Amy's wellbeing in the single text message which respondent-mother sent to petitioner during the relevant statutory time span; respondent-mother did not send Amy any cards, gifts, or other tokens of affection during the six months immediately preceding the filing of the petition; and petitioner did not have access to any funds garnished from respondent-mother's wages for the support of Amy during this period of time which is statutorily relevant to the existence of the ground of abandonment. Respondent-mother related in her testimony that she was aware that the funds which were garnished from her wages for purposes of child support were going to Amy's father rather than going to petitioner, who had sole custody of Amy during the pertinent time period. And while respondent-mother testified that she thought that Amy's father was giving the garnished child support money to petitioner, the father testified that he used the child support funds for his own purposes instead of for the support of Amy. Additional evidence which was introduced at the adjudication hearing indicated that respondent-mother was aware that Amy's father was incarcerated during most of the six-month period preceding the filing of the petition for termination of parental rights.

¶ 24 We emphasize that, with respect to its determination of the existence of abandonment here as a ground for termination of respondent-mother's parental rights, the trial court properly considered the fact that respondent-mother allowed her garnished wages for the support of Amy to be directed to the father rather than to petitioner during the course of the relevant six-month time period regarding abandonment when petitioner had sole custody of the juvenile and respondent-mother admitted during the adjudication hearing that respondent-mother was aware of this arrangement. It is an uncommon circumstance for a parent such as respondent-mother to experience court-ordered wage garnishment in order to ensure that child support is received for the benefit of the child on one hand, while on the other hand the same non-custodial parent subject to garnishment is aware that these garnished child support payments are being received by the other parent who also does not have custody of the child. Despite respondent-mother's required compliance with the trial court's mandated wage garnishment in order to guarantee respondent-mother's payment of child support, nonetheless this consistency of payment of child support funds which was known by respondent-mother to be directed by the trial court to the father rather than to petitioner neither mandatorily qualifies this development as favorable for respondent-mother, nor mandatorily disqualifies it as

unfavorable for respondent-mother, in the trial court's determination of the existence of the ground of abandonment. These aspects, combined with the trial court's evaluation of respondent-mother's testimony at the adjudication hearing regarding her assumption that the father was passing along to petitioner the child support payments which he was receiving and the trial court's assessment of the father's testimony at the adjudication hearing that he used the child support payments for his own benefit rather than the support of the juvenile, were all proper for the trial court to include in its considerations in determining the existence of the ground of abandonment pursuant to the principles which this Court has announced in *In re Young* and *Pratt v. Bishop*.

¶ 25 In light of the evidence which was presented to the trial court regarding respondent-mother's abandonment of Amy as defined by N.C.G.S. § 7B-1111(a)(7), we determine that the findings of fact and resulting conclusion of law which respondent-mother disputes in the adjudication order must be upheld. The trial court was able to see and hear witnesses as they testified at the adjudication hearing, while assessing the witnesses' credibility and demeanor, in order to resolve any contradictions in the evidence in making the tribunal's findings of fact. On appeal, this Court is "bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary." *In re M.C.*, 374 N.C. 882, 886 (2020) (quoting *In re Montgomery*, 311 N.C. at 110–11). Here, there is sufficient evidence to support each of the trial court's challenged findings of fact. The essential underlying findings of fact that would support the ultimate finding of fact and eventual conclusion of law that the ground of abandonment existed to permit the termination of respondent-mother's parental rights to Amy—that respondent-mother: did not visit with Amy; did not provide Amy with any correspondence, gifts, affection, or support; did not in any other manner evince a desire to engage in parental duties or act in a parental manner; and was aware that although her wages were being garnished for the support of Amy, these funds were going to the father rather than to petitioner, who respondent-mother knew had custody of Amy—were proven by clear, cogent, and convincing evidence. Accordingly, we affirm the adjudication portion of the trial court's order.

C. Best interests determination

¶ 26 **[3]** The second stage of a termination of parental rights proceeding, which transpires only if at least one ground supporting termination of parental rights is found to exist at the adjudication stage, is a consideration of whether the disposition would be in the juvenile's best interests. *See* N.C.G.S. § 7B-1110(a) (2021). "If [the trial court] determines that one

or more grounds listed in [N.C.G.S. §] 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842 (2016) (first citing *In re Young*, 346 N.C. at 247; and then citing N.C.G.S. § 7B-1110 (2015)). "At the disposition stage, the trial court solely considers the best interests of the child. Nonetheless, facts found by the trial court are binding absent a showing of an abuse of discretion." *In re J.H.*, 373 N.C. 264, 268 (2020) (quoting *In re N.G.*, 186 N.C. App. 1, 10 (2007)); *see also* N.C.G.S. § 7B-100(5) (2021) ("[T]he best interests of the juvenile are of paramount consideration . . . ."). An abuse of discretion is shown where a trial "court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285 (1988)).

¶ 27 The Juvenile Code provides that

> [i]n determining the best interests of a child during the dispositional phase of the termination of parental rights hearing, the trial court must make relevant findings concerning: (1) the age of the juvenile, (2) the likelihood of adoption, (3) whether termination will aid in the accomplishment of the permanent plan, (4) the bond between the juvenile and the parent, (5) the quality of the relationship between the juvenile and the proposed permanent placement, and (6) any relevant consideration.

In re J.H., 373 N.C. at 270 (citing N.C.G.S. § 7B-1110(a) (2019)). In the present case, the trial court made specific findings of fact on each of the above-referenced statutory criteria.

¶ 28 Respondent-mother contends that the trial court abused its discretion in terminating respondent-mother's parental rights because the disposition was not in the best interests of Amy for several reasons, including: (1) the guardian ad litem did not recommend that respondent-mother's parental rights be terminated; (2) Amy did not want respondent-mother's parental rights to be terminated; and (3) the trial court's decision was arbitrary in that the parental rights of respondent-mother were terminated in this action while the father's parental rights were not.[4] Upon review, none of respondent-mother's

4. Respondent-mother also contends that the trial court abused its discretion in finding that the termination of her parental rights was in Amy's best interests because the trial court erred in concluding that a ground existed to permit the termination of parental

arguments succeed in establishing that the trial court abused its discretion in concluding that the termination of respondent-mother's parental rights was in Amy's best interests.

¶ 29 The portion of the trial court's order which addressed disposition included a finding of fact acknowledging that the guardian ad litem had not recommended the termination of respondent-mother's parental rights. In so doing, the trial court indicated that it had "considered the report and testimony of the guardian ad litem. The court, however, was not bound by that recommendation." *In re A.U.D.*, 373 N.C. 3, 11 (2019) (emphasis omitted) (citing *In re D.L.W.*, 368 N.C. at 843, for the proposition that the trial court must "consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom"). While the role of the guardian ad litem is critical in every juvenile case, with the testimony and reports of the guardian ad litem serving as important evidence at every phase of a case's proceeding, nonetheless a guardian ad litem's recommendation regarding the best interests of a juvenile at the dispositional stage of a termination of parental rights case is not controlling. Rather, "because the trial court possesses the authority to weigh *all* of the evidence, the mere fact that it elected not to follow the recommendation of the guardian *ad litem* does not constitute error," let alone an abuse of discretion. *Id.* (emphasis added).

¶ 30 With regard to respondent-mother's claim that Amy did not want respondent-mother's parental rights to be terminated, respondent-mother's own presentation of the evidence on this circumstance is not as supportive of respondent-mother's stance concerning the juvenile Amy's wishes as respondent-mother unequivocally represents. Respondent-mother has submitted to this Court the following passage from the guardian ad litem's testimony at the trial court hearing:

> [W]hen I spoke to [Amy] about the termination she was very upset. The first thing in her mind she thought of is that she could possibly be taken out of [petitioner's] home. And so she did not want to be removed. However, when I—and at this time that I was speaking to her in terms of a termination about [respondent-mother] and [the father], because they were both still pending at that time, and [Amy]

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rights as specified in N.C.G.S. § 7B-1110. Having previously discussed the reasons why we reject respondent-mother's challenge to the trial court's determination that the ground of abandonment existed in this case, we do not revisit the issue here.

> seemed to be upset about the idea of the termination, about not being able to speak to [respondent-mother and the father] again. She didn't have anything bad to say about either one of them. It was obvious that she understands that [petitioner] is her caregiver, her provider. But she had fond things to say about both [respondent-mother] and [the father]. And so when I asked her about not, you know, did she understand that if their rights were terminated that they wouldn't be her mom and dad anymore, and that, you know, she didn't have to speak to them, she may not, you know, be allowed to speak to them anymore. And she got visibly upset over that.
>
> So I felt—that bothered me, that it hadn't been discussed with her, because she was so mature for her age. And maybe, you know, somebody should have went over that with her, especially before I popped in and, you know, broke, broke the news to her.

While respondent-mother gratuitously gilds this testimony of the guardian ad litem to indicate that Amy did not want respondent-mother's parental rights to be terminated, the guardian ad litem's account of Amy's reaction to the prospect of the termination of parental rights is more accurately depicted as the juvenile's apprehension about the legal and practical impact of such an outcome. Neutrally recounted, the guardian ad litem related that Amy feared being removed from petitioner's residence; that Amy made fond comments about respondent-mother and the father; that Amy was upset by the idea that Amy would not be able to speak to respondent-mother and the father if their parental rights were terminated; and that Amy should have had the legal proceeding and its effects reviewed with her prior to the hearing's occurrence. There is nothing in this segment of the guardian ad litem's testimony which is cited by respondent-mother to indicate that Amy did not want respondent-mother's parental rights to be terminated and nothing from which we can conclude that the trial court abused its discretion in determining that the termination of respondent-mother's parental rights was in the juvenile Amy's best interests.

¶ 31 Respondent-mother's remaining argument regarding the best interests determination by the trial court is that the forum abused its discretion in that "[t]here is an overall inequity in allowing [the father] to maintain a relationship with Amy while terminating [respondent-mother's] rights. . . . [Respondent-mother] was not a worse parent than [the father].

Treating her differently amounted to an abuse of discretion." The proper focus of the trial court at the dispositional phase of the case was on the best interests of *Amy*, not the equities between *the parents*. *In re J.H.*, 373 N.C. at 268. The trial court did not abuse its discretion in this regard.

¶ 32 We conclude that the trial court properly exercised its discretion to make a reasoned decision regarding the issue of whether termination of respondent-mother's parental rights was in Amy's best interests.

III. Conclusion

¶ 33 In conclusion, this Court holds that petitioner established her standing pursuant to statutory requirements to bring the underlying petition, that the evidence before the trial court sufficiently demonstrated the existence of a statutory ground for termination, and that the trial court did not abuse its discretion in concluding that termination of respondent-mother's parental rights was in the juvenile Amy's best interests.

AFFIRMED.

Justice EARLS concurring.

¶ 34 I agree that petitioner has standing to bring this action against respondent-mother for the reasons articulated by the majority. I write separately on the question of whether the trial court's findings of fact support its legal conclusion that: "Petitioner has proven by clear, cogent, and convincing evidence that Respondent has abandoned the minor child within the meaning of North Carolina General Statutes § 7B-1111(a)(7)." We have recently held that "[i]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and *willfully neglects to lend support and maintenance*, such parent relinquishes all parental claims and abandons the child." *In re E.H.P.*, 372 N.C. 388, 393 (2019) (emphasis added). Applying that precedent to this case, the challenge is that respondent-mother consistently paid child support of $216 a month during the relevant six-month period preceding the filing of the petition for termination of parental rights, that is, from 13 November 2018 to 13 May 2019. Indeed, she had been regularly paying child support monthly for seven years before the termination hearing and was not in arrears.

¶ 35 I write separately because in my view, fidelity to our precedents requires that we acknowledge that fact as cutting against, rather than supporting, the ultimate legal conclusion that respondent-mother abandoned her daughter. On balance, the trial court's other findings are

sufficient to support a conclusion of abandonment, and thus I agree with the majority's ultimate conclusion on this issue. However, I do not agree with the majority that respondent-mother's awareness that her child support payments, which were paid pursuant to a court order and directly garnished from her wages, went to the child's father and not directly to petitioner, are evidence of her abandonment of her daughter.

¶ 36 While the statutory language does not support a conclusion that payment of child support alone during the relevant six-month period is an absolute bar to a finding of abandonment, the Court of Appeals has considered the payment of child support as one factor to be considered. In *In re T.C.B.*, for example, the court recited the facts regarding a father's payment of child support and concluded that "[t]hese findings regarding the payment of child support further serve to undermine the district court's conclusion of willful abandonment." *In re T.C.B.*, 166 N.C. App. 482, 488 (2004). Similarly, in *In re K.C.*, the fact that respondent-mother had paid court-ordered child support was one factor, among others, such as attending nine visitations during an eighteen-month period and speaking with her son on the phone several times, showing that her actions "are not consistent with abandonment as defined under North Carolina law." *In re K.C.*, 247 N.C. App. 84, 88 (2016).

¶ 37 To be sure, the Court of Appeals has also found that abandonment may occur even when child support was being paid or was paid inconsistently. *See, e.g.*, *In re C.J.H.*, 240 N.C. App. 489, 504 (2015) (affirming finding of abandonment despite the fact that respondent made "last-minute child support payments and requests for visitation," because during the relevant period "respondent did not visit the juvenile, failed to pay child support in a timely and consistent manner, and failed to make a good faith effort to maintain or reestablish a relationship with the juvenile"); *In re Adoption of Searle*, 82 N.C. App. 273, 276 (1986) (evidence of one $500 payment by respondent — without any other activity during the relevant time period — was sufficient to support determination that father willfully abandoned child). But all these precedents together stand for the proposition that payment of child support, whether by court order or otherwise, is a relevant factor to consider in determining whether the statutory ground of abandonment has been established.

¶ 38 Here, the majority concludes that it was proper for the trial court to consider testimony about what respondent-mother knew regarding whether the father was using her child support payments for the benefit of the child, but maintains that evidence of consistent child support payments is not "mandatorily" favorable or unfavorable to respondent-mother on the question of abandonment. However, the trial

court's order includes a "Finding of Fact" that "[r]espondent had an affirmative duty to do something, and her failure to do so is further evidence forsaking her parental responsibilities." This is not a "fact," nor is it an accurate statement of the law. Rather, our case law establishes that petitioner has the burden of proving, for the ground of abandonment, that respondent-mother "willfully neglect[ed] to lend support or maintenance," among other things. *See In re E.H.P.*, 372 N.C. at 393. Petitioner must put forward clear and convincing evidence that respondent-mother's 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. 244, 252 (1997). In this case, respondent-mother had an affirmative duty to comply with the court order regarding payment of child support, which she did. She did not have "an affirmative legal duty to do something" more. The fact of her consistent child support payments does not bar the ultimate conclusion of abandonment here, but the majority errs in failing to acknowledge that this factor weighed in respondent-mother's favor.

IN THE MATTER OF B.B., S.B., S.B.

No. 24A21

Filed 17 June 2022

1. Termination of Parental Rights—jurisdiction—amendments to termination order—after notice of appeal given—substantive in nature

The trial court lacked jurisdiction pursuant to N.C.G.S. § 7B-1003(b) to amend its order terminating a mother's parental rights to her children after the mother had given notice of appeal of the original termination order because the amendments—multiple additional findings of fact which were neither mentioned in the court's oral ruling nor duplicative of other findings in the original order—were not merely clerical corrections but were substantive in nature. Therefore, the amended order was void, leaving only the original order subject to appellate review.

2. Termination of Parental Rights—motion to continue hearing—denied—no prejudice

The trial court did not abuse its discretion by denying respondent-mother's motion to continue a termination of parental rights

hearing (made on her behalf by her counsel when respondent did not appear at the hearing) where respondent failed to show the denial caused her prejudice, since she did not state that she would have testified or that a different outcome would have resulted if the motion had been allowed.

3. Termination of Parental Rights—grounds for termination—neglect—continued criminal activity—failure to engage with case plan

The trial court properly terminated respondent-mother's parental rights to her children on the ground of neglect based on findings, which were supported by clear, cogent, and convincing evidence, that, while the children were in DSS custody, respondent incurred new criminal charges; did not provide gifts, notes, letters, tangible items, or financial support to her children; and did not complete any aspect of her case plan. Respondent's periods of incarceration were not an adequate excuse for her lack of engagement with her children.

4. Constitutional Law—effective assistance of counsel—termination of parental rights—prejudice analysis

In a termination of parental rights matter, respondent-mother failed to show prejudice and therefore was not entitled to relief on her claim of ineffective assistance of counsel—in which she alleged that her counsel failed to ensure respondent was present at the hearings, seek visitation, file a response to the termination petition, assert due process claims, or advocate sufficiently. Based on evidence of numerous communications between respondent and her counsel throughout the proceedings, and respondent's failure to complete any part of her case plan despite understanding what was expected, she did not demonstrate that there was a reasonable probability of a different outcome absent the alleged errors by counsel.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 29 October 2020 and an order entered on 23 February 2022 after remand, both by Judge Wesley W. Barkley in District Court, Burke County. Heard originally in the Supreme Court on 5 October 2021 and calendared again for argument in the Supreme Court on 10 May 2022 but determined on the record and briefs without further oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

IN RE B.B.

[381 N.C. 343, 2022-NCSC-67]

Amanda C. Perez for petitioner-appellee Burke County Department of Social Services.

Olabisi A. Ofunniyin and Thomas N. Griffin III for appellee Guardian ad Litem.

W. Michael Spivey for respondent-appellant mother.

BARRINGER, Justice.

¶ 1 Respondent appeals from an order terminating her parental rights to three of her minor children, B.B. (Bob), S.B. (Sally) and S.B. (Susan).[1] After careful review, we affirm the trial court's order.

I. Background

¶ 2 On 14 September 2018, the Burke County Department of Social Services (DSS) received a Child Protective Services (CPS) report stating that respondent was incarcerated, and Bob, Sally, and Susan were living in a car with their father. The report further alleged that the father was suspected of using methamphetamine. DSS confirmed that respondent was incarcerated and met with the father at the home of his sister. The father claimed that he and the children were staying at his sister's home. The father signed a Safety Assessment in which he agreed the children would remain in his sister's home, and he would submit to a substance abuse screening within twenty-four hours. However, when a social worker returned to the home on 19 September 2018, the father had left the home and taken the children with him without providing any contact information.

¶ 3 On 21 September 2018, DSS was notified that the father brought Bob to school. Bob was wearing the same dirty and torn clothing that he had worn the previous day and stated that he had not eaten since the day before. At the end of the school day, nobody arrived to pick up Bob from school. DSS then contacted respondent, who was still incarcerated, and attempted without success to locate an appropriate alternative caregiver for the children based on information from respondent. Meanwhile, the father's sister notified DSS that the father had left Sally and Susan in her care without providing his contact information or making a plan of care for the children. The father's sister also refused to continue caring

1. Pseudonyms are used in this opinion to protect the juveniles' identities and for ease of reading.

for the children. At the time, Bob had eight unexcused absences from school and one tardy; Sally had a scar on her torso, which she stated was a cut with a knife from her father; and Susan had a diaper rash, fever, and two red bumps on her torso. Additionally, all the children had an odor about them. DSS was unable to locate the father.

¶ 4 The same day, DSS filed a petition alleging that the juveniles were neglected and dependent and obtained non-secure custody of Bob, Sally, and Susan. On 26 September 2018, DSS filed an amended petition.

¶ 5 Meanwhile, on 24 September 2018, respondent was released from custody, but she still had pending criminal charges in four counties including a probation violation. Respondent admitted to DSS the next day that she was unable to get the juveniles regular medical care and that for the last six months she had unstable housing. Respondent also refused to submit to a drug screen; she wanted to consult her attorney first. Respondent had previously tested positive for methamphetamines in 2017 and had a history of drug use. Susan tested positive at birth in 2017 for amphetamines, cannabinoids, and methamphetamine via meconium screening.

¶ 6 Before the hearing on the petition on 10 January 2019, respondent stipulated to the foregoing facts and stipulated that she was not employed and living with friends in a home that was not appropriate for children. Based upon stipulations made by respondent and the father, the trial court entered an order on 24 January 2019 adjudicating Bob, Sally, and Susan as neglected and dependent juveniles. The trial court continued custody of the juveniles with DSS. The trial court also ordered respondent to comply with an out-of-home family services agreement (case plan) and granted her supervised visitation.

¶ 7 The trial court held review hearings on 7 March 2019 and 16 May 2019. The trial court entered review orders from both hearings in which it found as fact that respondent was unemployed, did not have stable housing, had not maintained consistent contact with DSS, and had not engaged in any case plan services.

¶ 8 Following a permanency-planning-review hearing held on 15 August 2019, the trial court entered an order on 5 September 2019. The trial court found as fact that respondent had recently been arrested on drug related charges in Buncombe County. The trial court again found as fact that respondent was not engaged in case plan services and had failed to maintain consistent contact with DSS. The trial court adopted a primary permanent plan of adoption with a secondary plan of reunification.

¶ 9 On 22 October 2019, DSS moved to terminate respondent's parental rights to each of the three juveniles on the grounds of neglect, willful failure to make reasonable progress, willful failure to pay for the cost of care for the juveniles, and abandonment. N.C.G.S. § 7B-1111(a)(1)–(3), (7) (2021). Following a hearing held on 4 September 2020, the trial court entered an order on 29 October 2020 in which it determined grounds existed to terminate respondent's parental rights pursuant to each of the grounds alleged in the motion. The trial court further concluded it was in the juveniles' best interests that respondent's parental rights be terminated. Accordingly, the trial court terminated respondent's parental rights.[2] Respondent entered a notice of appeal on 2 November 2020. On 13 November 2020, the trial court entered an amended termination order.

¶ 10 On appeal, respondent presents four arguments. First, the trial court lacked jurisdiction to enter an amended termination order because notice of appeal had already been given, and the trial court made substantive, not clerical, changes. Second, the trial court abused its discretion by denying respondent's motion to continue. Third, the trial court erred by concluding that grounds existed to terminate respondent's parental rights. Fourth, respondent received ineffective assistance of counsel.

¶ 11 On 5 October 2021, this Court heard oral arguments concerning this appeal. Thereafter, this Court issued an order in the exercise of its discretion remanding the case "so the parties may supplement the record with evidence related to the trial court's statements on the record concerning respondent-mother's motion to continue on 4 September 2020" and "for the trial court to hear respondent-mother's claim of ineffective assistance of counsel." *In re B.B.*, 379 N.C. 660, 660 (2021) (order remanding case).

¶ 12 On remand, the trial court made findings of facts and conclusions of law and denied respondent's Rule 60(b) motion alleging ineffective assistance of counsel. Then, consistent with this Court's order, the parties supplemented the record on appeal and filed supplemental briefs for this Court. Thus, this appeal is now ripe for our full consideration.

II. Analysis

A. Jurisdiction

¶ 13 **[1]** We first consider respondent's argument that the trial court lacked jurisdiction to enter the amended termination order after respondent

2. The trial court's order also terminated the parental rights of the juveniles' father, but he did not appeal and is not a party to the proceedings before this Court.

had noticed her appeal because the trial court made substantive, not clerical, changes to the order. We agree that the trial court lacked jurisdiction to enter the amended termination order.

¶ 14 Generally, upon perfection of an appeal, N.C.G.S. § 1-294 "stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein." N.C.G.S. § 1-294 (2021); *see also Am. Floor Mach. Co. v. Dixon*, 260 N.C. 732, 735 (1963) ("As a general rule, an appeal takes a case out of the jurisdiction of the trial court."). However, "[w]hen a specific statute addresses jurisdiction during an appeal . . . that statute controls over the general rule." *In re M.I.W.*, 365 N.C. 374, 377 (2012). This Court recognized in *In re M.I.W.* that the legislature enacted a specific statute, N.C.G.S. § 7B-1003, regarding jurisdiction during an appeal for matters arising under the Juvenile Code that controls over N.C.G.S. § 1-294. *Id.* at 377–78. The legislature recognized that the "needs of the child may change while legal proceedings are pending on appeal," necessitating "a modified approach" to jurisdiction during an appeal in juvenile cases. *Id.* at 377.

¶ 15 As relevant to this appeal, N.C.G.S. § 7B-1003(b) provides as follows:

> (b) Pending disposition of an appeal, unless directed otherwise by an appellate court or subsection (c) of this section applies, the trial court shall:
>
> (1) Continue to exercise jurisdiction and conduct hearings under this Subchapter with the exception of Article 11 of the General Statutes; and
>
> (2) Enter orders affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.

N.C.G.S. § 7B-1003(b) (2021).

¶ 16 Article 11 of the Juvenile Code is entitled and addresses termination of parental rights. N.C.G.S. § 7B-1100 to -1114 (2021). Thus, absent direction from an appellate court to the contrary, "N.C.G.S. § 7B-1003(b) does not divest the court of jurisdiction in termination proceedings during an appeal but does . . . prohibit the trial court from exercising jurisdiction in termination proceedings while disposition of an appeal is pending." *In re J.M.*, 377 N.C. 298, 2021-NCSC-48, ¶ 17.

> Exercising jurisdiction, in the context of the Juvenile Code, requires putting the [trial] court's jurisdiction into action by holding hearings, entering substantive

> orders or decrees, or making substantive decisions on the issues before it. In contrast, having jurisdiction is simply a state of being that requires, and in some cases allows, no substantive action from the [trial] court.

In re M.I.W., 365 N.C. at 379.

¶ 17 In this matter, after respondent filed her notice of appeal and before this Court took any action, the trial court entered an amended order with multiple additional findings of fact. Several of these findings of fact are neither findings of fact mentioned in the trial court's oral ruling nor duplicative of other findings of fact in the original termination-of-parental-rights order. Thus, we are not persuaded that these changes corrected a clerical mistake or error arising from oversight or omission. *See* N.C.G.S. § 1A-1, Rule 60(a) (2021) ("Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division."). Rather, we conclude that the trial court exercised jurisdiction by entering a termination-of-parental-rights order that made substantive changes when the trial court lacked jurisdiction to do so under N.C.G.S. § 7B-1003(b). As a result, the amended termination-of-parental-rights order is void, and we only consider the original termination-of-parental-rights order that was entered on 29 October 2020 and the 23 February 2022 order entered after remand and pursuant to this Court's order.

B. Continuance

¶ 18 **[2]** We next consider respondent's argument that the trial court abused its discretion by denying her counsel's motion to continue the termination hearing. Assuming without deciding that the trial court erred, we conclude that respondent has not shown that she was prejudiced by the denial of the motion to continue. Therefore, respondent is not entitled to any relief.

¶ 19 The record reflects that at the outset of the termination hearing, respondent had not appeared, and the trial court asked respondent's counsel if he had any contact with her. Counsel responded that respondent had bonded out of jail the night before and he had not heard from her and moved to continue the hearing in order to locate respondent. The

trial court, after again determining that respondent was not in the courtroom, summarily denied the motion to continue. The trial court noted for the record that

> [respondent] was prepared for transport yesterday at some point, so she knew of today's court date. She did bond out, but she is not present today, despite the fact that she was aware yesterday and prepared to come to court yesterday. We do have the Respondent Father here, and we will proceed.[3]

¶ 20 The standard of review for addressing motions to continue is well-established. When a respondent "did not assert in the trial court that a continuance was necessary to protect a constitutional right," appellate courts "review the trial court's denial of her motion to continue only for abuse of discretion." *In re A.L.S.*, 374 N.C. 515, 517 (2020). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (cleaned up). "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *In re J.E.*, 377 N.C. 285, 2021-NCSC-47, ¶ 15 (cleaned up). Under the Juvenile Code, "[c]ontinuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice." N.C.G.S. § 7B-1109(d) (2021). "Moreover, regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when [the respondent] shows both that the denial was erroneous, and that [the respondent] suffered prejudice as a result of the error." *In re A.L.S.*, 374 N.C. at 517 (cleaned up).

¶ 21 In her supplemental brief, respondent contends that "[t]he trial court acknowledged that it acted upon incorrect information when it denied counsel's motion to continue," and "[h]ad Judge Barkley known all of the[ ] facts when the matter was called for hearing on September 4 it seems unlikely that he would have denied even a few minutes for counsel to locate [respondent]." Yet even taking respondent's presumption as true, respondent has not shown how she suffered prejudice as a result of the alleged error. Respondent has not shown that she "would have testified and that such testimony would have impacted the outcome of

3. Pursuant to this Court's order, the record has been supplemented concerning the basis for the trial court's first two statements. It is undisputed that the father was present for the termination hearing as reflected in the trial court's last statement.

the proceeding." *In re C.C.G.*, 380 N.C. 23, 2022-NCSC-3, ¶ 14; *see also In re D.J.*, 378 N.C. 565, 2021-NCSC-105, ¶ 14 ("Based on the record before us, respondent's offer of proof fails to demonstrate the significance of the witness's potential testimony and any prejudice arising from the trial court's denial of her motion to continue."); *In re H.A.J.*, 377 N.C. 43, 2021-NCSC-26, ¶ 13 ("[B]ased upon the record before us, we conclude respondent-mother has failed to demonstrate prejudice. She has not demonstrated how her case would have been better prepared, or a different result obtained, had a continuance been granted."). Therefore, regardless of whether the denial of the motion to continue was erroneous, respondent is not entitled to any relief.

C. Grounds for Termination

¶ 22 **[3]** We next consider respondent's argument that the trial court erred by concluding that grounds existed to terminate her parental rights at the adjudicatory stage. Since the trial court's findings of fact support termination on the grounds of neglect pursuant to N.C.G.S. § 7B-1111(a)(1) and only one ground is necessary for termination, we conclude that the trial court did not err by adjudicating the ground of neglect and terminating respondent's parental rights.

¶ 23 At the adjudicatory stage, the trial court takes evidence, finds facts, and adjudicates the existence or nonexistence of the grounds for termination set forth in N.C.G.S. § 7B-1111. N.C.G.S. § 7B-1109(e). The trial court may terminate parental rights upon an adjudication of any one of the grounds in N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1111(a); *see also In re E.H.P.*, 372 N.C. 388, 395 (2019). We review a trial court's adjudication to determine whether the findings are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law. *In re E.H.P.*, 372 N.C. at 392. "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019).

¶ 24 A trial court may terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) if "[t]he parent has abused or neglected the juvenile" as defined in N.C.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). As explained by this Court,

> [t]ermination of parental rights based upon this statutory ground requires a showing of neglect at the time of the termination hearing or, if the child has been

> separated from the parent for a long period of time, there must be a showing of a likelihood of future neglect by the parent. When determining whether such future neglect is likely, the [trial] court must consider evidence of changed circumstances occurring between the period of past neglect and the time of the termination hearing.

In re R.L.D., 375 N.C. 838, 841 (2020) (cleaned up).

¶ 25 In this case, respondent argues that the trial court's findings of fact are insufficient to support termination on the ground of neglect because the trial court did not analyze respondent's ability to participate in the case plan or provide support to her children during her incarceration. Respondent also challenges finding of fact 40 as not supported by the evidence. We disagree: competent evidence supports finding of fact 40, and the findings of fact support the trial court's adjudication of neglect.

¶ 26 Here, the trial court's findings of fact reflect that the juveniles came into the custody of DSS on 21 September 2018. At that time, respondent was incarcerated. DSS contacted respondent by phone in jail and made efforts to locate an appropriate caregiver, but an appropriate caregiver could not be located. Respondent had a history of drug use and had tested positive for methamphetamines in September 2017. Susan also tested positive for amphetamines, cannabinoids, and methamphetamine at birth in 2017. Respondent stipulated to these facts and others, and the trial court entered an order adjudicating Bob, Sally, and Susan neglected and dependent juveniles on 24 January 2018. Thereafter, respondent entered into a case plan, which included: (1) submitting to a substance abuse assessment and following all recommended treatment; (2) complying with random drug screens; (3) completing a parenting capacity evaluation; (4) completing a parenting education program; (5) obtaining and maintaining safe and stable housing; (6) refraining from criminal activity; and (7) obtaining and maintaining a legal source of income.

¶ 27 The trial court further found as follows:

> 28. The respondent mother has not addressed the issues that led to the juvenile[s] being taken into care.
>
> 29. The respondent mother has continued to engage in criminal behavior, including incurring criminal charges while the minor children have been in [DSS]'s custody.

30. Respondent mother was arrested in July of 2019 for felony counts of larceny, fleeing to elude arrest, possession of a stolen vehicle, driving while license revoked, failure to maintain lane control, speeding, reckless driving to endanger, possession of stolen property, and possession of methamphetamine.

31. At the time of this hearing, the respondent mother had recently been released from custody and had pending charges in Burke and Catawba Counties.

. . . .

34. [Respondent mother has] been out of custody at times while the minor children have been in [DSS]'s custody, but [has not] engaged with [DSS] or completed any part of [her] case plan[].

. . . .

38. Respondent mother does not have a child support order established and she has not voluntarily paid any support for the benefit of the juveniles since they came into [DSS]'s custody.

. . . .

40. [Respondent mother has not] provided any gifts, notes, letters or provided any necessities [for the juveniles] since the children came into [DSS]'s custody.

41. Pursuant to N.C.G.S. § 7B-1111(a)(1), [respondent mother has] neglected the juveniles as shown by findings [of] fact and conclusions of law contained in the adjudication order rendered by the Honorable Wesley W. Barkley and as specified above. There is a high likelihood of a repetition of the neglect if the juveniles were returned to the care and control of the [respondent mother as she has] not corrected the conditions that led to the removal of the juveniles.

¶ 28 Respondent only challenges finding of fact 40 as not supported by clear, cogent, and convincing evidence. However, at the termination-of-parental-rights hearing, a DSS social worker responded "no" when asked whether respondent had provided "anything" for her children. Given this

testimony, the trial court could find that respondent had not provided the juveniles with any gifts, notes, letters, or necessities since they entered into DSS's custody. *See In re D.L.W.*, 368 N.C. 835, 843 (2016) (stating that it is the trial court's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn therefrom). Thus, we conclude that finding of fact 40 is supported by clear, cogent, and convincing evidence.

¶ 29 We also reject respondent's argument that the findings of fact do not support the trial court's adjudication of neglect. This Court has stated:

> Our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision. How this principle applies in each circumstance is less clear. While respondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect, it may be relevant to the determination of whether parental rights should be terminated.

In re J.S., 377 N.C. 73, 2021-NCSC-28 ¶ 21 (cleaned up).

¶ 30 Here, the findings of fact reflect respondent had been out of custody at times while the juveniles were in DSS's custody but did not engage with DSS or completed *any* part of her case plan. Further, respondent did not provide gifts, notes, letters, necessities, or financial support to Bob, Sally, or Susan. Notably, respondent also continued to engage in criminal behavior and incurred criminal charges while Bob, Sally, and Susan were in DSS's custody. Respondent's case plan required her to refrain from criminal activity.

¶ 31 Given the foregoing, we are not persuaded by respondent's arguments. Continued criminal activity and a failure to complete a case plan when not incarcerated for the entirety of the case supports a determination of likelihood of future neglect. *See In re J.E.*, 377 N.C. 285, 2021-NCSC-47, ¶ 26; *In re J.M.J.-J.*, 374 N.C. 553, 566 (2020). Further, while recognizing the potential limitations of incarceration, our precedent does not excuse parents who are incarcerated from "showing interest in the child's welfare by whatever means available," and "requir[es parents] to do what they can to exhibit the required level of concern for their children." *In re A.G.D.*, 374 N.C. 317, 320 (2020) (cleaned up). Thus, we are not convinced that respondent's periods of incarceration should excuse respondent from failing to provide any gifts, notes, letters, necessities, or financial support to her children for almost two

years. *See In re W.K.*, 376 N.C. 269, 278–79 (2020) (stating that father's failure to send cards or gifts, despite being able to do so, supported a determination that neglect would reoccur should his children be returned to his care). Therefore, we conclude that the findings of fact support the trial court's conclusion of neglect.

¶ 32 Because the trial court's conclusion that a ground for termination existed pursuant to N.C.G.S. § 7B-1111(a)(1) is sufficient in and of itself to support termination of respondent's parental rights, *In re E.H.P.*, 372 N.C. at 395, we need not address respondent's arguments regarding N.C.G.S. § 7B-1111(a)(2), (3) and (7). Furthermore, respondent does not challenge the trial court's conclusion at the dispositional stage that termination of her parental rights was in the juveniles' best interests.

D. Ineffective Assistance of Counsel Claim

¶ 33 **[4]** On appeal in her initial briefs and at oral argument, respondent alleged that she received ineffective assistance of counsel at the termination hearing and claimed that her counsel failed to secure her presence at hearings, seek visitation, file a response to the petition to terminate her parental rights, assert her due process concerns when moving to continue the termination hearing, and advocate for her at the termination hearing.

¶ 34 After oral arguments, this Court remanded to the trial court in the exercise of its discretion "for the trial court to hear respondent-mother's claim of ineffective assistance of counsel." *In re B.B.*, 379 N.C. at 660. We observed that the "record before this Court contains no findings of fact or conclusions of law as to the claim of ineffective assistance of counsel because respondent-mother asserted her claim of ineffective assistance of counsel for the first time on appeal and has not sought relief from the trial court." *Id.* We provided that "within ten days of this order, appellate counsel for respondent-mother may file a Rule 60(b) motion with evidentiary support to set aside the termination-of-parental-rights order as to respondent-mother for ineffective assistance of counsel." *Id.* Additionally, if such a motion was filed, we ordered the trial court to hold an evidentiary hearing if necessary and "enter an order with any necessary findings of fact and conclusions of law" needed to address respondent-mother's Rule 60(b) motion regarding ineffective assistance of counsel. *Id.* at 661.

¶ 35 On remand, the trial court held an evidentiary hearing and entered an order with findings of fact and conclusions of law. The trial court concluded that respondent failed to provide any evidence or argument showing a reasonable probability that, but for deficient counsel, a

different result would have been reached in the termination proceeding. Thus, the trial court denied respondent's Rule 60(b) motion.

¶ 36 In her supplemental brief, respondent presented several arguments. First, respondent challenges the trial court's finding of fact "that there was no evidence that could have been presented to alter the result of the termination proceeding" and cites to findings of fact 42 and 44 through 50. The cited findings of fact from the trial court's order are as follows:

> 42. Throughout the underlying case, the respondent mother did not inform [her trial counsel] of any actions she had taken to be reunited with her children or any argument he needed to make regarding her progress, despite having the opportunity to do so.
>
> . . . .
>
> 44. The respondent mother did not provide evidence of what she would have testified to at the termination of parental rights hearing, had she been present.
>
> 45. The respondent mother did not identify evidence or witnesses that should have been presented at the termination of parental rights hearing, other than testifying that she wanted to provide gifts and letters to her children. As noted, the court finds that no such efforts were made prior to the filing of the motion for termination of parental rights.
>
> 46. There is no evidence that the respondent mother could have been presented in a more favorable manner on September 4, 2020 at the termination hearing.
>
> 47. In the absence of any showing of evidence or testimony that could have been presented, the court finds that, even if respondent mother had been present and available at every hearing throughout the pendency of the underlying case, the outcome of the termination hearing would have been the same.
>
> 48. The court received no evidence to contradict its findings in the underlying order support-

> ing grounds for termination under N.C.G.S. § 7B-1111(a)(l), (2), or (7).
>
> 49. There is no evidence that the outcome of the termination hearing would have been different had her trial counsel's performance been different.
>
> 50. The respondent mother was not prejudiced by her trial counsel's performance.

¶ 37 However, the cited findings of fact, which are quoted above, do not contain a finding "that there was no evidence that *could* have been presented to alter the result of the termination proceeding." (Emphasis added.) The trial court did find that respondent did not put forth material evidence that could have been presented at the termination hearing, but these are not analogous. Thus, there is no finding of fact for this Court to review as it relates to respondent's argument, and we are bound to the findings of facts. *In re K.N.L.P.*, 2022-NCSC-39, ¶ 15 (2022). Later in this opinion, we address respondent's argument that the trial court erred by concluding that she failed to put forward evidence to meet her burden to show that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. However, that does not appear to be the argument respondent makes here.

¶ 38 Second, respondent argues that the trial court erred by not applying the correct standard to assess prejudice. Respondent-mother claims that the trial court "held that respondent-mother failed to present evidence at the Rule 60 hearing showing that she would have 'won' and received a favorable ruling at the termination hearing." However, as stated in the trial court's order, the trial court articulated and applied the standard of "reasonable probability," which is consistent with our precedent. The trial court stated:

> 8. Respondent mother was not prejudiced by her trial counsel's performance, either in the termination hearing or the underlying case, in that she did not establish a reasonable probability that the outcome of the termination hearing (or other hearings) would have been different but for trial counsel's conduct.

¶ 39 This Court has explained that:

> To prevail on a claim of ineffective assistance of counsel, respondent must show that counsel's performance was deficient and the deficiency was so

> serious as to deprive him of a fair hearing. *To make the latter showing, the respondent must prove that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings.*

In re G.G.M., 377 N.C. 29, 2021-NCSC-25, ¶ 35 (cleaned up) (emphasis added). Respondent's initial brief acknowledges that our precedent requires this showing, citing *In re T.N.C.*, 375 N.C. 849, 854 (2020).

¶ 40 Applying this standard in proceedings under the Juvenile Code, we routinely resolve claims of ineffective assistance of counsel on the respondent's failure to show prejudice. *See, e.g.*, *In re Z.M.T.*, 379 N.C. 44, 2021-NCSC-121, ¶ 17; *In re B.S.*, 378 N.C. 1, 2021-NCSC-71, ¶ 13; *In re N.B.*, 377 N.C. 349, 2021-NCSC-53, ¶ 30; *In re J.M.*, 377 N.C. 298, 2021-NCSC-48, ¶ 36; *In re G.G.M.*, ¶ 35. Resolving claims of ineffective assistance of counsel on the respondent's failure to show prejudice is consistent with the recommendation by the Supreme Court of the United States and this Court's precedent in criminal proceedings. *State v. Braswell*, 312 N.C. 553, 563 (1985) ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." (quoting *Strickland v. Washington*, 466 U.S. 668, 697 (1984)).

¶ 41 Third, respondent argues that the trial court erred by failing to consider the cumulative effect of respondent's trial counsel's deficient performance and by not correctly applying the standard to assess prejudice. However, the trial court's conclusion of law eight reflects that the trial court considered cumulative prejudice. The trial court expressly considered whether respondent was prejudiced by her trial counsel's performance both "in the termination hearing" and "in the underlying case." Yet, as discussed, the trial court's findings of fact supporting these conclusions were either unchallenged or supported by competent evidence. Accordingly, were we to address this argument, we would be bound to affirm the trial court's conclusion that respondent was not cumulatively prejudiced. Because the trial court in this case did consider cumulative prejudice, we need not address whether cumulative prejudice must be considered by the trial court in this context.

¶ 42 Given the binding findings of fact before us, we agree with the trial court that respondent failed to put forward evidence to meet her burden to show that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 695–96.

¶ 43 In the case before us, the same trial court judge presided over the termination hearing and respondent's Rule 60(b) motion. The trial court had the totality of the evidence before him, and we do as well. We are not persuaded that a probability sufficient to undermine confidence in the outcome exists. Respondent testified that throughout the case, her trial counsel called or emailed her back every time she reached out by phone or email and that they would discuss what she could do to see her children, what she could do to get visitation, and what she could do to get her parental rights back. She testified that her trial counsel communicated with her at least 26 times throughout the length of the case. She further testified that she had met with the social worker and signed the case plan and knew what she was supposed to do for her plan without discussing it with her trial counsel. As found by the trial court, respondent understood her case plan, but respondent did not complete any element of her case plan and during the pendency of the case was both convicted of new criminal charges and violated her probation. Even if trial counsel has erred in some aspects of his representation,

> [a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid.

Strickland, 466 U.S. at 693. Therefore, we do not attempt to define what is correct and what to avoid, but merely hold that on the record before us, respondent is not entitled to relief from the trial court's termination-of-parental-rights order on the basis of ineffective assistance of counsel. Respondent was given the opportunity to prove her claim of ineffective assistance of counsel on remand before the trial court through an evidentiary hearing by an extraordinary act of discretion by this Court. Respondent failed to do so.

III. Conclusion

¶ 44 While the trial court's amended termination order was entered without jurisdiction pursuant to N.C.G.S. § 7B-1003(b), we conclude that the findings of fact in the trial court's original 29 October 2020 order supported the adjudication on the ground of neglect pursuant to N.C.G.S. § 7B-1111(a)(1). Respondent has not challenged the trial court's determination at the dispositional phrase. We have also concluded that the respondent failed to show prejudice from the denial of her counsel's motion to continue at the termination-of-parental-rights hearing and failed to show prejudice for any alleged error by her trial counsel. Accordingly, we affirm the trial court's order terminating respondent's parental rights to her children, Bob, Sally, and Susan, and the trial court's order denying respondent's Rule 60(b) motion regarding ineffective assistance of counsel.

AFFIRMED.

Justice EARLS dissenting.

¶ 45 A parent's right to effective representation in juvenile proceedings is an individual right that secures a broader structural principle. The right to counsel safeguards an individual parent's fundamental liberty interests by ensuring the parent is not subject to the unnecessary and permanent dissolution of their rights in their child. *In re T.N.C.*, 375 N.C. 849, 854 (2020) ("By providing a statutory right to counsel in termination proceedings, our legislature has recognized that this interest must be

safeguarded by adequate legal representation.") (quoting *In re Bishop*, 92 N.C. App. 662, 664 (1989)). At the same time, the right to counsel furthers the State's *parens patriae* interest in protecting a child's welfare by facilitating the "adversarial system of justice" necessary to "ascertain the truth in any legal proceeding," in the process helping the State determine what a child's best interests require. *In re Miller*, 357 N.C. 316, 334 (2003). Thus, a deprivation of a parent's right to counsel imposes both an individual and systemic harm: it jeopardizes the parent's constitutional rights as a parent and diminishes the capacity of juvenile proceedings to deliver just and accurate results based on something approaching "the truth."

¶ 46 In this case, there is no real dispute that respondent-mother did not receive adequate representation during the juvenile and termination proceedings involving her children: Bob, Sally, and Susan. Respondent-mother was in and out of jail throughout these proceedings. On numerous occasions, the trial court issued a writ to bring respondent-mother to court to participate in hearings, but she was not brought to court. Counsel did not vigorously defend respondent-mother's interests in her absence. Instead, at the final permanency planning hearing, another hearing respondent-mother was not brought to court to attend, respondent-mother's attorney informed the court that he "had not had any recent contact from his client," so he "consented to the Court receiving the court report and moving forward without his presence" because "he had another matter in another courtroom." Counsel did not file a responsive pleading to DSS's motion to terminate respondent-mother's parental rights, even though respondent-mother mailed the court a handwritten note stating that she wanted to "stop the termination process of my parental rights." At the termination hearing, counsel asked two questions of DSS's sole witness but otherwise offered no defense and made no argument on respondent-mother's behalf.

¶ 47 Under these circumstances, I cannot agree with the majority that respondent-mother's ineffective assistance of counsel (IAC) claim should be denied for failure to show prejudice. Although there is a paucity of evidence in the record indicating how respondent-mother could have rebutted the grounds for termination found by the trial court at the termination hearing, counsel's prolonged, repeated failure to adequately represent respondent-mother at every stage of these proceedings fatally undermined their validity as a mechanism for determining "the truth." Therefore, I would hold that respondent-mother has demonstrated prejudice because she has shown that "counsel's errors were so serious as to deprive the defendant of a fair [hearing], a [hearing] whose result is reliable." *State v. Braswell*, 312 N.C. 553, 562 (1985) (emphasis omitted)

(quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). I respectfully dissent.

I. Prejudice under *Strickland*

¶ 48 There are two main problems with the majority's analysis of respondent-mother's IAC claim.

¶ 49 The first is that the majority's articulation of how respondent-mother can demonstrate prejudice is unduly narrow and ignores a central concern animating *Strickland* and IAC doctrine—the critical importance of adequate representation to ensuring the integrity and validity of the adversarial process. The majority is correct that a party asserting IAC must demonstrate prejudice, and that the way courts typically examine prejudice is by assessing whether the party asserting IAC "prove[d] that there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceeding." *In re G.G.M.*, 377 N.C. 29, 2021-NCSC-25, ¶ 35 (cleaned up). But the "reasonable probability" standard does not require a party to establish that counsel's deficient performance was outcome-determinative. *Strickland*, 466 U.S. at 693 ("[A] defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."). *Strickland* itself cautioned that "that the principles we have stated do not establish mechanical rules." *Id.* at 696. Instead, the Supreme Court emphasized that

> the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Id.

¶ 50 "The right to counsel exists in order to protect the fundamental right to a fair trial," or in this case a fair termination hearing. *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (cleaned up). Accordingly, the prejudice prong of *Strickland* is ultimately concerned with distinguishing between instances of deficient performance that do not undermine the reliability of an adversarial proceeding and those that do. The goal of the inquiry is to assess whether counsel's deficient performance "rose to the level of compromising the reliability of the [outcome of a proceeding] and undermining confidence in it." *Theriault v. State*, 125 A.3d 1163,

2015 ME 137, ¶ 25; *see also Fretwell*, 506 U.S. at 372 ("[T]he 'prejudice' component of the Strickland test . . . focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair."). Oftentimes, this can be demonstrated by projecting what might have happened had counsel performed adequately. But in some cases, counsel's deficient performance completely undermines the validity of a supposedly adversarial proceeding as a mechanism for determining facts. In these rare circumstances, it is unnecessary to attempt to reconstruct what *might* have happened because what *did* happen produced a record and set of facts lacking all indicia of trustworthiness. *See*, *e.g.*, *Williams v. Taylor*, 529 U.S. 362, 391 (2000) ("It is true that while the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis."); *cf. United States v. Cronic*, 466 U.S. 648, 658 (1984) (holding in a case decided the same day as *Strickland* that in some cases, the circumstances were "so likely to prejudice the accused" that prejudice does not have to be proven.). In certain instances, the question the reasonable probability test was designed to answer—whether or not the proceeding was fundamentally fair—has already been answered. *See Griffin v. Aiken*, 775 F.2d 1226, 1229 (4th Cir. 1985) ("[E]ven though it is to be presumed that counsel is competent, certain circumstances may indicate a breakdown in the adversarial process which will justify a presumption of ineffectiveness without inquiry into counsel's actual performance at trial.")

¶ 51 In these circumstances, efforts to project what might have happened had counsel performed adequately will be based on little more than an appellate court's speculative guesswork. The reliability of this retrospective exercise is itself predicated on there being a reasonably well-developed record and established set of facts, which must be elicited and determined by the trial court. *See State v. Smith*, 278 N.C. 36, 41 (1971) (explaining that the trial court "sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth"). Assessing prejudice by projecting what might have happened based on a record and set of facts developed over the course of multiple hearings where a party repeatedly received deficient representation places that party "in an impossible bind," because counsel's performance is "so deficient that it deprived her of the opportunity to develop a record which would support her claim of prejudice[.]" *In re Z.M.T.*, 379 N.C. 44, 2021-NCSC-121, ¶ 20 (Earls, J., dissenting). Because "[t]he assistance of counsel is often a requisite to the very existence of a fair [proceeding]," *Argersinger*

v. Hamlin, 407 U.S. 25, 31 (1972), it is perverse to deny a party's IAC claim on the basis of a retrospective review of a record and set of facts produced in a set of proceedings where counsel's performance was wholly deficient.

¶ 52 Moreover, the majority's conclusion that it is routine and, indeed, preferable to resolve IAC claims by presuming that the representation was ineffective and jumping right to the question of whether there was a sufficient showing of prejudice disserves justice and the interests IAC doctrine aims to protect. *See United States v. DiTommaso*, 817 F.2d 201, 215 (2d Cir. 1987) ("The benchmark for judging any such claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). Resolving IAC claims by explaining why counsel's performance was constitutionally inadequate does not require us to inappropriately "grade counsel's performance"; rather, our refusal to do so constitutes an abandonment of our obligation to ensure the fair administration of justice. In our adversarial system, due process demands that parties have adequate opportunities to avail themselves of the advice of counsel and the services of an advocate who will present to a neutral fact finder the evidence and arguments that support their case. *Cf. Herring v. New York*, 422 U.S. 853, 862 (1975) ("The very premise of our adversary system of . . . justice is that partisan advocacy on both sides of a case will best promote the ultimate objective" of discerning the truth). Concluding that justice has been done in the absence of a meaningful adversarial process, based upon our own speculation that the result of a reliable process would not have been different, when our projection of what the result would have been is itself based upon the record and facts developed during a wholly untrustworthy proceeding, is little more than a convenient and comforting fiction.

¶ 53 The second problem with the majority's prejudice analysis is its refusal to meaningfully engage respondent-mother's cumulative prejudice claim. Under the cumulative prejudice doctrine, "instances of counsel's deficient performance may be aggregated to prove cumulative prejudice." *State v. Allen*, 378 N.C. 286, 2021-NCSC-88, ¶ 42. Cumulative prejudice may arise in circumstances such as this one where counsel performs deficiently numerous times or in various ways while representing a party. *See Cooper v. Fitzharris*, 586 F.2d 1325, 1333 (9th Cir. 1978) ("If counsel is charged with multiple errors at trial, absence of prejudice is not established by demonstrating that no single error considered alone significantly impaired the defense [because] prejudice may result from the cumulative impact of multiple deficiencies."). Because legal proceedings are dynamic, it is often difficult to isolate the effects of any

one instance of deficient performance—counsel's failure to provide adequate representation at multiple points in a proceeding might fundamentally alter the course of that proceeding, even though the harm to a party's interests cannot easily or entirely be traced to a single instance.

¶ 54 In stating that it "need not address whether cumulative prejudice must be considered by the trial court" because the trial court's conclusions of law reveal that it "considered cumulative prejudice," the majority implies that it is an open question whether a court must review for cumulative prejudice when a party brings an ineffective assistance of counsel claim alleging multiple discrete instances of deficient performance.[1] But this question was asked and answered in *State v. Allen*, 378 N.C. 286, 2021-NCSC-88. In *Allen*, we explained that a trial court considering an IAC claim raised in a motion for appropriate relief

> must examine whether any instances of deficient performance at discrete moments in the trial prejudiced Allen when considered both individually and cumulatively. We reject the MAR court's erroneous conclusion that cumulative prejudice is unavailable to a defendant asserting multiple IAC claims. . . . [W]e adopt the reasoning of the unanimous Court of Appeals panel which recently concluded that "because [IAC] claims focus on the reasonableness of counsel's performance, courts can consider the cumulative effect of alleged errors by counsel." *State v. Lane*, 271 N.C. App. 307, 316, 844 S.E.2d 32, *review dismissed*, 376 N.C. 540, 851 S.E.2d 367 (2020), *review denied*, 376 N.C. 540, 851 S.E.2d 624 (2020). To be clear, only instances of counsel's deficient performance may be aggregated to prove cumulative prejudice—the cumulative prejudice doctrine is not an invitation to reweigh all of the choices counsel made throughout the course of representing a defendant.

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1. The majority further suggests that because, in their view, respondent-mother did not challenge the trial court's findings of fact or those findings were supported by the evidence, "were we to address this argument, we would be bound to affirm the trial court's conclusion that respondent was not cumulatively prejudiced." However, that is not correct because it completely abdicates our duty as an appellate court to examine whether the findings of fact support the trial court's conclusions of law. *See In re E.H.P.*, 372 N.C. 388, 392 (2019) ("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.' " (quoting *In re Montgomery*, 311 N.C. 101, 111 (1984) (citing *In re Moore*, 306 N.C. 394, 404 (1982)).

Id. ¶ 42 (footnote omitted). We further explained that "[o]ur decision to recognize cumulative prejudice claims is based upon our own interpretation of *Strickland* and IAC doctrine," establishing that cumulative prejudice doctrine applies to *all* IAC claims derived from *Strickland*. *Id.* ¶ 42 n.8. The dissenting opinion in *Allen* disputed the majority's interpretation of our caselaw and this doctrine, but the dissenting opinion acknowledged that, post-*Allen*, cumulative prejudice doctrine would be part of "North Carolina's jurisprudence on ineffective assistance of counsel claims," *Id.* ¶ 80 (Berger, J., dissenting). *Allen* is controlling precedent, and this Court is "bound by prior precedent [under] the doctrine of stare decisis." *In re O.E.M.*, 379 N.C. 27, 2021-NCSC-120, ¶ 12 (quoting *Bacon v. Lee*, 353 N.C. 696, 712 (2001)). Under *Allen*, a trial court is required to review a party's IAC claim for cumulative prejudice, notwithstanding the majority's suggestions to the contrary. This Court must do the same on appeal, where the trial court's legal determination that a party has not demonstrated cumulative prejudice is reviewed de novo. *State v. Clark*, 380 N.C. 204, 2022-NCSC-13, ¶ 31 ("Whether a defendant was denied the effective assistance of counsel is a question of law that is reviewed de novo.").

¶ 55 Applying the proper prejudice standard to the facts of this case, I would conclude that respondent-mother has demonstrated she was prejudiced by her counsel's multiple instances of deficient performance. This case differs significantly from the typical case involving an IAC claim in a termination proceeding. In most cases, an appellate court reviews a claim that a respondent-parent received ineffective assistance in a termination proceeding alone, not that the parent received ineffective assistance during the underlying juvenile proceedings leading up to the termination hearing. *See*, *e.g.*, *In re M.Z.M.*, 251 N.C. App. 120, 124 (2016) ("Respondent-mother claims she received ineffective assistance of counsel ('IAC') at the termination hearing."). In those types of cases, an appellate court can conduct a prejudice analysis based on the record and set of facts developed and determined by the trial court during the underlying proceedings, which allow the appellate court to assess with a reasonable degree of certainty the probable impact of counsel's deficient performance at the termination hearing.

¶ 56 This case is different. In this case, respondent-mother's counsel failed to secure her presence in court on numerous occasions, failed to maintain ongoing communication with her during the course of proceedings, failed to file a responsive pleading to DSS's termination motion, failed to advocate on respondent-mother's behalf during the underlying juvenile proceedings, and failed to raise any defense at the termination hearing. These actions and omissions fall far short of what is necessary

to provide a respondent-parent with adequate representation. While the precise standard for adequate performance might vary depending upon the context and nature of a given proceeding, given the stakes involved for parents in juvenile matters, adequate representation would generally require counsel to do things like

> - Communicate regularly with clients (at least monthly and after all significant developments or case changes) and in-person when possible;
>
> . . . .
>
> - Thoroughly prepare for and attend all court hearings and reviews.
> - Thoroughly prepare clients for court, explain the hearing process and debrief after hearing are complete to make sure clients understand the results. For children this must be done in a developmentally appropriate way.
>
> . . . .
>
> - Conduct rigorous and complete discovery on every case.
> - Independently verify facts contained in allegations and reports.
> - Have meaningful and ongoing conversation with all clients about their strengths, needs, and wishes.
>
> . . . .
>
> - Work with every client to identify helpful relatives for support, safety planning and possible placement.
> - Attend and participate in case planning, family group decision-making and other meetings a client may have with the child welfare agency.
> - Work with clients individually to develop safety plan and case plan options to present to the court.
> - File motions and appeals when necessary to protect each client's rights and advocate for his or her needs.

United States Department of Health and Human Services, Administration on Children, Youth and Families, *High Quality Legal Representation for All Parties in Child Welfare Proceedings* 13 (2017). Respondent-mother did not receive adequate representation under the circumstances of this case.

¶ 57 These repeated failures deprived respondent-mother of a fundamentally fair termination proceeding and deprive this Court of a record and set of facts that allow us to reasonably assert respondent-mother's rights would have been terminated even if she had received adequate representation. These basic legal principles are usefully illustrated by a case out of Oregon, *In State ex rel. State Office for Services to Children & Families v. Thomas (In re Stephens)*, 170 Or. App. 383 (2000). The facts of *In re Stephens* are very similar to this case. In *In re Stephens*, the father failed to appear for the termination hearing. He was in a residential treatment center at the time of the hearing, and his attorney did not obtain a subpoena for his attendance or notify personnel at the center about the need to have the father at the hearing. Although counsel was present at the hearing, he made no opening statement except to say that his client could be a good father and was in treatment. He made no closing argument. He did not call witnesses, offer any exhibits, or cross-examine most of the witnesses. Counsel also admitted that he was not prepared for trial, in part, because of the father's absence. The court concluded that the attorney's lack of preparation and failure to advocate any theory for the father rendered his performance inadequate. The court also, on that record, found that his counsel's failure to defend his interests was prejudicial:

> Essential to our conclusion is the fact that the trial court was not given the opportunity to judge the credibility of the father's case or his evidence, whatever father's case and evidence may in fact be. . . . In a situation, as here, where father wanted to put on a case, where there is some credible evidence that father could be a resource for child, and where counsel has not effectively advocated *any* theory of father's case, father has not been heard. Accordingly, we will not conclude that the result would have inevitably been the same.

In re Stephens, 170 Or. App. at 395–96; *see also In re J.J.L.*, 2010 MT 4, 355 Mont. 23, 223 P.3d 921 (2010) (concluding that trial counsel rendered deficient performance by failing to object to hearsay evidence, making no other objections, asking no questions on cross-examination, and

not meeting with client prior to termination hearing). For similar reasons, the North Dakota Supreme Court has held that failure to provide counsel to an indigent parent in a juvenile proceeding may *never* be harmless error:

> We are skeptical that the denial of counsel to an indigent parent in an adoption proceeding which results in the termination of parental rights can ever be "harmless," under any standard. It is, after all, an axiom in criminal cases that counsel enables an accused to procure a fair trial, and the formality of these termination and adoption proceedings, along with their substantial threat to a fundamental interest of the parent, is not so different from those in a criminal case.

Matter of Adoption of K.A.S., 499 N.W.2d 558, 567 (N.D. 1993) (citation omitted). Given how wholly inadequate counsel's performance was in this case, the logic should apply.

¶ 58 Here, for example, because respondent-mother was in and out of jail throughout the course of these proceedings, an assessment of her progress on her case plan and the applicability of the asserted grounds for termination required an assessment of the constraints imposed by her incarceration. *See In re K.N.*, 373 N.C. 274, 283 (2020) ("[R]espondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect. Instead, the extent to which a parent's incarceration or violation of the terms and conditions of probation support a finding of neglect depends upon an analysis of the relevant facts and circumstances."). But because counsel never raised the issue at a permanency planning hearing, and because respondent-mother was never brought to court to raise the issue or present factual evidence herself, the trial court never considered whether the terms of respondent-mother's case plan needed to be adapted in view of the services available to her in jail. Because counsel did not file an answer to the termination motion and did not advocate for respondent-mother at the termination hearing, the trial court never examined the extent to which the existence of grounds for termination resulted from the fact of respondent-mother's incarceration alone. *In re M.A.W.*, 370 N.C. 149, 153 (2017) ("Our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.") (cleaned up). The opportunity to create a record that could support the claim that the outcome of the termination hearing might have been different was lost due to counsel's deficient performance at

all stages of these proceedings. In no meaningful sense do these circumstances establish that the termination of respondent-mother's parental rights resulted from "a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687.

II. Respondent-mother's challenge to the trial court's findings of fact

¶ 59 In addition to the majority's improper application of the prejudice standard, the majority also errs in sidestepping respondent-mother's challenge to the trial court's findings of fact by adopting a strained, unnecessary, and formalistic reading of the argument raised in her brief. According to the majority, respondent-mother failed to challenge any of the findings of fact the trial court actually entered because the trial court did not enter the finding respondent-mother purported to challenge, the finding "that there was no evidence that could have been presented to alter the result of the termination proceeding." It is correct that there is no finding precisely stating "that there was no evidence that could have been presented to alter the result of the termination proceeding" in those exact words. But the trial court did find that "[i]n the absence of any showing of evidence or testimony that could have been presented, the court finds that, even if respondent-mother had been present and available at every hearing throughout the pendency of the underlying case, the outcome of the termination hearing would have been the same." Substantively, there is no difference between the finding respondent-mother challenges and the finding the trial court entered. Both mean exactly the same thing: that, in the trial court's view, respondent-mother had failed to note any evidence that "could have been presented" during the termination proceeding (or underlying juvenile proceeding) that would have changed its ultimate outcome.

¶ 60 There is no requirement in our rules of appellate procedure stating that appellants must list the specific findings of fact being challenged using the precise words utilized by the factfinder in order to challenge findings of fact on appeal. We have never before imposed such a requirement in our caselaw. There is good reason not to. This Court has moved away from overly technical rules of appellate procedure in recent years, amending Rule 10 to eliminate the requirement that litigants must list specific "exceptions" and "assignments of error" to properly present an issue on appeal. *See Malone-Pass v. Schultz*, 868 S.E.2d 327, 2021-NCCOA-656, ¶ 15 (describing changes to Rules of Appellate Procedure effective as of October 2009). Consistent with this more reasonable approach, and based on the text of the current Rule 10, we have held that a party preserves an issue for appellate review by making a

general objection when "what action is being challenged and why the challenged action is thought to be erroneous . . . are 'apparent from the context[.]' " *State v. McLymore*, 380 N.C. 185, 2022-NCSC-12, ¶ 17. We should utilize the same approach in this context. Unchallenged findings of fact are always binding on appeal, but if it is "apparent from the context" that a party is challenging a particular finding of fact, we should not evade our obligation to review the trial court's findings to determine if they are supported by the record evidence.

III. Conclusion

¶ 61 Once again, this Court's decision to deny a respondent-parent's claim that she received ineffective assistance of counsel in a juvenile proceeding "gives short shrift to an important guarantor of the fairness of our juvenile system." *In re Z.M.T.*, 379 N.C. 44, 2021-NCSC-121, ¶ 21 (Earls, J., dissenting). Although I recognize the State's interest in protecting the welfare of the children subject to these proceedings and the children's concomitant need for permanency, the juvenile system suffers when we refuse to correct the erosion of rights guaranteed to parents in juvenile proceedings. The record in this case demonstrates that respondent-mother's counsel's representation in this instance was so deficient as to undermine the validity and reliability of the juvenile and termination proceedings entirely. Accordingly, I would reverse the order terminating respondent-mother's parental rights and remand for further proceedings.

IN RE B.F.N.

[381 N.C. 372, 2022-NCSC-68]

IN THE MATTER OF B.F.N. AND C.L.N.

No. 261A21

Filed 17 June 2022

Termination of Parental Rights—grounds for termination—willful abandonment—neglect by abandonment—termination petitions denied—insufficiency of findings

The trial court's orders denying petitioner-mother's petitions to terminate respondent-father's parental rights in the children born of their marriage lacked sufficient findings of fact—both to support denial of the petitions and to permit meaningful appellate review—and therefore the orders were vacated and remanded for additional findings and conclusions. Specifically, for the ground of willful abandonment, the trial court failed to identify the determinative six-month period, failed to address whether respondent had the ability to seek modification of an order requiring him to have no contact with his children during the determinative period, and, with one exception, considered respondent's "actions to improve himself" occurring only outside the determinative period; for the ground of neglect based on abandonment, the trial court failed to make any findings.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from orders entered on 18 May 2021 by Judge William B. Sutton Jr. in District Court, Sampson County. This matter was calendared for argument in the Supreme Court on 13 May 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Gregory T. Griffin for petitioner-appellant mother.

Jeffrey L. Miller for respondent-appellee father.

HUDSON, Justice.

¶ 1 Petitioner, the mother of C.L.N. (Chip)[1] and B.F.N. (Brad) (collectively, the children), appeals from the trial court's orders denying her petitions to terminate the parental rights of respondent, the children's

1. Pseudonyms are used in this opinion to protect the juveniles' identities and for ease of reading.

biological father. Because trial court's findings of fact do not permit meaningful appellate review and are thus insufficient to support the denial of the termination petitions, we vacate the trial court's orders and remand for further proceedings.

I. Factual and Procedural Background

¶ 2 Petitioner and respondent were married in 2003. Chip was born in 2007, and Brad was born in 2012. The parties divorced in 2015.

¶ 3 On 9 March 2015, a domestic violence protective order (DVPO) was issued against respondent. The trial court found that in March 2015, respondent had placed petitioner in fear of imminent serious bodily injury by threatening to harm her and causing property damage. The trial court concluded that respondent had committed acts of domestic violence against petitioner and that there was a danger of serious and immediate injury to petitioner. Pursuant to the DVPO, respondent was prohibited from assaulting, threatening, abusing, following, harassing, or interfering with petitioner; prohibited from threatening a member of petitioner's family or household; ordered to stay away from petitioner's residence or any place where petitioner receives temporary shelter; ordered to stay away from petitioner's work and "any place [petitioner] may be found"; and prohibited from possessing, receiving, or purchasing a firearm. The terms of the DVPO were in effect until 9 March 2016.

¶ 4 On 12 March 2015, petitioner and respondent entered into a "Confession of Judgment." They agreed that petitioner would have primary custody of the children. Respondent would have secondary joint custody of the children and visitation with the children every first and third weekend of the month and select holidays.

¶ 5 On 21 October 2017, respondent physically assaulted petitioner at a restaurant while the children were present. As a result of the incident, criminal charges were brought against respondent, and on 7 December 2017, respondent was found guilty of assault on a female.

¶ 6 On 11 December 2017, another DVPO was entered against respondent. The trial court found that on 21 October 2017, respondent had intentionally caused serious bodily injury to petitioner by "attacking and assaulting" petitioner. Pursuant to the DVPO, respondent was prohibited from assaulting, threatening, abusing, following, harassing, or interfering with petitioner; prohibited from assaulting, threatening, abusing, following, harassing, or interfering with children residing with or in the custody of petitioner; prohibited from threatening a member of petitioner's family or household; ordered to stay away from petitioner's

residence or any place petitioner receives temporary shelter; ordered to stay away from petitioner's work, the children's school or any place where the children receive day care, and "any other place where [petitioner] is located." Respondent was also ordered to make payments to petitioner for support of the children; prohibited from possessing, receiving, or purchasing a firearm; ordered to surrender firearms, ammunition, and gun permits; and ordered to attend and complete an abuser treatment program. The terms of the order were effective until 11 December 2018. Additionally, temporary custody of the children was granted to petitioner.

¶ 7 On 21 December 2017, the trial court entered an order finding that the children were exposed to a substantial risk of emotional injury caused by respondent, the children were present during acts of domestic violence perpetrated by respondent against petitioner, and respondent had acted in a manner that was not in the best interests of the children and was inconsistent with his constitutional rights as a natural parent. The trial court concluded that respondent was not a fit and proper person to exercise any custody or visitation with the children and that it was in the best interests of the children that petitioner have exclusive custody of them. Accordingly, petitioner was granted the exclusive care, custody, and control of the children, and respondent's rights of secondary joint custody and visitation were terminated.

¶ 8 Respondent was ordered to "remain away" and "not to go around" the children and petitioner, including but not limited to "any place where they may be whether at home, school, church, in any public or private place"; ordered to leave any premises "wherever they may be present"; and prohibited from making "any contact in person and/or by an agent directly or indirectly." Respondent was ordered not to have any contact with petitioner or the children "pending further orders of th[e] court and only upon a motion in the cause being filed by [respondent] alleging that a substantial change of circumstances has occurred and no sooner can such motion be filed then until after one (1) year from the entry of this order." As a condition precedent to respondent filing such a motion, the trial court ordered him to obtain a substance abuse and alcohol assessment and complete all recommended treatment; undergo a psychological examination and attend any recommended counseling; complete at least three consecutive alcohol and drug screens at least one month apart prior to filing any motion; complete certified parenting classes; complete domestic violence prevention classes; and complete an anger management assessment and all recommended treatment and counseling sessions.

¶ 9 On 14 March 2019, the trial court entered an order holding respondent-father in contempt for violating its 21 December 2017 order. The trial court found that respondent had violated the 21 December 2017 order by sending petitioner text messages on 14, 15, and 21 December 2018 requesting to see the children and going to Chip's school and attempting see him on 11 January 2019. The trial court ordered respondent to serve thirty days in the Sampson County Jail. All but one twenty-four-hour period of this sentence was suspended. The 21 December 2017 order remained in effect.

¶ 10 On 10 July 2020, petitioner filed petitions to terminate respondent's parental rights in the children. Petitioner alleged, *inter alia*, that respondent had for a period greater than two years preceding the filing of the petitions willfully failed without justification to pay for the care, support, and education of the children; respondent had "abandoned and neglected" the children and "ha[d] not made any inquiry about the well-being" of the children in over two years; and respondent had willfully abandoned the children for at least six months immediately preceding the filing of the petitions.

¶ 11 On 21 July 2020, respondent filed a motion for modification of child custody seeking joint legal and physical custody of the children. Alternatively, respondent sought "substantial visitation" with the children. On 19 October 2020, respondent filed an answer to the termination petitions, denying many of the allegations.

¶ 12 Following a hearing on 18 March 2021, the trial court entered orders on 18 May 2021 finding that there was "insufficient evidence for th[e] [c]ourt to conclude that grounds exist to terminate the parental rights of the Respondent" and denying the petitions to terminate respondent's parental rights.[2] Petitioner timely appealed to this Court.

II. Analysis

¶ 13 On appeal, petitioner challenges the trial court's conclusion that grounds did not exist to terminate respondent's parental rights in the children. Specifically, she argues the trial court erred in concluding that respondent did not willfully abandon or neglect the children.[3] Based on

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2. Although the trial court entered separate orders denying the petitions to terminate respondent's parental rights in the children, the findings of fact and conclusions of law are identical.

3. Petitioner does not argue on appeal that the evidence supported the termination of respondent's parental rights under N.C.G.S. § 7B-1111(a)(4), as she alleged in the petitions.

the reasons stated herein, we hold that the trial court's findings of fact do not permit meaningful appellate review and are thus insufficient to support the trial court's denial of the termination petitions.

¶ 14 Subsection § 7B-1109(e) provides that the trial court "shall take 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." N.C.G.S. § 7B-1109(e) (2021). The burden of proof is upon the petitioner and "all findings of fact shall be based on clear, cogent, and convincing evidence." N.C.G.S. § 7B-1109(f) (2021).

¶ 15 "Should the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition or deny the motion, *making appropriate findings of fact and conclusions [of law]*." N.C.G.S. § 7B-1110(c) (2021) (emphasis added). The trial court is under a duty to "find the facts specially and state separately its conclusions of law thereon, regardless of whether the court is granting or denying a petition to terminate parental rights." *In re K.R.C.*, 374 N.C. 849, 857 (2020) (cleaned up).

> Compliance with the fact-finding requirements of N.C.G.S. §§ 7B-1109(e) and -1110(c) is critical because [e]ffective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Id. at 858 (alteration in original) (quoting *Quick v. Quick*, 305 N.C. 446, 458 (1982)).

¶ 16 In her first argument, petitioner asserts the trial court erred in determining that "there is insufficient evidence . . . to conclude [respondent] willfully abandoned [the children] due to his actions to improve himself and the clear prohibitions set forth in the [21 December 2017] order" because respondent "could not use the 2017 Order as a complete shield." She contends that respondent had no contact with the children and failed to provide any financial or emotional support for the children

since 2017. Petitioner also claims that respondent failed to fully comply with the requirements of the 21 December 2017 order by refusing to participate in counseling sessions.

¶ 17 Termination of parental rights under N.C.G.S. § 7B-1111(a)(7) requires proof that "[t]he parent has willfully 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) (2021). As used in subsection 7B-1111(a)(7), abandonment requires a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to [the child]." *In re A.G.D.*, 374 N.C. 317, 319 (2020) (alteration in original) (quoting *In re N.D.A.*, 373 N.C. 71, 79 (2019)). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bishop*, 257 N.C. 486, 501 (1962). The willful intent element "is an integral part of abandonment" and is determined according to the evidence before the trial court. *Id.* "[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." *In re N.D.A.*, 373 N.C. at 77 (quoting *In re D.E.M.*, 257 N.C. App. 618, 619 (2018)).

¶ 18 Because the termination petitions were filed on 10 July 2020, the determinative six-month period in the present case is from 10 January 2020 to 10 July 2020. The trial court concluded that there was insufficient evidence to establish that respondent willfully abandoned the children "due to his actions to improve himself and the clear prohibitions set forth in the [21 December 2017] order."[4] However, outside the finding that he had been employed "since approximately 2012," the remaining findings detailing respondent's "actions to improve himself" refer to events that occurred outside the relevant six-month period. For instance, the trial court found respondent completed a psychological evaluation in November 2019, an anger management and batterer

4. Although the trial court labeled this as a finding of fact, a determination that respondent did not willfully abandon the children is a conclusion of law, involving the application of legal principles. *See State v. Sparks*, 362 N.C. 181, 185 (2008) ("[A]ny determination requiring . . . the application of legal principles is more properly classified [as] a conclusion of law." (quoting *In re Helms*, 127 N.C. App. 505, 510 (1997))). "[F]indings of fact [which] are essentially conclusions of law . . . will be treated as such on appeal[,]" and we will treat them as such in our review of the instant matter. *Id.* (second and third alterations in original) (quoting *Harris v. Harris*, 51 N.C. App. 103, 107, *disc. rev. denied*, 303 N.C. 180 (1981)).

intervention program in August 2018, outpatient substance abuse counseling in October 2019, and parenting classes in July 2019, but none of these efforts transpired during the determinative six-month period. "The inadequacy of the trial court's findings is further displayed by its failure to identify 'the determinative six-month period' governing its abandonment inquiry." *In re K.R.C.*, 374 N.C. at 861 (quoting *In re C.B.C.*, 373 N.C. 16, 23 (2019)).

¶ 19 Moreover, the trial court's findings regarding the limitations of the 21 December 2017 order on respondent's efforts are insufficient to support a determination that he did not willfully abandon the children. The trial court found that the 21 December 2017 order terminated respondent's rights to secondary joint custody and visitation with the children, ordered him to "to remain away from the minor children and [petitioner] and not go around them wherever [petitioner] or the minor children shall be located[,]" and prohibited him "from making any contact in person and/or by an agent directly or indirectly." However, respondent was free to seek modification of the order by alleging a substantial change in circumstances any time after 21 December 2018.

¶ 20 As a condition precedent to the court considering any motion in the cause filed by respondent, respondent was ordered to obtain a substance abuse and alcohol assessment and complete any recommended treatment, complete a psychological examination and attend any recommended counseling, complete three consecutive alcohol and drug screens at least one month apart, complete domestic violence prevention classes, and complete an anger management assessment and any recommended treatment and counseling. As previously noted, the trial court made findings that respondent complied with many of these requirements. Nonetheless, the court's findings fail to address whether respondent had the ability to seek modification of the 21 December 2017 order during the six-month determinative period. Respondent's ability or inability to seek modification of the 21 December 2017 order during this period would be relevant in determining the willfulness of his acts or omissions. *See In re E.H.P.*, 372 N.C. 388, 394 (2019) (rejecting an argument that a no-contact provision in a temporary custody judgment prevented the respondent from contacting his children during the relevant six-month period when the respondent made no attempt to modify the terms of the temporary custody judgment which was "by definition provisional, and . . . expressly contemplated the possibility that the no-contact provision would be modified in a future order"); *In re I.R.M.B.*, 377 N.C. 64, 2021-NCSC-27, ¶ 19 (rejecting an argument that a restraining order precluded contact with the respondent's child

during the determinative six-month period where the respondent was aware of his ability to seek legal custody and visitation rights and how to obtain such relief despite the limitations of the order but failed to do so). Likewise, the trial court's findings fail to address other indications that respondent sought to fulfill his parental duties during the applicable six-month period.

¶ 21 In her second argument, petitioner argues that the trial court erred in determining "there is insufficient evidence to suggest either current neglect or a likelihood of future neglect" by respondent and argues that this Court is unable to conduct meaningful appellate review when the trial court's findings are insufficient to demonstrate it considered terminating respondent's parental rights based upon neglect by abandonment.

¶ 22 According to N.C.G.S. § 7B-1111(a)(1), a trial court is entitled to terminate a parent's parental rights in a child on the basis of neglect if that child's "parent, guardian, custodian, or caretaker . . . [d]oes not provide proper care, supervision, or discipline[;] [h]as abandoned the juvenile[;] . . . [or c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2021). "In determining whether a parent's parental rights in a child are subject to termination on the basis of neglect, the parent's fitness to care for his or her child must be determined as of the date of the termination hearing, an event that is frequently held after the child has been removed from the parent's custody." *In re D.T.H.*, 378 N.C. 576, 2021-NCSC-106, ¶ 19. In that scenario, "[t]he trial court must consider evidence of changed conditions . . . in light of the history of neglect by the parents and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 714 (1984) (quoting *In re Wardship of Bender*, 170 Ind. App. 274, 285, 352 N.E.2d 797, 804 (1976)). "On the other hand, however, this Court has recognized that the neglect ground can support termination without use of the two-part *Ballard* test if a parent is presently neglecting their child by abandonment." *In re D.T.H.*, ¶ 19 (cleaned up).

¶ 23 A trial court has the authority to terminate a parent's parental rights in a child for neglect based upon abandonment in the event the trial court finds that the parent's conduct demonstrates a "willful neglect and refusal to perform the natural and legal obligations of parental care and support." *Pratt*, 257 N.C. at 501. In order to terminate parental rights on this ground, "the trial court must make findings that the parent has engaged in conduct which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child as of the time of the termination hearing." *In re N.D.A.*, 373 N.C. at 81 (cleaned up). In determining whether a parent has neglected his or her child by

abandonment for purposes of N.C.G.S. § 7B-1111(a)(1), the relevant time period "is not limited to the six consecutive months immediately preceding the filing of the termination petition." *Id.* at 81. "[A] trial court may consider a parent's conduct over the course of a more extended period of time . . . ." *Id.* at 81–82 (citations omitted).

¶ 24 In the orders denying the termination petitions, the trial court found that respondent had been in a relationship with his fiancée who testified about the absence of domestic violence and incidents of shouting and anger by respondent; respondent had a good relationship with his fiancé's children; respondent had never been physically violent toward Chip or Brad; respondent had taken steps to improve himself, including completing parenting, domestic violence, and substance abuse classes; and there was no evidence respondent had engaged in any violent crimes or dangerous behaviors since the 2017 incident involving petitioner. Ultimately, the trial court determined that

> while the incident of domestic violence towards [petitioner] at the Bojangles in the presence of the [children] and other acts that occurred prior to the December 21, 2017 Order support a finding of neglect by [respondent], there is insufficient evidence to suggest either current neglect or a likelihood of future neglect by [respondent].

¶ 25 However, despite allegations that respondent had "abandoned and neglected" the children and "ha[d] not made any inquiry about the well-being" of the children in over two years, the trial court's findings fail to offer an assessment regarding the issue of whether respondent neglected the children by abandonment. This Court has previously held that "when the trial court denies a petition at the adjudicatory stage pursuant to N.C.G.S. § 7B-1110(c), the order must allow for appellate review of the trial court's evaluation of *each and every* ground for termination alleged by the petitioner." *In re K.R.C.*, 374 N.C. at 864. Without findings addressing whether respondent's acts or omissions amounted to "wil[l]ful neglect and refusal to perform the natural and legal obligations of parental care and support[,]" *Pratt*, 257 N.C. at 501, this Court is precluded from conducting meaningful appellate review on this ground.

III. Conclusion

¶ 26 For the reasons set forth above, we hold that the trial court's findings of fact are insufficient to support its denial of petitioner's termination-of-parental-rights petitions. As a result, we vacate the trial court's 18 May 2021 orders and remand the matter to the trial court for entry of

additional findings of fact and conclusions of law. On remand, we leave to the discretion of the trial court whether to hear additional evidence. *See, e.g.*, *In re K.R.C.*, 374 N.C. at 865.

VACATED AND REMANDED.

IN THE MATTER OF D.R.J.

No. 147A21

Filed 17 June 2022

1. Termination of Parental Rights—collateral attack—initial custody determination—failure to appeal—not facially void for lack of jurisdiction

In his appeal from the trial court's order terminating his parental rights in his daughter, respondent-father could not collaterally attack the initial custody determination adjudicating his daughter as neglected and placing her in the department of social services' custody. Respondent's failure to appeal the initial custody determination precluded his collateral attack, and the exception regarding orders that are facially void for lack of jurisdiction did not apply.

2. Termination of Parental Rights—grounds for termination—notice—sufficiency of allegations

Where the department of social services' motion to terminate respondent-father's parental rights specifically cited only N.C.G.S. § 7B-1111(a)(3) and (a)(6) as grounds for terminating his parental rights, the trial court erred by adjudicating the existence of the grounds in N.C.G.S. § 7B-1111(a)(1), (a)(2), and (a)(7). A sentence in the motion under the paragraph citing N.C.G.S. § 7B-1111(a)(6) —even when coupled with prior orders incorporated by reference— alleging that the "parents have done nothing to address or alleviate the conditions which led to the adjudication of this child as a neglected juvenile" did not adequately allege statutory language to provide notice of the grounds in N.C.G.S. § 7B-1111(a)(1) or (a)(2), and the allegation in the motion referencing N.C.G.S. § 7B-1111(a)(7) with regard to the children's mother could not provide notice that respondent's parental rights were subject to termination on that ground.

3. Termination of Parental Rights—grounds for termination—failure to pay a reasonable portion of the cost of care—dependency—sufficiency of evidence and findings

The trial court erred in determining that the grounds of failure to pay a reasonable portion of the cost of care (N.C.G.S. § 7B-1111(a)(3)) and dependency (N.C.G.S. § 7B-1111(a)(6)) existed to support termination of respondent-father's parental rights where insufficient evidence of each ground was presented before the trial court and therefore the factual findings were insufficient. Specifically, for the ground in N.C.G.S. § 7B-1111(a)(3), the single factual finding recited the statutory language, and there was no evidence or finding regarding the cost of the child's care or respondent's ability to pay; for the ground in N.C.G.S. § 7B-1111(a)(6), the trial court's single factual finding failed to address the availability of an alternate placement option, and no evidence was presented on the matter.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from orders entered on 3 March 2021 by Judge Hal Harrison in District Court, Avery County. This matter was calendared in the Supreme Court on 13 May 2022 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Stephen M. Schoeberle for petitioner-appellee Avery County Department of Social Services.

Matthew D. Wunsche for appellee Guardian ad Litem.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky Brammer, for respondent-appellant father.

MORGAN, Justice.

¶ 1 Respondent-father appeals the trial court order terminating his parental rights to "Dana," a minor female child born in May 2010.[1] The order also terminated the parental rights of Dana's mother, but the mother is not a party to this appeal. We reverse the trial court's order which terminates respondent-father's parental rights.

1. We use a pseudonym to protect the identity of the minor child and for ease of reading.

I. Factual and Procedural Background

¶ 2 After receiving reports in June 2018 and August 2018 concerning the mother's drug use and the commission of violence in the presence of the juvenile Dana, the Avery County Department of Social Services (DSS) filed a juvenile petition on 27 August 2018 alleging that Dana was a neglected juvenile. On 4 October 2018, the trial court entered an order adjudicating Dana to be a neglected juvenile based on stipulations by the parents to the following facts as alleged in the juvenile petition:

> [DSS] became involved with this child on June 28, 2018 with a report of drug use by [the mother]. [The mother] agreed to complete a drug screen for the social worker on or about August 3, 2018, which came back positive for methamphetamine, amphetamine, Benzodiazepam and Lorazapam [*sic*]. On August 13, 2018, DSS received another report that [the mother] and her boyfriend (not the Respondent father herein) had gotten into an argument over drugs in the presence of the child. Due to ongoing concerns with these reports as well as drug use by the Respondent father, DSS and the parents agreed the child should reside with the maternal grandmother[.]

As an interim disposition, the trial court ordered that Dana remain in the care of her maternal grandmother.

¶ 3 On 20 October 2018, prior to the disposition hearing on 25 October 2018, DSS received a report that Dana had been sexually abused by the maternal step-grandfather. On the date of the disposition hearing, DSS obtained nonsecure custody of Dana and placed her in a licensed foster home. In the dispositional order entered on 28 November 2018, the trial court found that respondent-father was ordered previously to sign and complete a case plan, but that he had not done so. The trial court directed that Dana remain in DSS custody. In the subsequent 25 January 2019 permanency planning order, the trial court set the primary plan as reunification with a concurrent plan of custody or guardianship with a suitable adult.

¶ 4 Respondent-father entered into a case plan on 26 October 2018 which required him to complete a mental health and substance abuse assessment, to follow all of the resulting recommendations, and to submit to drug screens prior to visitation with Dana. The case plan was subsequently modified several times in order to include the completion of parenting classes, as well as additional substance abuse

counselling and outpatient treatment for alcohol addiction. Despite respondent-father's initial progress in addressing his substance abuse issues in the 16 September 2020 permanency planning order, the trial court made findings of fact which showed that respondent-father's progress with his case plan had stalled. The trial court relieved DSS of its efforts toward the reunification of respondent-father with the juvenile Dana and changed the permanent plan to adoption with a concurrent plan of custody or guardianship with a suitable adult.

¶ 5 DSS filed a motion to terminate parental rights of respondent-father on 30 September 2020, advancing these allegations as grounds for termination:

> A. Per G.S. 7B-1111(a)(3) neither parent has not [*sic*] paid any consistent support for the minor child, the juvenile having been placed in the custody of [DSS] for a continuous period of six months next preceding the filing of the petition, since the final Adjudication and Dispositional Order was entered. Both parents have willfully failed for such a period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so, in that neither parent is disabled, is able to work, and has paid nothing towards the cost of care of the minor child during that period of time.
>
> B. Per G.S. 7B-1111(a)(6) both parents are 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 there is a reasonable probability that such incapability will continue for the foreseeable future. Neither parent has provided for the financial or housing needs of the child since the child came into the custody of [DSS], and neither is prepared to do so now. The parents have done nothing to address or alleviate the conditions which led to the adjudication of this child as a neglected juvenile[.][2]

¶ 6 At the conclusion of the termination hearing on 4 February 2021, the trial court announced that the evidence supported the termination

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2. The motion to terminate parental rights included an additional allegation, pursuant to N.C.G.S. § 7B-1111(a)(7), that grounds existed to terminate only the mother's parental rights due to abandonment.

of respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(6). In the termination order entered on 3 March 2021, the trial court determined that grounds existed to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(3), (6), and (7). The trial court rendered findings of fact in its decision which mirrored the language in DSS's termination motion. The trial court also made findings related to respondent-father's progress toward completing his case plan and his efforts toward reunification with Dana. Based on the findings of fact, the trial court reached the following conclusions of law related to the alleged grounds for termination of parental rights:

> 2. Grounds exist for the termination of the parental rights of the Respondent [p]arents;
>
> 3. [Dana] has been adjudicated a neglected juvenile and there remains a strong likelihood of a repetition of neglect if [she] was returned to either parent;
>
> 4. [Dana] has been left in foster care or other placement for more than one year without there being any reasonable progress made under the circumstances to correct conditions leading to [her] removal;
>
> 5. The parents have willfully abandoned [Dana] by failing to make reasonable efforts at completing a case plan in a timely manner, and not addressing the problems leading to removal of [Dana];
>
> . . . .
>
> 8. [DSS] has shown by clear, cogent and convincing evidence that the grounds exist to terminate the parental rights of the Respondent parents as more specifically set forth herein.
>
> . . . .
>
> 10. That grounds exist pursuant to N.C.G.S. §7B-1111 for the termination of the parental rights of the Respondent parents.

The trial court ultimately concluded that it was in the juvenile Dana's best interests to terminate the parental rights of respondent-father, and thereupon terminated respondent-father's parental rights. Respondent-father appeals.

II. Arguments on Appeal

¶ 7 Respondent-father collaterally attacks the initial custody determination. He also challenges both the trial court's adjudication of grounds for termination of his parental rights and the trial court's conclusion of the best interests of the child. We address each argument in turn.

A. Initial Determination of Custody

¶ 8 **[1]** Respondent-father first argues that, as the parent who did not commit the alleged wrongdoing which led to the juvenile Dana being placed in DSS custody, he was "unfairly denied custody" of Dana at the outset of the case because the trial court never found that he was unfit or that he acted inconsistently with his constitutionally protected status. Respondent-father contends that Dana should have been placed in his care upon her removal without a requirement for his compliance with a case plan.

¶ 9 Dana was adjudicated as neglected based upon the parents' stipulation to facts which were alleged in the juvenile petition. At the disposition hearing, the trial court determined that it was in Dana's best interests for DSS to have custody of the juvenile and ordered the agency to assume custody.

¶ 10 Respondent-father had a right to appeal the adjudication and dispositional orders, *see* N.C.G.S. § 7B-1001(a)(3) (2021) (providing the right to appeal "[a]ny initial order of disposition and the adjudication order upon which it is based" to the Court of Appeals), but he failed to do so. Such failure to appeal "generally serves to preclude a subsequent collateral attack . . . during an appeal of a later order terminating the parent's parental rights[,]" *In re A.S.M.R.*, 375 N.C. 539, 544 (2020),except that a collateral attack on an adjudication order or a dispositional order may be appropriate on appeal of an order terminating parental rights when said order "is void on its face for lack of jurisdiction[.]" *Id.* at 543 (quoting *In re Wheeler*, 87 N.C. App. 189, 193–94 (1987)).

¶ 11 Respondent-father does not contend that either the adjudication order or the dispositional order is void, and we conclude that neither of the trial court's orders is void on its face for lack of jurisdiction. Because respondent-father failed to appeal the adjudication and dispositional orders, they remain valid and binding, and respondent-father is precluded from instituting a collateral attack on the trial court's custody determination in this appeal from the tribunal's order which terminated his parental rights.

B. Motion to Terminate Parental Rights

¶ 12 **[2]** Respondent-father next challenges DSS's motion to terminate his parental rights to the child Dana, contending that the motion insufficiently alleges the grounds that the trial court found to exist in order to terminate his parental rights in Conclusions of Law 3, 4, and 5 of the trial court's order. A motion to terminate parental rights must include, *inter alia*, "[f]acts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist." N.C.G.S. § 7B-1104(6) (2021). "While there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue." *In re B.C.B.*, 374 N.C. 32, 34 (2020) (quoting *In re Hardesty*, 150 N.C. App. 380, 384 (2002)).

¶ 13 In this case, the termination of parental rights motion alleged grounds for the termination of respondent-father's parental rights based on his alleged failure to pay reasonable support for Dana's care and dependency. *See* N.C.G.S. § 7B-1111(a)(3), (6) (2021). The trial court's Conclusions of Law 3, 4, and 5, as set forth above, correspond to the statutory grounds for termination based on neglect, willful failure to make reasonable progress, and willful abandonment. *See* N.C.G.S. § 7B-1111(a)(1), (2), (7) (2021). Respondent-father asserts that the "termination motion did not allege grounds (a)(1) and (a)(2) at all or ground (a)(7) for [respondent-father], much less any specific facts to support" those grounds; therefore, these grounds for termination "cannot be adjudicated and should be disregarded."

¶ 14 The guardian ad litem (GAL) concedes that the termination motion specifically cited only N.C.G.S. § 7B-1111(a)(3) and (a)(6) as grounds to terminate respondent-father's parental rights. However, the GAL contends that the motion contained sufficient factual allegations to provide respondent-father with adequate notice that his parental rights could be terminated under N.C.G.S. § 7B-1111(a)(1) and (a)(2) because "[w]ithin the paragraphs containing those citations" to (a)(3) and (a)(6) "the motion states: 'The parents have done nothing to address or alleviate the conditions which led to the adjudication of this child as a neglected juvenile.' " The GAL further submits that the motion to terminate incorporated by reference "the initial adjudication and interim disposition order, the dispositional order entered on 25 October 2018, and the 3 September 2020 permanency planning order that made adoption Dana's permanent plan[,]" which describe respondent-father's and the mother's history of substance abuse, the establishment of the parents' respective case plans, and "their general noncompliance with the steps of those case plans over the life of the case." The GAL argues that the incorporation of these prior

orders, "plus the language that informed respondent-father that he had not made adequate progress on the conditions that led to the original adjudication, put respondent[-]father on notice that his rights could be terminated based on neglect or willful failure to make reasonable progress." The GAL asserts that the trial court's findings support such an adjudication pursuant to N.C.G.S. § 7B-1111(a)(1) or (2).

¶ 15 DSS joins the GAL's argument that the motion to terminate parental rights provided respondent-father with adequate notice that his parental rights could be terminated pursuant to N.C.G.S. § 7B-1111(a)(2).[3] However, DSS submits that the requirement for adequate notice "may be satisfied by findings made in court orders attached to" the termination motion alone.

¶ 16 In support of their positions, DSS and the GAL rely upon *In re Hardesty*, 150 N.C. App. 380, and *In re Quevedo*, 106 N.C. App. 574, 578, *appeal dismissed*, 332 N.C. 483 (1992). In those cases, the Court of Appeals held that a termination of parental rights petition which included only a "bare recitation . . . of the alleged statutory *grounds* for termination" was insufficient to comply with the statutory requirement that a petition contain sufficient facts to warrant a determination that *grounds* for termination exist. *In re Quevedo*, 106 N.C. App. at 579; *In re Hardesty*, 150 N.C. App. at 384. In *In re Quevedo*, the petition to terminate parental rights alleged that the respondent "neglected the child[,]" and "willfully abandoned the child for at least six (6) months immediately preceding the filing of the petition." 106 N.C. App. at 578–79. The Court of Appeals concluded that the petition sufficiently alleged grounds for termination because in addition to that "bare recitation" of the statutory language, the termination petition incorporated an earlier custody award, which contained "sufficient facts to warrant such a determination." *Id.* at 579. The petition in *In re Hardesty* alleged that the respondent was "incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is dependent and there is a reasonable probability that such incapability will continue for the foreseeable future." 150 N.C. App. at 384. In *Hardesty*, the lower appellate court opined that "[u]nlike *Quevedo*, there was no earlier order containing the requisite facts incorporated into the petition[,]" and decided that the petition, which "merely use[d] words similar to those in the statute setting out grounds for termination," was insufficient to put the respondent "on notice as to what acts, omissions or conditions [were] at issue." *Id.*

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3. DSS only argues that the trial court properly adjudicated grounds for termination under N.C.G.S. § 7B-1111(a)(2). DSS does not address any of the other grounds.

¶ 17 Unlike in *In re Quevedo* and *In re Hardesty*, the termination motion in the present case does not even contain a "bare recitation" of the statutory grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(1) or (2). While the GAL contends that the termination motion's sentence representing that the "parents have done nothing to address or alleviate the conditions which led to the adjudication of this child as a neglected juvenile[,]" which was located in the paragraph beginning "Per G.S. 7B-1111(a)(6) both parents are incapable of providing for the proper care and supervision of the juvenile such that the juvenile is a dependent juvenile" is sufficient, nonetheless this statement does not adequately allege the statutory language for an adjudication of the existence of grounds to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)(1) or (2). *See* N.C.G.S. § 7B-1111(a)(1) ("The parent has abused or neglected the juvenile. The juvenile shall be deemed to be abused or neglected if the court finds the juvenile to be an abused juvenile within the meaning of G.S. 7B-101 or a neglected juvenile within the meaning of G.S. 7B-101."); *see* N.C.G.S. § 7B-1111(a)(2) ("The parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile."). Therefore, we reject the GAL's assertion here that the termination motion's above-referenced sentence, even when coupled with the incorporation of prior orders, was "sufficient to warrant a determination" that grounds for terminating parental rights existed under N.C.G.S. § 7B-1111(a)(1) or (2). *See* N.C.G.S. § 7B-1104(6). We also rebuff DSS's contention that respondent-father's notice of potential adjudication pursuant to subsection (a)(2) "was more than sufficient" based upon the motion to terminate incorporating "generally all of the prior orders and court reports and specifically" the adjudication order, the dispositional order, and the 3 September 2020 permanency planning order. To hold otherwise would nullify the notice requirement of N.C.G.S. § 7B-1104(6) and contravene the delineation of specific grounds for terminating parental rights. The consequence of such a decision would require a respondent parent to refute any termination ground that could be supported by any facts alleged in any document attached to a termination motion or petition.

¶ 18 Moreover, DSS drafted the termination motion at issue and could have specifically included either or both N.C.G.S. § 7B-1111(a)(1) or (2) as grounds for termination of parental rights but did not do so. DSS's and the GAL's arguments on appeal constitute an impermissible attempt to conform the termination of parental rights motion to the evidence presented at the termination hearing. *See In re B.L.H.*, 190 N.C. App.

142, 146 (reversing the trial court's allowance of DSS to amend the termination petition at the hearing to add grounds which were not alleged), *aff'd per curiam*, 362 N.C. 674 (2008).

¶ 19 We conclude that the motion to terminate parental rights was insufficient to provide notice to respondent-father that his parental rights were subject to termination for neglect or for willful failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(1) or (2), and therefore the trial court's adjudication finding the existence of either ground was error. *See In re B.O.A.*, 372 N.C. 372, 382 (2019) ("a trial court would clearly err by terminating a parent's parental rights in a child for failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2) in the event that this ground for termination had not been alleged in the termination petition or motion,") *see also In re S.R.G.*, 195 N.C. App. 79, 83 (2009) (holding that the failure to allege that the parent's parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) deprived the trial court of the right to terminate the parent's parental rights on the basis of that statutory ground for termination).

¶ 20 For the same reason, we find to be unpersuasive the GAL's argument that respondent-father "waived any objection to the sufficiency of the petition to allege" grounds for termination under N.C.G.S. § 7B-1111(a)(1) or (2) because he did not present any such arguments at the termination of parental rights hearing and because he presented evidence of his compliance with the case plan along with his efforts to address the issues that led to the juvenile Dana's removal. The GAL relies, in part, on *In re H.L.A.D.*, 184 N.C. App. 381, 392 (2007), *aff'd per curiam*, 362 N.C. 170 (2008) for this contention. The respondent-father in *In re H.L.A.D.* moved to dismiss the termination of parental rights petition in the trial court after the presentation of the petitioner's evidence and at the close of all of the evidence "based on the insufficiency of the evidence[.]" *Id.* at 392. On appeal, the respondent-father argued, *inter alia*, that the termination petition failed to comply with the requirements of N.C.G.S. § 7B-1104(6) by failing to allege sufficient facts to warrant a determination that grounds existed to terminate his parental rights. *Id.* at 392. The Court of Appeals noted in its decision that since the Rules of Civil Procedure apply to termination proceedings, a Rule 12(b)(6) motion cannot be made for the first time on appeal. *Id.* Because the respondent-father's argument on appeal in *In re H.L.A.D.* challenged the legal sufficiency of the petition itself and not the sufficiency of the evidence as he argued in his motion to dismiss in the trial court, the Court of Appeals held that the respondent-father failed to properly preserve the sufficiency of the petition issue for appeal. *Id.* Notably, the father

in *In re H.L.A.D.* was arguing that the facts alleged in the petition were insufficient to support the grounds alleged in the petition, not that the petition failed to allege the grounds on which the trial court ultimately made a determination. *Id.*

¶ 21 Additionally, it would be illogical to conclude in the instant case that respondent-father waived appellate review by failing to object at the termination hearing because the motion to terminate his parental rights failed to provide him with notice that his parental rights were potentially subject to termination under N.C.G.S. § 7B-1111(a)(1) or (2). The only grounds for adjudication specified in the motion for termination of parental rights and at the termination hearing were N.C.G.S. § 7B-1111(a)(3) and (6). Grounds for termination pursuant to N.C.G.S. § 7B-1111(a)(1) and (2) appear for the first time in the trial court's subsequent written order; therefore, the first and only available time to challenge the adjudication of the existence of grounds addressed in N.C.G.S. § 7B-1111(a)(1) and (2) is on appeal. *See In re B.R.W.*, 278 N.C. App. 382, 2021-NCCOA-343, ¶ 40 ("An appeal is the procedure for 'objecting' to the trial court's findings of fact and conclusions of law.").

¶ 22 We also hold in the current case that the termination of parental rights motion did not provide notice to respondent-father that his parental rights were subject to termination for willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7). The termination motion only specified N.C.G.S. § 7B-1111(a)(7) as grounds for termination for Dana's mother; consequently, the trial court's findings of fact and conclusions of law that respondent-father abandoned Dana were erroneous. *In re B.O.A.*, 372 N.C. at 382. Accordingly, we only consider the properness of the trial court's adjudication of the existence of grounds to terminate for which respondent-father received adequate notice in the termination motion; namely N.C.G.S. § 7B-1111(a)(3) and (6).

C. Grounds for Adjudication

¶ 23 **[3]** Respondent-father challenges the trial court's findings of fact and the sufficiency of the evidence upon which the findings are based which led to the forum's determination that grounds existed for the termination of his parental rights under N.C.G.S. § 7B-1111(a)(3) and (6). This Court reviews 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 Montgomery*, 311 N.C. 101, 111 (1984). "[T]he issue of whether a trial court's adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights pursuant to

N.C.G.S. § 7B-1111(a)" is reviewed de novo. *In re T.M.L.*, 377 N.C. 369, 2021-NCSC-55, ¶ 15.

¶ 24 As discussed above, the trial court could have only adjudicated grounds to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(3) and (6). Respondent-father acknowledges DSS alleged the existence of grounds under N.C.G.S. § 7B-1111(a)(3) in its motion, but he argues that no evidence was presented, and the trial court made no findings, concerning child support.

¶ 25 A "court may terminate parental rights upon a finding" that

> [t]he juvenile has been placed in the custody of a county department of social services . . . and the parent has for a continuous period of six months immediately preceding the filing of the petition or motion willfully failed to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

N.C.G.S. § 7B-1111(a)(3) (2021).

¶ 26 Here, the trial court made a single finding concerning the payment of support, which recited the statutory language:

> Per G.S. 7B-1111(a)(3) neither parent has not [*sic*] paid any consistent support for the minor child, the juvenile having been placed in the custody of [DSS] for a continuous period of six months next preceding the filing of the petition. Both parents have willfully failed for such a period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so, in that neither parent is disabled, is able to work, and has paid nothing towards the cost of care of the minor child during that period of time.

Whether this finding is best classified as an ultimate finding of fact or a conclusion of law is irrelevant because "that classification decision does not alter the fact that the trial court's determination concerning the extent to which a parent's parental rights in a child are subject to termination on the basis of a particular ground must have sufficient support in the trial court's factual findings." *In re N.D.A.*, 373 N.C. 71, 77 (2019). The trial court entered no other findings regarding the cost of care for the juvenile Dana or concerning respondent-father's ability to pay. *Cf. In re S.E.*, 373 N.C. 360, 367 (2020) (holding that where a trial

court's findings regarding a reasonable portion of the cost of care of the child is "a sum greater than zero[,]" the respondent's ability to pay "a sum greater than zero" and her failure to do so were sufficient to support an adjudication of grounds under N.C.G.S. § 7B-1111(a)(3)). Moreover, no such evidence as to the cost of the child's care or respondent-father's ability to pay was introduced at the termination hearing or into the record. Consequently, insofar as the trial court adjudicated grounds to terminate respondent-father's parental rights pursuant to N.C.G.S. § 7B-1111(a)(3), such an adjudication is unsupported by the evidence contained in the record and any resulting findings of fact, and therefore must be reversed. *See In re Z.G.J.*, 378 N.C. 500, 2021-NCSC-102, ¶ 33.

¶ 27 The order terminating the parental rights of both parents similarly contained a single finding which recognized the ground of dependency to exist. It stated:

> Per G.S. 7B-1111(a)(6) both parents are 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 there is a reasonable probability that such incapability will continue for the foreseeable future. Neither parent has provided for the financial or housing needs of the child since the child came into the custody of [DSS], and neither is prepared to do so now.

However, an adjudication under N.C.G.S. § 7B-1111(a)(6)

> requires the trial court to make two ultimate findings: (1) that the parent is incapable (and will continue to be incapable for the foreseeable future) of providing proper care and supervision to their child, rendering the child a "dependent juvenile" as defined by N.C.G.S. § 7B-101(9) . . .; and (2) that the parent lacks an appropriate alternative child care arrangement.

In re K.C.T., 375 N.C. 592, 596 (2020) (quoting N.C.G.S. § 7B-1111(a)(6) and citing *In re K.R.C.*, 374 N.C. 849, 859 (2020)).

¶ 28 DSS forgoes the presentation of any arguments concerning the trial court's purported adjudication under N.C.G.S. § 7B-1111(a)(6), and the GAL concedes that the trial court's findings of fact are insufficient "to support the ground of dependency, because the trial court did not address the availability of an alternate placement option[.]" We agree with the GAL's candid acknowledgement that the trial court failed to find that

respondent-father lacked an appropriate alternative childcare arrangement. Moreover, respondent-father was not questioned about potential alternative childcare arrangements during his testimony at the termination hearing. No other witness addressed the issue. "Since the trial court failed to make this required finding and no evidence was presented that would allow it to make such a finding," any such "conclusion that dependency provides a ground for termination must be reversed." *In re K.C.T.*, 375 N.C. at 597.

D. Dispositional Determination

¶ 29 Lastly, respondent-father argues that the trial court failed to make sufficient findings of fact to support its determination that termination of respondent father's parental rights was in the juvenile Dana's best interests. However, since we have already concluded that the trial court erred by adjudicating the existence of grounds to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a), we do not need to address this issue. *See In re Young*, 346 N.C. 244, 252 (1997).

III. Conclusion

¶ 30 Because respondent-father failed to appeal the underlying adjudication and dispositional orders, he is precluded from instituting a collateral attack upon the custody determinations in those orders in this appeal from the order terminating his parental rights. With regard to the existence of grounds for the termination of respondent-father's parental rights, the termination of parental rights motion failed to provide sufficient notice to respondent-father that his parental rights were potentially subject to termination under N.C.G.S. § 7B-1111(a)(1), (2) or (7), and therefore the trial court erred in adjudicating the existence of those grounds. As to the grounds which were adequately alleged in the motion to terminate parental rights, insufficient evidence was presented, and thereupon insufficient findings were made, to support an adjudication of grounds for termination of parental rights under N.C.G.S. § 7B-1111(a)(3) or (6). Accordingly, this Court holds that the trial court erred in adjudicating the existence of grounds to support a termination of respondent-father's parental rights. Therefore, we reverse the trial court's order.

REVERSED.

IN RE E.D.H.

[381 N.C. 395, 2022-NCSC-70]

IN THE MATTER OF E.D.H.

No. 207A21

Filed 17 June 2022

Civil Procedure—presumption of regularity—order terminating parental rights—signed by judge who did not preside over hearing—administrative and ministerial action

An order terminating respondent-mother's parental rights, signed by the chief district court judge after the judge who had presided over the hearing retired—which stated in an unchallenged finding that the findings of fact, conclusions of law, and decretal had been announced in chambers by the now-retired judge, and that the order was administratively and ministerially signed by the chief district court judge—was held to be properly entered in an administrative and ministerial capacity pursuant to Civil Procedure Rules 52 and 63 where respondent-mother failed to rebut the presumption of regularity.

Justice HUDSON dissenting.

Justices MORGAN and EARLS join in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered on 15 February 2021 by Chief District Court Judge David V. Byrd in District Court, Wilkes County. Heard in the Supreme Court on 24 May 2022 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

Erika Leigh Hamby for petitioner-appellee Wilkes County Department of Social Services.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by J. Mitchell Armbruster, for appellee Guardian ad Litem.

Peter Wood for respondent-appellant mother.

BARRINGER, Justice.

IN RE E.D.H.

[381 N.C. 395, 2022-NCSC-70]

¶ 1 Respondent appeals from an order terminating her parental rights to her minor child E.D.H. (Emily).[1] According to respondent, the trial court committed prejudicial error when Chief District Court Judge David V. Byrd signed the termination order after Judge Jeanie R. Houston, who had presided over the hearing, retired. After careful review, we hold that that termination order was properly entered pursuant to Rules 52 and 63 of the North Carolina Rules of Civil Procedure. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

I. Factual and Procedural Background

¶ 2 The Wilkes County Department of Social Services (DSS) first got involved with Emily's family in September of 2017 due to allegations of domestic violence that resulted in Emily's father being charged with and later convicted of child abuse.[2] In February of 2018, DSS investigated a report of domestic violence occurring between the two parents while Emily was present and discovered that Emily's lower back was bruised significantly. Neither parent could nor would identify the source of the bruising. As a result, DSS requested a safety placement for Emily and, after the parents were unable to provide one, obtained nonsecure custody of Emily. Emily was subsequently adjudicated an abused and neglected juvenile.

¶ 3 DSS developed a case plan to address the conditions that led to Emily's removal, particularly respondent's mental health and mental stability. Respondent's mental health diagnoses included schizoaffective disorder, substance abuse disorder cannabis, mood disorder, bipolar II disorder, and post-traumatic stress disorder. Respondent initially participated in therapy, but her participation appeared to have ceased during the six months prior to the termination hearing. During the pendency of the case, respondent voluntarily committed herself on two separate occasions. Additionally, respondent's interactions with the social worker prior to the termination hearing did not display stable mental health.

¶ 4 Another objective of respondent's case plan was remedying her history of domestic violence. A domestic violence assessment scored respondent as high risk. Respondent did not complete a program to address this risk until two years after the assessment and over seven months after DSS filed the termination petition. Respondent also had a

1. A pseudonym is used in this opinion to protect the juvenile's identity and for ease of reading.

2. Emily's father did not appeal from the termination order, which also terminated his parental rights, and is not a party to this appeal.

history of separating from and getting back together with Emily's father. At one point, respondent testified that she was separating from Emily's father and never going back due to his abuse of her, but then later that week, respondent reported she was back in a relationship with him. Respondent also blamed a failed drug screen on Emily's father, alleging that he had forcibly injected her with methamphetamine.

¶ 5 At the time of the termination hearing, respondent resided in an unapproved placement. Additionally, none of the potential alternative placements respondent provided DSS were willing or appropriate placements for Emily. Prior to this case, respondent's parental rights had been involuntarily terminated to three other children.

¶ 6 DSS petitioned to terminate respondent's parental rights in Emily based on dependency, N.C.G.S. § 7B-1111(a)(6), and on the basis of having had her parental rights to another child involuntarily terminated by a court of competent jurisdiction and respondent lacking the ability or willingness to establish a safe home, N.C.G.S. § 7B-1111(a)(9). A hearing on the petition to terminate respondent's parental rights in Emily was conducted on 25 August 2020 before Judge Houston. Respondent was present and represented by counsel.

¶ 7 After the presentation of evidence and arguments of counsel as to adjudication, Judge Houston found that grounds alleged for termination as to respondent existed and proceeded to the dispositional phase. Following the presentation of evidence and arguments of counsel as to disposition, Judge Houston took the matter under advisement and scheduled an in-chambers conference with the attorneys for the following Thursday, 27 August 2020.

¶ 8 Judge Houston retired from office on 31 December 2020. On 15 February 2021, an order was entered terminating respondent's parental rights in Emily based on an adjudication of grounds under N.C.G.S. § 7B-1111(a)(6) and (9) and a dispositional determination that it was in Emily's best interests to terminate respondent's parental rights. The order states: "Findings of fact, conclusions of law, and decretal announced in chambers on the 28th day of August 2020 by the Honorable Jeanie R. Houston . . . [a]dministratively and ministerial[l]y signed by the Chief District Court Judge this the 15th day of Feb[ruary], 2021." Respondent appealed.

II. Analysis

¶ 9 On appeal, respondent does not contest the trial court's adjudication that grounds existed to terminate her parental rights pursuant to

N.C.G.S. § 7B-1111(a)(6) and (9), nor does respondent challenge the trial court's determination that terminating her parental rights was in Emily's best interests. Instead, respondent's only argument is that the order was a nullity pursuant to Rules 52 and 63 of the North Carolina Rules of Civil Procedure because Chief Judge Byrd signed the order without presiding over the hearing.

A. Standard of Review

¶ 10 The North Carolina Rules of Civil Procedure are part of the General Statutes. *See* N.C.G.S. § 1A-1 (2021). Accordingly, interpreting the Rules of Civil Procedure is a matter of statutory interpretation. *See Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 272, 276 (1988). "A question of statutory interpretation is ultimately a question of law for the courts." *Brown v. Flowe*, 349 N.C. 520, 523 (1998). We review conclusions of law de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

¶ 11 In contrast, "[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 (2019). Further, "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019).

B. Validity of the Order

¶ 12 The only issue before this Court is whether the termination order was properly entered pursuant to Rules 52 and 63 of the North Carolina Rules of Civil Procedure. Rule 52 provides that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1). Rule 63 provides that

> [i]f by reason of . . . retirement . . . a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed[ ]
>
> . . . .
>
> . . . [i]n actions in the district court, by the chief judge of the district . . . .

N.C.G.S. § 1A-1, Rule 63. However, "[i]f the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing." N.C.G.S. § 1A-1, Rule 63.

¶ 13 One of "the duties to be performed by the court under these rules," N.C.G.S. § 1A-1, Rule 63, is finding the facts, stating the conclusions of law, and directing the entry of judgment pursuant to Rule 52. Thus, this Court has interpreted Rules 52 and 63 together to provide that a substitute judge cannot find facts or state conclusions of law in a matter over which he or she did not preside. *See In re C.M.C.*, 373 N.C. 24, 28 (2019). Conversely, and respondent concedes, if Judge Houston made the findings of fact and conclusions of law that appear in the order before retiring and Chief Judge Byrd did nothing more than put his signature on the order and enter it ministerially, the order is valid.

¶ 14 Respondent argues that the order is a nullity because the record is silent on whether the order was properly entered in accordance with Rules 52 and 63. However, in making this argument, respondent fails to recognize that she bears the burden of proving the order was improperly entered, due to the presumption of regularity. As this Court has long recognized,

> [i]t is, as a general rule presumed that a public official properly and regularly discharges his duties, or performs acts required by law, in accordance with the law and the authority conferred on him, and that he will not do any act contrary to his official duty or omit to do anything which such duty may require.

Huntley v. Potter, 255 N.C. 619, 628 (1961) (cleaned up). Thus, the burden is "on the party challenging the validity of public officials' actions to overcome this presumption by competent and substantial evidence." *Leete v. County of Warren*, 341 N.C. 116, 119 (1995); *see also Huntley*, 255 N.C. at 628.

¶ 15 Though this Court has not previously addressed whether the presumption of regularity applies to the specific action of a Chief Judge signing and entering an order with findings of fact and conclusions made by a retired judge, after careful review, we hold that it does. To begin with, this Court has long recognized that the "presumption of regularity attaches generally to judicial acts." *Freeman v. Morrison*, 214 N.C. 240, 243 (1938). We have also described this rule as a general presumption that applies when "a public official in the performance of an official duty

acts in accordance with the law and the authority conferred upon him." *State v. Watts*, 289 N.C. 445, 449 (1976). Based on this general characterization, Chief Judge Byrd's judicial action in this case would appear to qualify. Chief Judge Byrd was a public official: a chief district court judge; he performed an official duty in accordance with the law: signing and entering an order on behalf of a retired judge who presided over the hearing in accordance with Rules 52 and 63; and he acted within the authority conferred on him: Rules 52 and 63 authorize the chief district court judge to sign and enter such an order and Chief Judge Byrd was the chief district court judge of his district.

¶ 16 Moreover, this Court's precedent supports applying the presumption of regularity to this case because the action in question was administrative and ministerial. In *Henderson County v. Osteen*, 297 N.C. 113 (1979), for instance, we held that the mailing of a notice of sale by the sheriff's office fell within the presumption of regularity. *Id.* at 117. In *State v. Watts*, we held that the authentication of records by an authorized officer of the Division of Motor Vehicles received this presumption. *Watts*, 289 N.C. at 449–50.[3] And in *In re N.T.*, 368 N.C. 705 (2016), we held that a signature appearing in a space marked for "Signature of Person Authorized to Administer Oaths" should receive this presumption. *Id.* at 708. In each of those cases, the official's action at issue was administrative and ministerial. Likewise, in this case, the action of the Chief District Judge, signing and entering an order, was also purely administrative and ministerial. Thus, the presumption of regularity applies in this case.

¶ 17 Applying the presumption of regularity, we presume that Chief Judge Byrd signed the order in an exclusively administrative and ministerial capacity, in conformance with Rules 52 and 63. To challenge this presumption, respondent must meet the heavy burden of proving that Chief Judge Byrd violated the Rules of Civil Procedure and signed the order despite not knowing whether Judge Houston made the findings of fact and conclusions of law that appear in it. Yet respondent failed to provide any evidence that Chief Judge Byrd improperly signed the order. Nor can respondent argue that such evidence was unavailable because the announcement occurred off the record. Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure provides an express avenue to include off-the-record evidence in the record on appeal. N.C. R. App. P. 9(c)(1). Respondent chose not to pursue this option. As a result,

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3. Notably, the public officials whose actions were challenged were not named parties in *Osteen* or *Watts*.

respondent failed to meet her burden, and the presumption of regularity was unrebutted.

¶ 18 Further, respondent is incorrect that the record is entirely silent on who made the findings of fact and conclusions of law that appear in the order. The order includes a statement that "[f]indings of fact, conclusions of law, and decretal announced in chambers on the 28th day of August 2020 by the Honorable Jeanie R. Houston." While this statement is not labeled as a finding of fact, this Court has previously recognized that "[r]egardless of the label given by the trial court, this Court is 'obliged to apply the appropriate standard of review to a finding of fact or conclusion of law.' " *In re S.C.L.R.*, 378 N.C. 484, 2021-NCSC-101, ¶ 19 (quoting *In re J.S.*, 374 N.C. 811, 818 (2020)). Whether a certain action occurred at a given place and time is a question of fact. *See State ex rel. Utils. Comm'n v. Pub. Staff–N.C. Utils. Comm'n*, 322 N.C. 689, 693 (1988). Therefore, a statement in the order that on 28 August 2020 Judge Houston announced in chambers the findings of fact, conclusions of law, and decretal that appear in the order is a finding of fact.

¶ 19 Since respondent never specifically challenged the finding that Judge Houston made the findings of fact and conclusions of law that appear in the order, it is binding on appeal. *See In re T.N.H.*, 372 N.C. at 407. Moreover, even if respondent's brief is interpreted as challenging this finding, the finding is supported by the presumption of regularity, which respondent has failed to rebut. At best, respondent can point to a discrepancy between the trial transcript and the adjudication of one of the grounds regarding Emily's father. However, "a trial court's oral findings are subject to change before the final written order is entered," *In re A.U.D.*, 373 N.C. 3, 9–10 (2019), and Emily's father is not a party to this appeal and has not challenged that adjudication. More importantly, a single discrepancy between the transcript and the order is not sufficient to rebut the "heavy burden" a party faces when challenging the presumption of regularity, which must be satisfied "with *competent and substantial* evidence." *See Leete*, 341 N.C. at 119 (emphasis added).

¶ 20 By that same reasoning, other evidence in the record supports the order. For example, DSS had alleged a third ground existed to terminate respondent's parental rights: willful failure to pay a reasonable portion of the cost of the juvenile's care pursuant to N.C.G.S. § 7B-1111(a)(3). However, during the hearing, DSS dismissed all claims against respondent under N.C.G.S. § 7B-1111(a)(3). At the conclusion of the adjudicatory hearing, Judge Houston stated that she would find the existence of "all the grounds" for termination against respondent. Looking to the order, it concludes that grounds exist to terminate respondent's parental

rights under N.C.G.S. § 7B-1111(a)(6) and (a)(9) but not (a)(3), which was consistent with the discussions that occurred at the hearing. The transcript also reflects that at the conclusion of the hearing a meeting regarding the case was scheduled between Judge Houston and the parties' attorneys for Thursday, August 27. It is a reasonable inference that on August 28, the day after the meeting, Judge Houston would announce the findings of fact and conclusions of law that appear in the order.

¶ 21 In summary, there is an unchallenged finding of fact in the record that Judge Houston made the findings of fact and conclusion of law that appear in the order. The finding is supported by the presumption of regularity which respondent has failed to rebut. Based on this finding, Chief Judge Byrd's signature and entry of the order was an exclusively administerial and ministerial action, which meets the legal requirements of Rules 52 and 63. Therefore, respondent has failed to prove that the order was a nullity.

III. Conclusion

¶ 22 Emily has been in the care and custody of DSS since February of 2018. Her parents' parental rights have been terminated since February of 2021. Yet over a year since the termination order was entered and four years since entering DSS custody, Emily still has not received permanence.

¶ 23 Respondent does not challenge the trial court's adjudication that grounds existed to terminate her parental rights or that termination was in Emily's best interests. Instead, her only argument on appeal is that the order was a nullity when it was entered. However, as discussed, the order is supported by the presumption of regularity, which respondent has failed to rebut, as well as an unchallenged finding of fact. Accordingly, we affirm the order terminating respondent's parental rights.

AFFIRMED.

Justice HUDSON dissenting.

¶ 24 The judicial process earns its credibility, in part, by showing its work. A case's paper record and trial court documents allow both the parties and appellate courts to understand the procedural and substantive foundation of a trial court's ultimate outcome. As the stakes of that outcome are raised, so is the importance of its foundational process and reasoning.

¶ 25 Here, the thin record cannot bear the weight of the order's heavy consequence. The August 2020 hearing transcript indicates that the initial judge, Judge Jeanie R. Houston, made a few oral findings, took the case under advisement, and planned on convening a subsequent meeting for further conversation. However, there is no record of that meeting or of any findings or conclusions made therein, or at any point before Judge Houston's December 2020 retirement. Chief District Court Judge David V. Byrd's February 2021 written order summarily states that its findings and conclusions were made at an August 2020 meeting but in fact directly contradicts some of the initial findings announced at the hearing. The February 2021 order also states that it was signed "administratively and ministerially," but the record's gaps indicate otherwise. Notably, the consequence of this order could hardly be more severe: it permanently severs the parental rights of a mother to her young daughter.

¶ 26 In my view, Rules 52, 58, and 63 of our Rules of Civil Procedure collectively require more. Above, the majority's improper application of a "presumption of regularity" contorts a de novo review of a legal conclusion into a much more deferential standard, allowing the substitute judge's mere recitation of the "administrative and ministerial" requirement to patch significant holes in the record. Likewise, the majority erroneously determines that Chief Judge Byrd's factual finding regarding the 28 August 2020 in-chambers meeting is unchallenged and therefore binding, when in fact respondent's entire appeal is implicitly and explicitly founded on challenging that finding. Through both errors, the majority's analysis turns this case on its head, determining that respondent has provided insufficient evidence of irregularity when in fact this lack of evidence is precisely what respondent challenges and what renders the record so irregular in the first place. In so doing, the majority improperly applies a presumption of regularity to justify the entry of the order by the chief judge, who had not heard the evidence. Because no party to this action argued for or even mentioned a presumption of regularity, and because Rules 52, 58, and 63 set forth the procedure and foundational principles of our analysis, I respectfully dissent.

I. Factual and Procedural Background

¶ 27 On 22 November 2019, DSS filed a petition to terminate the parental rights of respondent and the father in their daughter, Emily. As to respondent, DSS alleged two grounds for termination: (1) dependency, N.C.G.S. § 7B1111(a)(6); and (2) respondent had previously had her parental rights to another child terminated, N.C.G.S. § 7B-1111(a)(9). As to the father, DSS alleged two grounds for termination: (1) the father

willfully failed to pay a reasonable portion of Emily's cost of care, N.C.G.S. § 7B-1111(a)(3); and (2) dependency, N.C.G.S. § 7B-1111(a)(6).

¶ 28 On 25 August 2020, Judge Houston conducted a hearing on the petition. After hearing testimony from several witnesses and arguments from the parties regarding adjudication, Judge Houston stated: "All right. I'll find there's grounds. What do you say about the dad's child support? I actually made a note of that myself." In response, DSS's attorney made further arguments regarding the father's child support obligations. Ultimately, Judge Houston stated: "I'm going to find *all the grounds except for that one*. I actually agree with you on that one, [father's attorney]." (Emphasis added). Accordingly, Judge Houston implied that she would find the existence of both alleged grounds to terminate respondent's parental rights (dependency and prior termination of parental rights), but only *one* of the two alleged grounds to terminate father's parental rights (dependency but not failure to pay a reasonable portion of cost of care).

¶ 29 Next, the trial court proceeded with testimony and arguments regarding disposition. After the conclusion of these arguments, Judge Houston did not announce any further findings or conclusions. Instead, she took the matter under advisement. Specifically, Judge Houston stated:

> All right, folks. I've got all these exhibits to look at and the report from the guardian [ad litem] and the medical records. So I'll get up—I'm here Thursday [27 August 2020], okay. I would suspect I'd see every one of you but [DSS's attorney] Thursday. So we'll get [DSS's attorney] on the phone, and we'll have a conversation, and I'll let you get back to your clients.

This concluded the hearing.

¶ 30 From there, the record is silent as to the occurrence or outcome of any subsequent meeting between Judge Houston and the parties. According to DSS, "[i]nstead of rendering a decision the following Thursday [27 August 2020] as indicated, Judge Houston rendered her decision in chambers on [28 August 2020,] the following Friday." According to respondent, though, "[n]othing in the record indicates that the court ever conducted a further hearing, met with counsel to discuss the order, drafted an order, or that Judge Houston ever entered oral findings on either adjudication or disposition."

¶ 31 On 31 December 2020, Judge Houston retired. There is no direct evidence in the record of Judge Houston having made any further factual findings or legal conclusions before her retirement.

¶ 32 On 15 February 2021, the trial court entered an order terminating the parental rights of respondent and the father. Following extensive factual findings, the order concludes that both grounds exist to terminate respondent's parental rights: (1) dependent juvenile; and (2) prior TPR. The order further concludes that both grounds exist to terminate father's parental rights: (1) failure to pay a reasonable portion of Emily's cost of care; and (2) dependency. The order then concludes that "it is in the best interests of the minor child and is consistent for her health and safety for [respondent's and the father's] parental rights to be terminated so that the minor child can proceed with the Permanent Plan of adoption." After the subsequent decretal formally terminating the parental rights of respondent and the father, the order states:

> HELD IN AB[E]YANCE IN OPEN COURT ON THE 25th DAY OF AUGUST, 2020.
>
> FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECRETAL ANNOUNCED IN CHAMBERS ON THE 28th DAY OF AUGUST 2020 BY THE HONORABLE JEANIE R. HOUSTON.
>
> ADMINISTRATIVELY AND MINISTERIALLY SIGNED BY THE CHIEF DISTRICT COURT JUDGE THIS THE 15TH DAY OF FEB[RUARY], 2021.

Below these statements, the order is hand-signed "D. V. Byrd for JRH."

¶ 33 On 16 March 2021, respondent appealed to this Court from the February 2021 order. On appeal, respondent argues that the trial court committed prejudicial error when Chief Judge Byrd signed the February 2021 order when he had not presided over the hearing and Judge Houston had retired.

II. Analysis

¶ 34 Now, this Court must determine whether the February 2021 order is valid under three of our Rules of Civil Procedure: Rules 52, 58, and 63. *See In re C.B.C.*, 373 N.C. 16, 19 (2019). I would hold that it is not.

¶ 35 As noted by the parties and the majority above, this case requires the interpretation of our Rules of Civil Procedure and is therefore reviewed de novo. *Brown v. Flowe*, 349 N.C. 520, 523 (1998). "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. The trial court's conclusions of law are reviewable de novo on appeal." *In re S.C.L.R.*, 378 N.C. 484, 2021-NCSC-101, ¶ 15 (cleaned up).

¶ 36 Rule 52, titled "Findings by the court," requires that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1) (2021).

¶ 37 Rule 58, titled "Entry of judgment," establishes that "a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5." N.C.G.S. § 1A-1, Rule 58 (2021)

¶ 38 Finally, Rule 63, titled "Disability of a judge," states that:

> If by reason of . . . retirement . . . a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules *after a verdict is returned or a trial or hearing is otherwise concluded*, then those duties, including entry of judgment, may be performed:
>
> . . . .
>
> (2) In actions in the district court, by the chief judge of the district. . . .
>
> If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

N.C.G.S. § 1A-1, Rule 63 (2021) (emphasis added).

¶ 39 Four similar cases usefully illustrate how our appellate courts have considered the intersection of these rules within the termination of parental rights context. First, in *In re Whisnant*, the Court of Appeals considered the validity of a termination of parental rights order that was signed by a different judge than the judge who conducted the hearing. 71 N.C. App. 439, 440 (1984). The court stated that Rule 52 "requires the trial court in [non-jury] proceedings to do three things: (1) find facts on all issues of fact joined on the pleadings, (2) declare conclusions of law

arising from the facts found, and (3) to enter judgment accordingly." *Id.* at 441. Although the initial judge had "presided over the hearing and then announced in open court that respondent's parental rights were terminated," the court determined that "[t]his is not sufficient compliance with the obligations imposed by Rule 52." *Id.*

¶ 40 Regarding Rule 63, the *In re Whisnant* court observed that "[t]he function of a substitute judge is . . . ministerial rather than judicial." *Id.* "Rule 63," the court continued,

> does not contemplate that a substitute judge, who did not hear the witnesses and participate in the trial, may nevertheless participate in the decision[-]making process. It contemplates only performing such acts as are necessary under our rules of procedure to effectuate a decision already made. *Under our rules, where a case is tried before a court without a jury, findings of fact and conclusions of law sufficient to support a judgment are essential parts of the decision[-]making process.*

Id. at 441–42 (emphasis added) (cleaned up). Because there was no indication that the original judge had been unable to perform his duties, the court held that Rule 63 was inapplicable. *Id.* at 441. But because the original judge failed to meet the requirements of Rule 52, the Court of Appeals vacated the order for him to do so or if he was unavailable, for the case to be reheard de novo. *Id.* at 442.

¶ 41 Second, in *In re Savage*, the Court of Appeals again considered the validity of a termination of parental rights order that was signed by a different judge than the judge who heard the evidence. 163 N.C. App. 195, 196 (2004). Noting that its prior holding in *In re Whisnant* was "dispositive of this appeal," the court determined that under the requirements of Rules 52 and 63, the order was invalid. *Id.* at 197–98. Further, because the original judge "ha[d] since left office and is unavailable to render a decision in th[e] case on remand," the court held that it was "left with no choice but to remand this case for a hearing *de novo*." *Id.* at 198.

¶ 42 Third, in *In re C.M.C.*, this Court considered the validity of two termination of parental rights orders: an initial order that had been signed by a different judge than the judge who conducted the hearing and appealed by the respondent but subsequently vacated by the signing judge, and a second corrected order signed by the same judge who conducted the hearing. 373 N.C. 24, 25–27 (2019). Adopting the Rule 52 analysis in

both *In re Whisnant* and *In re Savage* summarized above, this Court "conclude[d] that the initial termination orders signed by [the substitute judge] were . . . a nullity." *Id.* at 28. We further determined that the initial order was also invalid under Rule 58, which "provides that a judgment is entered when it is reduced to writing, signed by *the* judge, and filed with the clerk of court." *Id.* (cleaned up). Ultimately, because "the entry of additional orders correct[ed] the error worked by [the substitute judge]'s decision to sign orders in a termination of parental rights case [over] which she had not presided," we affirmed the corrected order. *Id.* at 29.

¶ 43 Finally, in *In re R.P.*, the Court of Appeals considered the validity of a termination of parental rights order that was signed by a substitute judge after the judge who conducted the hearing and orally announced certain factual findings and conditions to be included in the order resigned before issuing the order. 276 N.C. App. 195, 2021-NCCOA-66, ¶¶ 8–11. Despite the parties' stipulation to the facts underlying the adjudication, the court, relying on *In re Whisnant*, stated that

> *nothing in the record or transcript shows [the original judge] ever made or rendered the final findings of fact and conclusions of law* in the unfiled and unsigned orders. He merely stated he would enter the adjudication "as is admitted to." Since the record on appeal shows only a stipulation without any adjudication of the facts and conclusions of law, or rendering of the order, any action by [the substitute judge] to cause the later prepared and unsigned draft order to be entered was not solely a ministerial duty.

Id. ¶ 23 (emphasis added). The court further reasoned that because "[t]he written disposition portion of the order went beyond the oral recitations of [the original judge,] . . . [r]endering and entering judgment was more than a ministerial task." *Id.* ¶¶ 26–27. Finally, the court noted that this Court's ruling in *In re C.M.C.* "specifically adopted the reasoning of [the Court of Appeals'] decisions in *In re Whisnant* and *In re Savage*" when considering the validity of termination of parental rights orders signed by substitute judges. *Id.* ¶ 29 (cleaned up). In light of this reasoning, the court held that the substitute judge "was without authority to sign the adjudication and disposition orders and the orders are a nullity." *Id.* ¶ 27 (cleaned up).

¶ 44 Collectively, as summarized by the majority here, these cases establish that

> a substitute judge cannot find facts or state conclusions of law in a matter over which he or she did not preside. Conversely, . . . if [the original judge] made the findings of fact and conclusions of law that appear in the order before retiring and [the substitute judge] did nothing more than put his signature on the order and enter it ministerially, the order is valid.

¶ 45 Here, in my opinion, these rules and precedents require this Court to vacate the February 2021 order below. As in the above cases, the original judge here presided over the hearing and made certain initial oral findings but never rendered finalized factual findings or legal conclusions, either orally or in writing. As in the above cases, the substitute judge here signed the February 2021 order despite not having presided over the hearing and without anything in the record showing the origin or details of the findings and conclusions that ultimately appear in the order. Further, as in *In re R.P.*, the order's findings and conclusions go well beyond any made on the record by the original judge during the hearing or thereafter. *In re R.P.*, ¶ 26. As in the above cases, therefore, Chief Judge Byrd here acted beyond a mere ministerial and administrative capacity, and the order is subsequently invalid under Rules 52, 58, and 63.

¶ 46 Of course, this case includes one notable fact that the above cases did not. Here, Chief Judge Byrd wrote at the end of the February 2021 order:

> HELD IN AB[E]YANCE IN OPEN COURT ON THE 25th DAY OF AUGUST, 2020.
>
> FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECRETAL ANNOUNCED IN CHAMBERS ON THE 28th DAY OF AUGUST 2020 BY THE HONORABLE JEANIE R. HOUSTON.
>
> ADMINISTRATIVELY AND MINISTERIALLY SIGNED BY THE CHIEF DISTRICT COURT JUDGE THIS THE 15TH DAY OF FEB[RUARY], 2021.

¶ 47 The majority's overreliance on these statements is the foundation of our disagreement about the correct outcome here. Specifically, the majority's error in my view arises from: (1) its improper application of a "presumption of regularity" to Chief Judge Byrd's legal conclusion that he signed the order "administratively and ministerially"; and (2) its erroneous determination that Chief Judge Byrd's factual finding regarding

the 28 August 2020 in-chambers announcement was unchallenged and therefore binding, and alternative application of a presumption of regularity to this factual finding.

¶ 48 First, the majority errs by applying a "presumption of regularity" to Chief Judge Byrd's statement that he signed the order "administratively and ministerially." Determining whether an order is signed in a purely administrative and ministerial capacity requires the application of legal standards to the present facts and is therefore a conclusion of law. *See Woodard v. Mordecai*, 234 N.C. 463, 472 (1951) ("Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law"). As a legal conclusion, then, this statement is properly reviewed by this Court de novo; it does not warrant a presumption of regularity. Previously, this Court has applied a presumption of regularity in two contexts: first to actions of public officials who are parties or otherwise involved in the litigation, and second to a trial court's decision to exercise jurisdiction over a case. *See In re C.N.R.*, 379 N.C. 409, 2021-NCSC-150, ¶ 20 (noting these two applications). Neither applies here.

¶ 49 In the first context, this Court has applied a presumption of regularity to challenged actions of a public official who is either a party in the case or otherwise directly involved in the facts of the underlying litigation. For instance, all six cases cited by the majority in its presumption of regularity analysis above fall into this category. In *Huntley v. Potter*, the Court applied a presumption of regularity to a town's land annexation report. 255 N.C. 619, 628 (1961). In *Leete v. County of Warren*, the Court applied a presumption of regularity to a county's employment action. 341 N.C. 116, 117 (1995). In *Freeman v. Morrison*, the Court applied a presumption of regularity to a notary public's lease acknowledgement. 214 N.C. 240, 242–43 (1938). In *State v. Watts*, the Court applied a presumption of regularity to the reprinted signature of a Department of Motor Vehicle official. 289 N.C. 445, 449 (1976). In *Henderson County v. Osteen*, the Court applied a presumption of regularity to a sheriff office's mailing of a notice of a tax foreclosure sale. 297 N.C. 113, 117 (1979). Finally, in *In re N.T.*, the Court applied a presumption of regularity to the illegible signature of a Wake County Human Services official on a juvenile petition. 368 N.C. 705, 707 (2016). In all of these cases, this Court afforded a presumption of regularity not to a legal conclusion of the trial court, but to the action of a public official or entity that was directly implicated in the case.

¶ 50 The second context in which this Court has previously applied a presumption of regularity is a trial court's decision to exercise jurisdiction

over a case. In these instances, "[t]his Court presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise." *In re L.T.*, 374 N.C. 567, 569 (2020).

¶ 51 In some cases, this Court has applied both types of presumptions of regularity. For instance, in *In re C.N.R.*, where the respondent parents challenged a verification form because it was missing the date of its notarization, this Court held that respondents failed to overcome the presumption of regularity afforded both to notarial acts *and* to the trial court's exercise of jurisdiction over the case. 379 N.C. 409, 2021-NCSC-150, ¶ 20. Likewise, in *In re N.T.*, this Court held that respondent failed to overcome the presumption of regularity afforded both to the illegible petition signature *and* to the trial court's exercise of jurisdiction over the case. 368 N.C. at 708.

¶ 52 Here, neither version of the presumption of regularity applies. First, while Chief Judge Byrd is certainly a public official, he is neither a party in the case nor a tangential actor in the facts underlying the litigation whose clerical actions the court views with a certain degree of leniency; he is acting as the court itself. Second, this case does not present a question of jurisdiction but one of statutory interpretation. Respondent does not challenge Judge Houston's exercise of jurisdiction over the case; she challenges the validity of Chief Judge Byrd's subsequent actions under the Rules of Civil Procedure. Accordingly, Chief Judge Byrd's legal conclusion that he signed the February 2021 order "administratively and ministerially" does not fall within the actions to which this Court has previously applied a presumption of regularity.[1]

¶ 53 Nor should it. As the majority correctly notes above, this case presents a question of statutory interpretation that this Court must review de novo: whether Chief Judge Byrd's signing of the February 2021 order violates our Rules of Civil Procedure. By applying a presumption of regularity to Chief Judge Byrd's mere recitation of the "administratively and ministerially" requirement, the majority fails to review this legal conclusion de novo and instead improperly expands our presumption of regularity doctrine into new territory, tilting the scales significantly in favor of allowing the order to stand.

¶ 54 This expansion is ill-advised. To support its application of a presumption of regularity to Chief Judge Byrd's legal conclusion that he

1. Notably, both DSS and the guardian ad litem apparently recognize that a presumption of regularity is inapplicable in this case, as neither make any mention of or argument for such a presumption in their briefs.

signed the February 2021 order administratively and ministerially, the majority reasons that the presumption "attaches generally to judicial acts" and "applies when a public official in the performance of an official duty acts in accordance with the law and authority conferred upon him." Therefore, according to the majority, "Chief Judge Byrd's judicial action in this case would appear to qualify." Notably and problematically, though, this broad reasoning would also support applying a presumption of regularity to *any* statement or action by a judge acting in her official capacity, including both factual findings and legal conclusions. Such a broadly applied presumption of regularity would eviscerate the proper standards by which appellate courts review a trial court's findings and conclusions: for competent evidence and de novo, respectively.

¶ 55 Finally, the majority reasons that "this Court's precedent supports applying the presumption of regularity to this case because the action in question was administrative and ministerial." As noted above, though, the cases the majority cites are wholly inapplicable here because they exclusively apply a presumption of regularity to acts of public officials involved in the underlying litigation, not to a ruling of the trial court itself. What's more, this reasoning is entirely tautological: the majority first concludes that Chief Judge Byrd's action was administrative and ministerial because a presumption of regularity applies, and then concludes that a presumption of regularity applies because the action was administrative and ministerial. This reasoning cannot support its own weight and should be rejected.

¶ 56 To be clear, this does not imply that Chief Judge Byrd's "administratively and ministerially" conclusion should be considered untrustworthy or as lacking good faith. Rather, as in all de novo reviews of a legal conclusion, the judge's intentions are simply not a factor in our determination, which focuses exclusively on the order's legal validity. Here, our review does not consider whether or not Chief Judge Byrd *intended* to sign the order "administratively and ministerially," as he concluded. Instead, it considers the record evidence anew to determine whether or not his signing of the order was *actually* limited to an administrative and ministerial capacity, based on the available evidence in the record. Accordingly, in my opinion, the majority errs by applying a presumption of regularity to the judge's statement.

¶ 57 When properly reviewed de novo, the evidence in the record cannot adequately support the majority's conclusion that Chief Judge Byrd signed the order in a purely administrative and ministerial capacity in conformity with Rules 52 and 63. During the August 2020 hearing, Judge Houston indicated that she planned on finding both alleged grounds for

termination as to respondent (dependency and prior termination of parental rights) but only *one* of the alleged grounds for termination as to the father, (dependency but not failure to pay a reasonable portion of cost of care). After hearing arguments regarding disposition, though, Judge Houston did not make further findings or legal conclusions at that time; instead, she stated that she would hold the case in abeyance and conduct a future conversation with the parties. However, there is no direct evidence in the record of the occurrence or outcome of this future conversation. Instead, the record skips directly to Chief Judge Byrd's February 2021 order without any indication as to who made the order's extensive findings and conclusions or when they were made. The record is likewise silent on what, if any, communications occurred between Judge Houston and Chief Judge Byrd regarding any findings or conclusions in this case, either before or after Judge Byrd's retirement. The first appearance in the record of almost all of the detailed findings and conclusions included within the February 2021 order is the order itself, which bears Chief Judge Byrd's signature. As established by the cases from this Court and the Court of Appeals noted above, this gap in the record reveals a failure (intended or not) to uphold the requirements of Rules 52, 58, and 63 that a substitute judge act in a purely administrative and ministerial capacity.

¶ 58 Furthermore, there is a significant inconsistency between Judge Houston's statements during the August 2020 hearing and the legal conclusions reached in the February 2021 order that cast additional doubt on the order's validity under our Rules. Although Judge Houston plainly stated at the August 2020 hearing that she would *not* find grounds to terminate the father's parental rights for failure to pay a reasonable portion of the cost of care under subsection (a)(3), the February 2021 order *does* conclude that grounds exist to terminate the father's parental rights on that basis. This fundamental misalignment between Judge Houston's statements at the hearing and the February 2021 order raises significant concern about the origin of the order's findings and conclusions, and thus upon DSS's argument—and the majority's conclusion—that the order was signed in a purely administrative and ministerial capacity.

¶ 59 Instead of engaging in appropriate de novo review, the majority's erroneous presumption of regularity transforms the lack of evidence in the record from a liability to an asset. Whereas the majority rules under a presumption of regularity that "respondent failed to provide any evidence that Chief Judge Byrd improperly signed the order," respondent's entire argument before this Court revolves around the complete lack of evidence in the record showing that Judge Houston made the extensive,

formal factual findings and legal conclusions that first appear in the February 2021 order signed by Chief Judge Byrd. This is not to say that respondent had no burden at all before this Court. Rather, by adequately demonstrating the significant hole in the record here regarding the origin of the ultimate findings and conclusions, respondent met the burden on a de novo review: showing that when considered anew, the facts here illustrate that the February 2021 order fails to meet the requirements of Rules 52, 58, and 63, and is therefore invalid.

¶ 60 Second, the majority errs in concluding that Chief Judge Byrd's statement regarding the 28 August 2020 chambers "announcement" of factual findings and legal conclusions was unchallenged and therefore binding on appeal. In fact, respondent's *entire appeal* is premised upon explicitly and implicitly challenging the occurrence and validity of any in-chambers announcement based on its lack of direct evidence in the record. For instance, the sole argument heading in respondent's appellate brief asserts that the February 2021 order is invalid because "Judge Jeanie Houston had presided over the hearing on [25 August 2020], and had retired on [31 December 2020], *without making any findings of fact or conclusions of law*." (Emphasis added). This argument is implicitly and explicitly repeated and expounded upon throughout respondent's brief. For example:

- "The Honorable Jeanie Houston, presiding judge, in open court did not make a determination as to the best interests, but in the written order the chief district court judge, who had not heard the case, determined it to be in the best interest of Emily to terminate [respondent's parental] rights";
- "Nothing in the record indicates that the court ever conducted a further hearing, met with counsel to discuss the order, drafted an order, or that Judge Houston ever entered oral findings on either adjudication or disposition" ;
- "The record does not indicate who drafted the order or when it was drafted";
- "*[Chief] Judge Byrd* determined it to be in the best interests of Emily to terminate the rights of both parents" (emphasis added);
- "Since Judge Houston did not draft the order before retiring and did not enter any findings of fact or conclusions of law in open court,

[Chief] Judge Byrd did not sign the order in a ministerial function";

- "Since Judge Houston retired on [31 December 2020], and [Chief] Judge Byrd did not preside over the termination hearing the order signed by [Chief] Judge Byrd is a nullity";
- "This meeting may or may not have occurred. Nothing in the record speaks to it. If it did happen, nothing transpired in open court";
- "The court reporter and attorneys for [DSS and the guardian ad litem] assured [respondent's counsel] that no hearing occurred other than the hearing on [25 August 2020]";
- "The record is silent as to whether the parties drafted the order with the input of Judge Houston before her retirement";
- "[T]he record is silent about whether [Chief Judge Byrd] had the complete findings of Judge Houston";

¶ 61 To be sure, at no point in her brief does respondent state with exacting formality "I challenge Chief Judge Byrd's factual finding that Judge Houston announced findings of fact and conclusions of law in chambers on 28 August 2020." But she is not required to use any particular words; instead, it is more than sufficient for respondent to make implicitly and explicitly clear throughout her argument—indeed as the very premise of her appeal—that she challenges the validity of this finding. Just as the majority is perfectly able to determine that Chief Judge Byrd's statement is a finding of fact without it being formally labeled as such, it should likewise be able to determine that respondent explicitly and implicitly challenges this finding without her labeling it as such. Determining otherwise is erroneous.

¶ 62 Finally, the majority alternatively reasons that "even if respondent's brief is interpreted as challenging this finding, the finding is supported by the presumption of regularity, which respondent has failed to rebut." (Emphasis added). As above regarding Chief Judge Byrd's legal conclusion that he signed the order administratively and ministerially, this reasoning improperly applies a presumption of regularity where this Court has never done so before—this time, to a trial court's finding of fact. As above, this application is novel and erroneous.

¶ 63 When a trial court's finding of fact is challenged on appeal, this Court does not *presume* that the trial court properly found the fact; instead, it considers the record itself to determine whether the finding is indeed supported by competent evidence. *In re S.C.L.R.*, 378 N.C. 484, 2021-NCSC-101, ¶ 15. This standard of review requires a party challenging a trial court's factual finding to demonstrate that the finding is inadequately supported by the record, but does not begin the inquiry by tilting the scales against her through a presumption of regularity.

¶ 64 As above, this expansion of our presumption of regularity doctrine to apply to a trial court's challenged factual finding is ill-advised. In this case, it transforms the problem into the solution, reasoning that the glaring lack of record evidence indicates that respondent has failed to demonstrate irregularity when that same lack of evidence is what respondent challenges as irregular in the first place. More broadly, it applies newfound deference to a trial court's challenged findings of fact, which this Court properly reviews for competent evidence.

¶ 65 When properly reviewed for competent evidence, Chief Judge Byrd's finding here fails. As repeatedly pointed out by respondent, there is no direct evidence in the record to support Chief Judge Byrd's finding that Judge Houston ever made the extensive factual findings and legal conclusions stated in the February 2021 order signed by Chief Judge Byrd after Judge Houston's retirement. Further, the circumstantial evidence of Judge Houston's statement during the hearing that such a conversation *would* happen is significantly undermined by the fact that the one of the conclusions of law ultimately made in the February 2021 order is in direct conflict with the limited findings and conclusions she announced at the hearing. In short, Chief Judge Byrd's factual finding that the "findings of fact, conclusions of law, and decretal [were] announced in chambers on the 28th day of August 2020 by the Honorable Jeanie R. Houston" is not supported by competent evidence, and therefore must be rejected.

III. Conclusion

¶ 66 Our judicial process maintains credibility through transparency. Specifically, Rules 52 and 58 of our Rules of Civil Procedure require that the judge who presided over a non-jury hearing make sufficient factual findings and legal conclusions to support its ultimate ruling. If that judge is unavailable to issue that ultimate ruling, Rule 63 allows a substitute judge to issue it, but only if he or she is acting in a purely administrative and ministerial capacity—that is, if the original judge made the findings and conclusions, and the substitute judge is merely signing off on them.

¶ 67 Here, respondent has demonstrated that there is no competent evidence in the record showing that Judge Houston made the factual findings and legal conclusions that appear in the February 2021 order signed by Chief Judge Byrd. As a result, the findings do not support the legal conclusion that he signed the order "administratively and ministerially." Accordingly, I would vacate the order and remand the case back to the trial court to either make additional factual findings or conduct a rehearing.

¶ 68 In my view, the majority's error is twofold: first, the majority errs by applying a presumption of regularity to Chief Judge Byrd's statement that he was signing the order "administratively and ministerially." This Court has not applied such a presumption to such legal conclusions in the past, and should not do so here. Instead, this conclusion of law is properly reviewed by this Court de novo. De novo review reveals that there is no evidence in the record of Judge Houston ever making the extensive findings and conclusions stated in the February 2021 order. Indeed, one of the order's conclusions regarding grounds for termination directly contradicts Judge Houston's statements from the August 2020 hearing. Further, there is no evidence in the record that Judge Houston ever determined or declared that termination was in the best interests of the child. Accordingly, there is insufficient evidence regarding the origin of the order's findings and conclusions to show that the order was signed in a purely administrative and ministerial capacity. The order is therefore invalid under our Rules of Civil Procedure, and the majority errs in holding otherwise.

¶ 69 Second, the majority errs in concluding that the statement in the order regarding the alleged 28 August 2020 in-chambers announcement is an unchallenged—and therefore binding—finding of fact. In fact, respondent's entire appeal is premised upon implicitly and explicitly challenging this finding. Because no competent evidence in the record supports this finding, it should be disregarded, not upheld. Further, the majority's alternative application of a presumption of regularity to the trial court's factual finding again improperly applies a presumption of regularity where this Court has never done so before, with the effect of distorting the proper standard of review: whether the finding is supported by competent evidence. When properly reviewed under this standard, Chief Judge Byrd's finding fails and must be rejected.

¶ 70 For these reasons, I would hold that the February 2021 order is invalid, vacate the order, and remand the case to the trial court for additional findings of fact or a rehearing. Accordingly, I respectfully dissent.

Justice MORGAN and Justice EARLS join in this dissenting opinion.

IN RE M.K.

[381 N.C. 418, 2022-NCSC-71]

IN THE MATTER OF M.K.

No. 186A21

Filed 17 June 2022

Termination of Parental Rights—grounds for termination—neglect—likelihood of future neglect—case plan, domestic violence, and parenting skills

The trial court's order terminating respondent-mother's parental rights in her child on the ground of neglect was affirmed where, even after the factual findings that lacked evidentiary support were disregarded, the trial court's conclusion that respondent was likely to neglect her child in the future was supported by the remaining findings—including that she had failed to adequately make progress on her case plan, she continued to have issues with domestic violence, and she had failed to show any ability to parent appropriately.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) (2019) from an order entered 9 March 2021 by Judge J.H. Corpening, II, in District Court, New Hanover County. This matter was calendared for argument in the Supreme Court on 13 May 2022 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Jane R. Thompson for petitioner-appellee New Hanover County Department of Social Services.

Poyner Spruill LLP, by Stephanie L. Gumm, for appellee Guardian ad Litem.

Benjamin J. Kull for respondent-appellant mother.

ERVIN, Justice.

¶ 1 Respondent-mother Onika G. appeals from the trial court's order terminating her parental rights in her minor child M.K.[1,2] After careful

1. M.K. will be referred to throughout the remainder of this opinion as "Marco," which is a pseudonym used for ease of reading and to protect the juvenile's identity.

2 The trial court also terminated the parental rights of Marco's father, Keshawn B., in Marco. In view of the fact that he did not note an appeal from the trial court's termination order, the father is not a party to the proceedings before this Court.

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

I. Background

¶ 2 Marco was born in January 2019 and has two older siblings, M.N., who was born in 2014, and M.G., who was born in 2017. The New Hanover County Department of Social Services had been attempting to help Marco's family address issues relating to mental health, domestic violence, parenting, and housing stability since May 2018, at which time the father of M.N. and M.G. had obtained the entry of a domestic violence order of protection against respondent-mother after she threatened him with a brick. In August 2018, respondent-mother was charged with assaulting a woman. Respondent-mother struggled to maintain housing and had moved multiple times. After completing a comprehensive clinical assessment on 14 November 2018, respondent-mother was diagnosed as suffering from mild persistent depressive disorder and intermittent explosive disorder, with the assessor having recommended that respondent-mother participate in outpatient therapy, medication management, transition management services, and "individual placement" to "support[ ] employment." However, respondent-mother failed to cooperate with the assessor's recommendations and only made minimal progress in attempting to comply with a case plan that had been developed for her by DSS.

¶ 3 On 22 February 2019, respondent-mother and Marco were staying with respondent-mother's aunt in New Hanover County. At 5:00 a.m. on that date, law enforcement officers responded to a domestic violence report originating from the aunt's residence. At the time that the officers arrived, respondent-mother had been locked out of her aunt's house and was arguing with her aunt through the door. The children were present during the incident, at the conclusion of which the officers arrested respondent-mother based upon outstanding warrants for failing to appear in court and violating a domestic violence order of protection. On the same date, DSS filed a juvenile petition alleging that Marco was a neglected juvenile and obtained the entry of an order placing him in nonsecure custody.[3]

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3. Although the two older children were also the subject of the initial neglect proceeding and were involved in certain other juvenile proceedings discussed in the text of this opinion, we will refrain from discussing the proceedings relating to M.N. and M.G. any further given that they were later placed in their father's custody and were not subjects of the termination proceeding that is before us in this case.

¶ 4 After a hearing held on 27 March 2019 following respondent-mother's release from pretrial detention on 22 March 2019, the trial court entered an order finding, based upon the evidence presented on that occasion and certain stipulations between the parties, that Marco was a neglected juvenile as defined in N.C.G.S. § 7B-101(15). Although the trial court found that respondent-mother had failed to cooperate with the recommendations that had been made during her clinical assessment, it also found that she had agreed with the assessor's recommendations and wished to pursue a plan of reunification. As a result, the trial court ordered respondent-mother to

> complete a psychological evaluation and comply with any and all recommendations. She shall comply with any and all recommendations received from her substance abuse treatment provider. She shall seek medication treatment from one medication provider and consume all medication as prescribed. She shall submit to random drug screens as requested by [DSS] and [the] Guardian ad Litem. She shall execute a release on behalf of [DSS] and Guardian ad Litem with all service providers. She shall obtain stable housing and verifiable income.

¶ 5 At a review hearing held on 5 June 2019, a report describing the results of a psychological evaluation conducted by Len Lecci, Ph.D., which had been completed on 1 May 2019, was admitted into evidence. Dr. Lecci diagnosed respondent-mother as suffering from bipolar II disorder and recommended that she receive a medication assessment, behavioral intervention, Dialectical Behavior Therapy group work, and one-on-one parenting education and that she apply for Section 8 housing assistance and social security disability benefits. At the time of the 5 June 2019 review hearing, respondent-mother lacked independent housing and was not employed. In a review order entered on 9 July 2019, the trial court found that respondent-mother had applied for social security disability benefits and Section 8 housing assistance and had expressed the intention to pursue medication management. The trial court authorized respondent-mother to have supervised visitation with Marco for two hours each week and allowed DSS to increase the frequency and duration of the respondent-mother's visits with Marco to the extent that respondent-mother complied with the provisions of her case plan.

¶ 6 After a permanency planning hearing held on 6 February 2020, the trial court entered an order on 27 February 2020 in which it determined that respondent-mother was utilizing mental health services provided

by the Physician Alliance for Mental Health (PAMH). On the other hand, the trial court found that respondent-mother denied that she had any responsibility for her untreated mental health difficulties and her lack of stable housing and that respondent-mother's "unwillingness to act on her own behalf [wa]s a significant barrier" to her ability to satisfy the requirements of her case plan. In addition, the trial court noted that DSS had concerns about respondent-mother's "ability to keep herself and her child[ ] safe"; observed that respondent-mother had "made threats of violence towards others;" described "accounts of physical violence towards others" and had made "videos of fights"; and pointed out that, even though respondent-mother had been authorized to have weekly supervised visitation with Marco, she had only done so "sporadically," having participated in six of the ten visits that had been scheduled between November 2019 and the date of the permanency planning hearing. Finally, the trial court noted that respondent-mother had met with DSS employees on 24 January 2020, that respondent-mother had acknowledged that she had a substance abuse problem at that time, and that, after acknowledging that she would test positive for marijuana, respondent-mother had refused to comply with a request that she submit to a random drug screen. In light of these and other findings of fact, the trial court ordered respondent-mother to comply with the terms of her case plan and established a primary permanent plan for Marco of reunification, with a secondary plan of adoption.

¶ 7 On 30 November 2020, the trial court entered another permanency planning order in the aftermath of a hearing that was held on 4 November 2020. At that time, the trial court determined that respondent-mother had failed to make adequate progress towards satisfying the requirements of her case plan within a reasonable amount of time. More specifically, the trial court determined that respondent-mother had consistently failed to engage in the services that had been recommended for her during the psychological evaluation that had been performed by Dr. Lecci and that her "unwillingness to act on her own behalf" continued to pose a significant barrier to her ability to satisfy the requirements of her case plan. The trial court also found that respondent-mother's "unwillingness to address her anger management issues continue[d] to put [Marco] at risk of harm" and posed yet another barrier to reunification.

¶ 8 The trial court found that respondent-mother had completed a comprehensive clinical assessment with PAMH in January 2020 and that PAMH had recommended that she receive a Community Support Team level of care. The trial court found that, after respondent-mother had been placed on a waiting list for such services, CST had contacted

respondent-mother in May 2020 for the purpose of addressing her "immediate stressors" — housing and employment. The trial court further noted that respondent-mother did not have a mental health treatment plan and that PAMH was not addressing respondent-mother's medication management or mental health therapy needs at that time.

¶ 9 The trial court determined that, by August 2020, respondent-mother was in the process of obtaining a psychiatric evaluation and transitioning her medication management to PAMH. The trial court noted that respondent-mother had made contradictory reports to social workers concerning the medications that she had been taking and that, while respondent-mother claimed that she had been taking her psychotropic medication as prescribed, she had been unable to identify the medication in question. The trial court found that, despite the fact that DSS and the guardian ad litem had repeatedly contacted PAMH for the purpose of obtaining information about the treatment that respondent-mother had been receiving, neither had received a response. In light of this set of circumstances and respondent-mother's failure to respond to inquiries that DSS had made to respondent-mother about her treatment, the trial court found that respondent-mother had "intentionally withh[eld] treatment information from [DSS] and [the] Guardian ad Litem."

¶ 10 Similarly, the trial court found that respondent-mother had failed to consistently submit to random drug screens in accordance with DSS requests and that visitation with respondent-mother had become a "negative experience" for Marco. Aside from the fact that she had only attended sixteen of thirty-three scheduled visits, respondent-mother had failed to exhibit appropriate parenting skills during the visits in which she did participate and had been unable to participate in needed one-on-one parenting instruction given her failure to consistently visit with Marco. Based upon these and other findings, the trial court determined that respondent-mother was "acting in a manner inconsistent with [Marco's] health and safety," ordered that termination of respondent-mother's parental rights in Marco be pursued, required respondent-mother to comply with the requirements of her case plan, and changed Marco's permanent plan to a primary plan of adoption and a secondary plan of reunification.

¶ 11 On 7 December 2020, DSS filed a petition seeking the termination of respondent-mother's parental rights in Marco on the basis of neglect, N.C.G.S. § 7B-1111(a)(1) (2021), and willfully leaving Marco in a placement outside of the home for more than twelve months without showing reasonable progress toward correcting the conditions that had led to Marco's removal from her care, N.C.G.S. § 7B-1111(a)(2) (2019).

After conducting a hearing concerning the issues raised by the termination petition on 1, 8, and 11 February 2021, the trial court entered an order on 9 March 2021 in which it found, among other things, that respondent-mother had had a fourth child, named R.T. in August 2020 and that respondent-mother had experienced ongoing domestic violence involving R.T.'s father since R.T.'s birth. In its termination order, the trial court found that both of the grounds for termination alleged in the termination petition existed and that termination of respondent-mother's parental rights would be in Marco's best interests. Respondent-mother noted an appeal to this Court from the trial court's termination order.

II. Analysis

¶ 12 A termination of parental rights proceeding consists of an adjudicatory stage and a dispositional stage. *See* N.C.G.S. § 7B-1109, -1110 (2019). During the adjudicatory stage, the trial court is required to determine whether any of the grounds for terminating a parent's parental rights delineated in N.C.G.S. § 7B-1111 exist, *see* N.C.G.S. § 7B-1109(e), with the petitioner having the obligation to establish the existence of any applicable grounds for termination by clear, cogent, and convincing evidence, *see* N.C.G.S. § 7B-1109(f). "We review a district court's adjudication under N.C.G.S. § 7B-1111(a) to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re J.S.*, 374 N.C. 811, 814 (2020) (cleaned up) (quoting *In re N.P.*, 374 N.C. 61, 62–63 (2020)). "Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal." *In re B.R.L.*, 379 N.C. 15, 2021-NCSC-119, ¶ 11 (quoting *In re T.N.H.*, 372 N.C. 403, 407 (2019)). "A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding." *In re A.L.*, 378 N.C. 396, 2021-NCSC-92, ¶ 16 (quoting *In re B.O.A.*, 372 N.C. 372, 379 (2019)). " '[T]he issue of whether a trial court's adjudicatory findings of fact support its conclusion of law that grounds existed to terminate parental rights pursuant to N.C.G.S. § 7B-1111(a)' is reviewed de novo by the appellate court." *In re M.R.F.*, 378 N.C. 638, 2021-NCSC-111, ¶ 7 (alteration in original) (quoting *In re T.M.L.*, 377 N.C. 369, 2021-NCSC-55, ¶ 15). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *In re T.M.L.*, 377 N.C. 369, 2021-NCSC-55, ¶ 15 (cleaned up) (quoting *In re C.V.D.C.*, 374 N.C. 525, 530 (2020)). "[A]n adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order." *In re M.S.*, 378 N.C. 30, 2021-NCSC-75, ¶ 21 (quoting *In re J.S.*, 374 N.C. at 815).

A. Findings of fact

¶ 13 In the brief that she filed before this Court, respondent-mother begins by arguing that portions of the following findings of fact lack sufficient evidentiary support:

> 8. During the ongoing services treatment case in 2018, [respondent-mother] struggled to maintain stable housing for herself and her children. Housing instability remained an issue at [Marco]'s birth in 2019, and [respondent-mother] moved multiple times and between counties. She resided in domestic violence shelters in Wake County and Pender County prior to [Marco]'s removal. She was involuntarily discharged from a domestic violence shelter in Pender County due to her behaviors and subsequently relocated to New Hanover County where she resided with a relative.
>
> 9. On February 22, 2019, law enforcement responded to a 911 call regarding a domestic violence incident at 5:00 a.m. [Respondent-mother] was locked out of [a] maternal aunt['s] home, and [the maternal aunt] would not allow her into the home. [Respondent-mother] and [the maternal aunt] . . . argued through the door, and [respondent-mother] threatened to kill [the maternal aunt]. Law enforcement responded. The children were present during the incident. Respondent-mother had outstanding warrants for failure to appear and violation of a domestic violence protection order, and she was arrested.
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> . . . .
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> 11. [Respondent-mother] failed to focus on making an appropriate plan for her children and was only focused on getting released from jail.
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> . . . .
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> 16. At the inception of [Marco]'s foster care case, [respondent-mother] entered into a Family Services Agreement that included obtaining and maintaining stable housing, obtaining and maintaining verifiable employment, submitting to a psychological evaluation, submitting to random drug screens and

maintaining an executed release with all service providers on behalf of [DSS] and [the] Guardian ad Litem.

17. [Respondent-mother] has failed to maintain safe and suitable housing for herself and [Marco] for any prolonged period of time. She has resided with various relatives including [the maternal aunt], [the maternal grandmother] and the maternal grandfather. [Respondent-mother] obtained independent housing for a short period of time with the assistance of [PAMH] and the Back @ Home Program. She obtained a lease agreement for a residence [on] . . . 9th Street, Wilmington, North Carolina. The lease term was from August 2020 to July 31, 2021. She failed to maintain this residence due to ongoing domestic violence with [R.T.'s father]. After leaving the . . . house, she resided at a hotel with the assistance of Open Gate due to a domestic violence incident.

18. [Respondent-mother] recently relocated to . . . S. Kerr Avenue, Wilmington, North Carolina. She occupies one bedroom in the home, while she shares the living room, kitchen and laundry area with two unidentified males. She does not like her current living arrangement and is seeking alternate housing. She is currently behind on her rent payments.

. . . .

20. [Respondent-mother] failed to complete her application for Social Security Benefits as recommended in her psychological evaluation, however, she plans to apply in the near future. Caseworkers at SSI/SSDI Outreach, Access and Recovery (SOAR) and staff with PAMH will be assisting in filling out the required paperwork.

21. Domestic violence remains a barrier to reunification.

22. [Respondent-mother] acknowledged pulling a knife on [M.N. and M.G.'s father] in December 2019. During the altercation, [respondent-mother] was stabbed and sustained injuries requiring staples in her head.

23. [Respondent-mother] has been involved in a relationship with [R.T.'s father] for many years. Their relationship has been riddled with domestic violence since the birth of [respondent-mother]'s daughter in August 2020. [R.T.'s father] has spat on [respondent-mother], choked her and cut her forehead and face. She had altercations with a boyfriend in May 2020, July 2020, July [sic] 2020 and September 2020. In December 2020, [R.T.'s father] busted windows out and kicked the door in at her home.

. . . .

27. On May 1, 2019, [respondent-mother] completed a psychological evaluation with [Dr. Lecci]. During her evaluation with Dr. Lecci, she reported difficulty maintaining employment. She has been fired from every job she obtained. She acknowledged the need for medication management, however, at the time of the evaluation and for months thereafter, she failed to take medication to address her mental health issues. She obtained a Full Scale IQ of 77. This IQ score is described as borderline to low average cognitive functioning. She has intact intellectual capacities, but some of her biggest weaknesses are verbal ability and working memory. Her weaknesses will likely result in her presenting as less cognitively intact and can lead to functional problems.

. . . .

29. [Respondent-mother] failed to consistently address her mental health needs throughout [Marco]'s case. Eleven months into [Marco]'s foster care case, [respondent-mother] finally engaged with [PAMH]. In January 2020, PAMH began assisting [respondent-mother] with obtaining stable housing as it was her most immediate basic need. No additional therapeutic were provided at that time.

. . . .

31. [Respondent-mother] is engaged with the [CST] at PAMH. Danielle Dest, MSW, LCSW is the [CST] Lead. Ms. Dest has monthly contact

> with [respondent-mother]. The frequency in which [respondent-mother] is seen is dependent on her current need and circumstances. [Respondent-mother] has frequent contact with multiple professionals employed by PAMH. Ms. Dest has used DBT techniques in her interactions with [respondent-mother]. PAMH is not offering DBT groups during the COVID-19 pandemic so [respondent-mother] is not currently involved in DBT groups. [Respondent-mother] is engaged weekly by staff to address specific treatment goals. [Respondent-mother]'s years of involvement in the system as a child and young adult have created a mistrust which has been a challenge to overcome in her treatment. Much of PAMH staff's time with [respondent-mother] revolves around crisis management.
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> . . . .
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> 38. During visitations with [Marco], [respondent-mother] was observed being verbally abusive to [Marco] during at least seven visits attended. She has been observed mocking [Marco], calling him names and telling him she is leaving the visits due to his behavior. She was observed by [DSS] calling [Marco] "fat," "weak," and "soft." She often talks on her cellphone during the visit while [Marco] cries unattended or entertains himself. [Respondent-mother] is unable to appropriately parent for two hours. [DSS] has been unable to expand visitation as to frequency, duration or level of supervision due to [respondent-mother]'s lack of progress.

We will analyze each of respondent-mother's challenges to the sufficiency of the evidentiary support for these findings of fact in turn.

¶ 14 As an initial matter, respondent-mother asserts that the statements in Finding of Fact No. 8 that she "was involuntarily discharged from a domestic violence shelter in Pender County due to her behaviors" and that she "resided in domestic violence shelters in Wake County and Pender County prior to Marco's removal" conflicted with the record evidence. At the termination hearing, Joshua Barton, a social worker employed by DSS, testified that, before Marco was taken into nonsecure custody, respondent-mother "had been in shelters in Wake County and

Pender County." In addition, the trial court took judicial notice of the orders that had been previously entered with respect to the children, *see In re A.C.*, 378 N.C. 277, 2021-NCSC-91, ¶ 17 (stating that "a trial court may take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard[,] because[,] where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence," (first alteration in original) (quoting *In re T.N.H.*, 372 N.C. 403, 410 (2019)), with the 22 April 2019 adjudication and disposition order having noted, based upon a stipulation between the parties, that respondent-mother had been "involuntarily discharged from a domestic violence shelter in Pender County." As a result, while the record does contain evidence tending to support most of the information contained in Finding of Fact No. 8, we are unable to identify any support for the trial court's finding that respondent-mother had been involuntarily discharged from the Pender County shelter "due to her behaviors," and will disregard this portion of Finding of Fact No. 8 in determining whether the trial court's findings support its conclusion that respondent-mother's parental rights in Marco were subject to termination. *In re J.M.J.-J.*, 374 N.C. 553, 559 (2020) (disregarding adjudicatory findings of fact not supported by clear, cogent, and convincing evidence).

¶ 15 Next, respondent-mother argues that the statement contained in Finding of Fact No. 9 that she "threatened to kill" her aunt lacks sufficient evidentiary support. Once again, we agree that the record does not contain evidence tending to show that respondent-mother threatened to kill the aunt at the time of the incident that ended in respondent-mother's arrest and Marco's placement in foster care. For that reason, we will disregard the trial court's determination that respondent-mother "threatened to kill" her aunt on that occasion in evaluating the extent to which the trial court's findings support its conclusion that respondent-mother's parental rights were subject to termination. *See In re J.M.J.-J.*, 374 N.C. at 559.

¶ 16 In addition, respondent-mother asserts that the trial court's statement in Finding of Fact No. 11 that, following her arrest on 22 February 2019, respondent-mother "failed to focus on making an appropriate plan for her children and was only focused on getting released from jail" has insufficient support in the evidentiary record. At the termination hearing, Mr. Barton testified that he spoke with respondent-mother at the New Hanover County jail on the day of her arrest for the purpose of discussing "her children and what she wanted to do as far as placement." According to Mr. Barton, "[respondent-mother's] main focus [during

that conversation] was getting out of jail" given that "[s]he felt like she was getting out of jail that day and going to her mother's residence." Although respondent-mother argues that the fact that "[h]er main focus" was on getting out of jail does not support a finding that release from incarceration was her "only" focus, "it is well-established that a district court 'ha[s] the responsibility to pass[ ] upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom.' " *In re A.R.A.*, 373 N.C. 190, 196 (2019) (alterations in original) (quoting *In re D.L.W.*, 368 N.C. 835, 843 (2016)). After carefully examining Mr. Barton's testimony, we conclude that it supports the trial court's inference that, following her arrest on 22 February 2019, respondent-mother "was only focused on getting released from jail." *See In re A.L.*, ¶ 16; *In re A.R.A.*, 373 N.C. at 196. Thus, we hold that respondent-mother's challenge to the sufficiency of the record support for Finding of Fact No. 11 lacks merit.

¶ 17 In the same vein, respondent-mother argues that the description of her case plan contained in Finding of Fact No. 16 as requiring that she obtain and maintain "stable housing" is not supported by the record evidence. In attempting to persuade us of the merits of this contention, respondent-mother points to testimony by George Colby, a DSS social worker, describing respondent-mother's case plan as requiring that she obtain "safe and appropriate" housing and contends that "safe and appropriate" housing is not the same thing as "stable" housing. However, the trial court ordered respondent-mother to obtain "stable" housing in the 22 April 2019 adjudication and disposition order, the 9 July 2019 review order, and the 27 February 2020 permanency planning order. *See In re A.C.*, ¶ 17. As a result, we hold that the trial court's description of respondent-mother's case plan as requiring her to obtain "stable" housing has sufficient record support.

¶ 18 In addition, respondent-mother contends that the trial court erred by stating in Finding of Fact No. 16 that her case plan required her to obtain "verifiable employment" in light of the fact that Mr. Colby testified that respondent-mother's case plan mandated that she obtain "[l]egal income which would have at any point included social security." In respondent-mother's view, the trial court's finding that her case plan required her to obtain "verifiable employment" "improperly disregard[s] the contemplated option that her income could take the form of social security benefits." We note, however, that the trial court stated in its 27 February 2020 permanency planning order that respondent-mother should "comply with the terms of her Family Services Agreement[ ] . . . [and] obtain and maintain . . . verifiable employment." *See In re A.C.*,

¶ 17. In addition, the record contains no evidence tending to show that respondent-mother ever received social security benefits. As a result, we hold that respondent-mother's remaining challenge to Finding of Fact No. 16 lacks merit as well.

¶ 19 Similarly, respondent-mother argues that the trial court erroneously stated in Finding of Fact No. 17 that, "[a]fter leaving the 9th Street house, she resided at a hotel with the assistance of Open Gate" on the grounds that the record contains no evidence tending to show that respondent-mother resided at a hotel during this period of time. However, the record reflects that the term of respondent-mother's lease at the 9th Street residence ran from August 2020 until 31 July 2021, that Mr. Colby testified that respondent-mother had utilized the services of Open Gate to find housing in September 2020, and that, after respondent-mother moved out of the 9th Street residence, Mr. Colby "picked [respondent-mother] up from a motel" that he thought "was likely provided by Open Gate but I was not aware of that at the time." In addition, Melissa Ellison, who served as Marco's guardian ad litem, testified that respondent-mother's residential history included periods during which she lived at "various hotels" using assistance provided by Open Gate. In light of this evidence, the trial court's inference that respondent-mother resided in a hotel after vacating her residence on 9th Street has ample record support. *See In re A.L.*, ¶ 16; *In re A.R.A.*, 373 N.C. at 196.

¶ 20 Furthermore, respondent-mother argues that the trial court's statement in Finding of Fact No. 18 that she "is currently behind on her rent payments" is devoid of evidentiary support on the theory that the record only reflected that her rent was one month, rather than multiple months, in arrears. A careful review of the record reflects that, when asked if respondent-mother was able to make or was current on her rent payments, Ms. Dest with the CST team at PAMH testified that "I know that [respondent-mother] is late currently on a payment" by about a month "give or take." As a result, while we agree with respondent-mother that the record evidence does not tend to show that she was more than one month behind on her rent payments, we further conclude that the evidence does suffice to support a determination that respondent-mother was behind on her rent payments. *See In re A.L.*, ¶ 16. For that reason, we hold that this aspect of respondent-mother's challenge to the trial court's termination order lacks merit.

¶ 21 Moreover, respondent-mother challenges the sufficiency of the evidentiary support for the trial court's statement in Finding of Fact No. 20 that she "failed to complete her application for Social Security Benefits."

In arguing that the record does not contain evidence tending to show that she "failed to complete her application," respondent-mother directs our attention to the orders that the trial court entered on 9 July 2019 and 30 November 2020 finding that respondent-mother had applied for social security disability benefits. In addition, we note that respondent-mother testified at the termination hearing that she had submitted her disability application and that, according to Dr. Lecci, her application had been approved. Finally, the record reflects that Ms. Dest testified that respondent-mother's application for social security benefits had been referred to SOAR, a nonprofit advocacy organization that "supports an individual who is applying for disability," and described respondent-mother's application for social security disability benefits as "a work in process." Thus, given that the record does not contain any evidence tending to show that respondent-mother had "failed to complete her application for Social Security Benefits," we will disregard this portion of Finding of Fact No. 20 in determining whether the trial court's findings of fact support a determination that her parental rights in Marco were subject to termination. *See In re J.M.J.-J.*, 374 N.C. at 559.

¶ 22 Similarly, respondent-mother challenges the trial court's statement in Finding of Fact No. 21 that "[d]omestic violence is a barrier to reunification" on the grounds that this statement is, in reality, a conclusion of law or an ultimate finding of fact that has no legitimate bearing upon the issue of whether her parental rights in Marco were subject to termination. In view of the fact that respondent-mother has not contended that the challenged portion of Finding of Fact No. 21 lacks sufficient record support, that finding is binding upon us for purposes of appellate review. *See In re B.R.L.*, ¶ 11 (stating that "[f]indings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal"). As a result, we will address respondent-mother's contentions concerning the relevance of her domestic violence-related problems in the portion of this opinion that discusses the extent to which respondent-mother's parental rights in Marco were subject to termination.

¶ 23 In addition, respondent-mother argues that the trial court's statement in Finding of Fact No. 22 that she had "acknowledged pulling a knife on [M.N. and M.G.'s father] in December 2019" was not supported by the evidentiary record. At the termination hearing, the guardian ad litem testified that the father of M.N. and M.G. had sought to obtain a domestic violence order of protection against respondent-mother after "she had pulled a knife on him and his family." In discussing this aspect of the guardian ad litem's testimony, respondent-mother testified that

"[t]hat was around the time that [the guardian ad litem] said I pulled a knife to him which . . . had to be December of 2019." Although the record does contain evidence tending to show that respondent-mother had threatened the father of M.N. and M.G. with a knife, it does not indicate that she ever acknowledged having done so. For that reason, we will disregard the portion of Finding of Fact No. 22 stating that respondent-mother had acknowledged pulling a knife on M.N. and M.G.'s father in determining whether the trial court's findings support a conclusion that her parental rights in Marco were subject to termination. *In re J.M.J.-J.*, 374 N.C. at 559.

¶ 24 Next, respondent-mother argues that the trial court's statement in Finding of Fact No. 23 that she "has been involved in a relationship with [R.T.'s father] for many years" lacks sufficient record support given that the challenged finding implies that she continued to be involved in a romantic relationship with R.T.'s father at the time of the termination hearing. At the termination hearing, respondent-mother testified that she had been involved in a romantic relationship with R.T.'s father "ever since [she] was [fourteen years old]" and that, while the two of them were "together" at the time of Marco's birth, their relationship had ended by the time that respondent-mother gave birth to R.T. in 2020. As a result, given the absence of any evidence tending to show that respondent-mother continued to be romantically involved with R.T.'s father at the time of the termination hearing, we will disregard Finding of Fact No. 23 to the extent that it can be construed to mean that the relationship between respondent-mother and R.T.'s father was ongoing at the time of the termination hearing in determining whether respondent-mother's parental rights in Marco were subject to termination. *In re J.M.J.-J.*, 374 N.C. at 559.

¶ 25 Furthermore, respondent-mother argues that the trial court erred by stating in Finding of Fact No. 23 that she had "had altercations with a boyfriend in May 2020, July 2020, July [sic] 2020 and September 2020" on the grounds that the record provided insufficient support for this finding. However, Mr. Colby testified that respondent-mother had utilized Open Gate to find housing in May, June, July, and September 2020, as the result of incidents in which she had been involved with a boyfriend and the guardian ad litem testified that, "a couple of times throughout 2020," respondent-mother sought shelter as the result of domestic violence perpetrated by R.T.'s father. Thus, we hold that the record contains sufficient support for an inference that respondent-mother had "had altercations" with a boyfriend in May, July, and September 2020. *See In re A.L.*, ¶ 16; *In re A.R.A.*, 373 N.C. at 196.

¶ 26 In the same vein, respondent-mother challenges the sufficiency of the evidentiary support for the trial court's statement in Finding of Fact No. 27 that she had "acknowledged the need for medication management" during her 1 May 2019 psychological evaluation. As we read the relevant portion of the record, while respondent-mother did acknowledge a general need for treatment on that occasion, there is no evidentiary support for the trial court's determination that respondent-mother had acknowledged a need for medication management at that time. For that reason, we will disregard the challenged portion of Finding of Fact No. 27 in evaluating the extent to which respondent-mother's parental rights in Marco were subject to termination. *In re J.M.J.-J.*, 374 N.C. at 559.

¶ 27 Similarly, respondent-mother argues that the trial court erred by determining in Finding of Fact No. 29 that respondent-mother had "failed to consistently address her mental health needs throughout [Marco]'s case." According to respondent-mother, the undisputed record evidence demonstrates that she sought out and received services for the purposes of addressing her mental health difficulties. We note, however, that respondent-mother has failed to challenge the sufficiency of the evidentiary support for the trial court's findings that "[she] was diagnosed with Intermittent Explosive Disorder several years ago," that DSS had provided services to respondent-mother for the purpose of addressing her mental health problems in May 2018, and that, "[a]t the time of [Marco]'s removal [in February 2019], [respondent-mother] was not participating in medication management or therapy to address her mental health issues."

¶ 28 The record further reflects that the trial court had directed respondent-mother to complete a psychological evaluation and comply with any and all treatment recommendations in its initial adjudication and disposition order and that Dr. Lecci's subsequent report indicated that respondent-mother suffered from bipolar II disorder and a long-standing mood disorder. According to Dr. Lecci, respondent-mother should receive a medication assessment relating to her bipolar II disorder and might benefit from a behavioral intervention other than "traditional psychotherapy" and the availability of a social support network. Although Dr. Lecci observed that respondent-mother's behavioral issues had previously been treated with anti-psychotics, "which would have a sedating effect and could have minimized the consequences of both psychiatric instability and attention deficits," the trial court found that, "at the time of the [1 May 2019] evaluation and for months thereafter,

[respondent-mother] failed to take medication to address her mental health issues."

¶ 29 In addition, the record contains evidence tending to show that respondent-mother had begun to receive treatment at PAMH in January 2020 "and then there [had been] a large period of lull maybe in part [due to] the pandemic" before respondent-mother re-engaged with PAMH in June or July 2020. As a result, respondent-mother began receiving medication management services and participated in a psychiatric evaluation at PAMH in October 2020, which was only four months before the termination hearing was held. Thus, in light of the extensive evidence describing the nature and extent of respondent-mother's episodic participation in recommended mental health treatment, we hold that the record provides ample support for the trial court's finding that she "failed to consistently address her mental health needs throughout [Marco]'s case." *See In re A.L.*, ¶ 16.

¶ 30 Respondent-mother also argues that the trial court's statement in Finding of Fact No. 31 that "[m]uch of PAMH staff's time with [respondent-mother] revolves around crisis management" lacks sufficient record support. At the termination hearing, Ms. Dest acknowledged that, when respondent-mother first sought assistance from PAMH in January 2020, it was "dealing with her housing crisis." In addition, Ms. Dest explained that, while respondent-mother's "service definition allow[ed] up to four hours per week of any type of service delivery[,] . . . in circumstances in which there are needs such as housing or crisis, we do have the ability to engage more frequently to address and to assist in individual stabilizing." According to both Ms. Dest and respondent-mother, respondent-mother contacted PAMH on a daily basis during this period, with Ms. Dest having stated that PAMH "maximize[d] [its] time with [respondent-mother]." Moreover, Ms. Dest described respondent-mother as having a "propensity for impulsive decisions without thinking about the potential consequences" and stated that "we're still at a phase in which we want to continue to support [respondent-mother] in lowering that stress level so it provides us an opportunity to do something different; to make other decisions." Finally, Mr. Colby testified that, as of mid-September 2020, PAMH was "only mitigating crisis [sic] at the time." As a result, we have no difficulty in concluding that the trial court's finding that PAMH's work with respondent-mother "revolves around crisis management" constituted a reasonable inference from the record evidence. *See In re A.R.A.*, 373 N.C. at 196.

¶ 31 Next, respondent-mother argues that the trial court's statement in Finding of Fact No. 38 that respondent-mother was "verbally abusive

to [Marco] during at least seven visits [she] attended" had insufficient support in the record evidence. As an initial matter, respondent-mother contends that the record does not contain any evidence indicating the number of occasions upon which she was verbally abusive to Marco. However, the trial court found in the 30 November 2020 permanency planning review order that "[respondent-mother] was observed being verbally abusive to [Marco] during seven of the last sixteen visits attended." *See In re A.C.*, ¶ 17. In addition, after acknowledging that the record contained evidence tending to show that she had called Marco "fat," "weak," and "soft," respondent-mother contends that the trial court's description of her conduct as "verbally abusive" constitutes "an improper conclusion of law, to the extent it is a determination that [respondent-mother] abused her son," with "it def[ying] reason to conclude that conduct such as this could possibly rise to the level of abuse, given that parents have a constitutionally protected right to physically punish their children hard enough to leave a bruise." We do not, however, interpret the trial court's reference to "verbal abuse" as any sort of shorthand assertion that respondent-mother's comments sufficed to make Marco an "abused juvenile," *see* N.C.G.S. § 7B-101(1) (2019) (defining "abused juvenile," in part, as a juvenile "whose parent . . . [c]reates or allows to be created serious emotional damage to the juvenile" as "evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others"), although Mr. Colby did testify that, while respondent-mother's descriptions of Marco as "soft," "a crybaby," and "fat" could have been said "jovially, in a joking manner," those statements were, in actuality, "part of an escalation of frustration." Thus, we hold that the trial court's finding concerning the number of occasions upon which respondent-mother made inappropriate comments to Marco and its description of those statements as "verbal abuse" had ample record support. *See In re A.R.A.*, 373 N.C. at 196. As a result, after carefully examining the record, we hold that some of respondent-mother's challenges to the trial court's findings have merit and will disregard the relevant findings in determining whether the trial court's findings of fact supported its determination that respondent-mother's parental rights in Marco were subject to termination.

B. Neglect

¶ 32 Subsection 7B-1111(a)(1) provides that a trial court is authorized to terminate a parent's parental rights in his or her child in the event that the child is a neglected juvenile as that term is defined in G.S. 7B-101. N.C.G.S. § 7B-1111(a)(1) (2021). According to N.C.G.S. § 7B-101(15) (2019), a neglected juvenile is, among other things, one "whose parent

. . . 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).[4]

¶ 33 A court may terminate a parent's parental rights in a child based upon neglect occurring at the time of the termination hearing. *See, e.g.*, *In re K.C.T.*, 375 N.C. 592, 599–600 (2020) (stating that "this Court has recognized that the neglect ground can support termination . . . if a parent is presently neglecting their child by abandonment"). On the other hand, in the event that the child has not been in the parent's custody for a significant period of time prior to the termination hearing, a decision to "requir[e] the petitioner . . . to show that the child is currently neglected by the parent would make termination of parental rights impossible." *In re N.D.A.*, 373 N.C. 71, 80 (2019) (quoting *In re L.O.K.*, 174 N.C. App. 426, 435 (2005). In such circumstances, a trial court is entitled to consider "evidence of neglect by a parent prior to losing custody of a child — including an adjudication of such neglect" — along with "any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *In re Ballard*, 311 N.C. 708, 715 (1984). "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 (2019) (citing *In re Ballard*, 311 N.C. at 715).

¶ 34 In its termination order, the trial court determined that respondent-mother had neglected Marco and that "the likelihood of repetition of neglect [was] high." Although respondent-mother does not challenge the validity of the trial court's conclusion that she had neglected

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4. The General Assembly amended the definition of a "neglected juvenile," N.C.G.S. § 7B-101(15), by enacting Session Law 2021-132, effective 1 October 2021, with the new definition being applicable "to actions filed or pending on or after that date." Act of Sept. 1, 2021, S.L. 2021-132, § 1(a), 2021 N.C. Sess. Laws 165, 165, 170. As a result, the definition of a "neglected juvenile" now encompasses:

> Any juvenile less than 18 years of age . . . (ii) whose parent, guardian, custodian, or caretaker does any of the following:
>
> a. Does not provide proper care, supervision, or discipline.
>
> . . . .
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.

N.C.G.S. § 7B-101(15) (2021).

Marco in the past, she does argue that the trial court's findings failed to support a conclusion that she was likely to neglect Marco in the future. According to respondent-mother, the trial court's findings show that she made reasonable progress in satisfying the requirements of her case plan and that the amount of progress that she made suffices to preclude a determination of future neglect. We do not find respondent-mother's argument persuasive.

¶ 35 "A parent's failure to make progress in completing a case plan is indicative of a likelihood of future neglect." *In re S.R.F.*, 376 N.C. 647, 2021-NCSC-5, ¶ 25 (quoting *In re M.A.*, 374 N.C. 865, 870 (2020)). On the other hand, however, "[a]s this Court has previously noted, a parent's compliance with his or her case plan does not preclude a finding of neglect." *In re J.J.H.*, 376 N.C. 161, 185 (2020) (citing *In re D.W.P.*, 373 N.C. 327, 339–40 (2020) (noting the parent'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 given that the parent had failed "to recognize and break patterns of abuse that put her children at risk")). A careful review of the record satisfies us that the trial court had ample justification for finding a likelihood of future neglect in the event that Marco was returned to respondent-mother's care.

¶ 36 The case plan that respondent-mother entered into with DSS and with which the trial court ordered respondent-mother to comply included completing a psychological evaluation and following "any and all recommendations," obtaining and maintaining stable housing and verifiable employment, and submitting to random drug screens as requested. As the trial court's findings of fact reflect, respondent-mother failed to consistently address her mental health needs throughout the period of time during which Marco remained in foster care and continued to struggle with mental health issues at the time of the termination hearing. At the time of Marco's removal from her home, respondent-mother was not participating in medication management or therapy despite the fact that such services had been recommended in her clinical assessment. Although respondent-mother had acknowledged her need for assistance and the efficacy of taking psychotropic medications, she did not take her prescribed medication "for months" following her evaluation and did not consistently take the prescribed medication for the majority of the interval between Marco's placement in foster care and the date of the termination hearing. Similarly, respondent-mother failed to engage with PAMH until eleven months after Marco entered foster care and did not obtain a psychiatric evaluation from and participate in medication management

with PAMH until October 2020. According to a comprehensive clinical assessment that PAMH completed less than a week before the termination hearing began, respondent-mother suffered from "Post Traumatic Stress Disorder, Intermittent Explosive Disorder, Major Depressive Disorder, recurrent, moderate, Generalized Anxiety Disorder, Cannabis Use Disorder, mild, Unspecified Housing or Economic Problem, Other Problem Related to Employment, Academic or Educational Problems and Unspecified Problem Related to Social Environment." As a result, the trial court's findings reflect that respondent-mother had failed to adequately address the mental health problems that contributed to Marco's placement in foster care.

¶ 37 Similarly, respondent-mother failed to maintain safe and suitable housing or verifiable employment for any significant portion of the time after Marco's removal from her home. At the time of the termination hearing, respondent-mother was behind on her rent payments, was seeking alternative housing and lacked employment, with nothing in the present record tending to show that respondent-mother's inability to care for Marco stemmed solely from respondent-mother's poverty. In addition, respondent-mother's continued struggles with domestic violence had caused her to lose employment and independent housing within six months of the termination hearing. Finally, respondent-mother failed to submit to several requested drug screens in accordance with the requirements of her case plan. Thus, for all of these reasons, we hold that the trial court's order refutes respondent-mother's contention that she had made reasonable progress in satisfying the requirements of her case plan as of the date of the termination hearing.

¶ 38 As part of her challenge to the trial court's finding of a likelihood of future neglect, respondent-mother argues that the trial court's findings of fact relating to the issue of domestic violence fail to support the trial court's determination that future neglect of Marco was likely and that the trial court's determination that domestic violence constituted a barrier to respondent-mother's reunification with Marco was not relevant to the making of its termination decision given that concerns about domestic violence had not been a part of the basis for the trial court's original decision to adjudicate Marco as a neglected juvenile and given that domestic violence-related concerns had not been mentioned in respondent-mother's case plan, her psychological evaluation, or any prior court order. According to respondent-mother, "[a]ny past domestic violence was simply never serious enough to compel [DSS] or the court to require [her] to specifically address it in this case." We do not find respondent-mother's domestic violence-related argument to be persuasive.

¶ 39 "Termination of parental rights proceedings are not meant to be punitive against the parent, but to ensure the safety and wellbeing of the child." *In re D.W.P.*, 373 N.C. 327, 340 (2020) (citing *In re Montgomery*, 311 N.C. 101, 109 (1984) (recognizing that the determinative factors in deciding whether a child is neglected are the circumstances and conditions surrounding the child rather than the culpability of the parent)). At a hearing held in a proceeding in which a parent's parental rights in a child are sought to be terminated on the basis of neglect pursuant to N.C.G.S. § 7B-1111(a)(1), "the trial court must admit and consider all evidence of relevant circumstances or events which existed or occurred either before or after the prior adjudication of neglect." *In re M.A.W.*, 370 N.C. 149, 153 (2017) (emphasis omitted) (quoting *Ballard*, 311 N.C. at 716). For that reason, even if domestic violence-related concerns had not constituted a basis for the trial court's initial determination that Marco was a neglected juvenile, the trial court was required to consider respondent-mother's domestic violence problems in determining whether Marco was likely to suffer a repetition of neglect if he was returned to respondent-mother's care. *See generally id.* at 153–54 (affirming the termination of the respondent-father's parental rights in a case in which the adjudication of neglect was based upon the mother's conduct prior to the establishment of the respondent-father's paternity and the conclusion that the juvenile was likely to be neglected in the future was supported by respondent-father's long history of criminal activity and substance abuse); *In re C.L.S.*, 245 N.C. App. 75 (affirming the termination of a father's parental rights on the basis of neglect in a case in which the father was incarcerated and paternity had not been established until after a prior adjudication of neglect that rested upon substance abuse by the mother), *aff'd per curiam*, 369 N.C. 58 (2016). As a result, even if concerns related to the domestic violence in which respondent-mother was ensnared had not helped precipitate the initial adjudication of neglect, those concerns could still support a determination that future neglect was likely in the event that Marco was returned to respondent-mother's care.

¶ 40 In addition, domestic violence-related concerns did contribute to Marco's adjudication as a neglected juvenile and the fact that Marco had remained in foster care from the entry of the nonsecure custody order until the date upon which the termination hearing was held. As the record reflects, respondent-mother stipulated to a history of domestic violence that preceded Marco's placement in foster care in advance of the initial adjudication order.[5] Moreover, the record reflects that Marco

5. We do not wish to be understood as implying that the fact that respondent-mother was a victim of domestic violence, without more, supports a determination that her parental

was taken into DSS custody after an incident of domestic violence occurred at the home of a relative at a time when Marco and his siblings were present, with respondent-mother having been placed under arrest for, among other things, violating a domestic violence order of protection at the conclusion of that incident. On the same day, a social worker approached respondent-mother for the purpose of discussing her "continuing domestic violence issues." In its termination order, the trial court found that respondent-mother "has a history of abusive relationships with the fathers of her children" and that her relationship with R.T.'s father had been "riddled with domestic violence" since R.T.'s birth in August 2020, which was only six months prior to the termination hearing. In addition, the trial court found that respondent-mother "has a severe and persistent mental illness that affects her functioning during periods of psychiatric deterioration," that "[h]er mood is easily affected by any change she experiences," and that "she has a propensity to react strongly and out of proportion to triggering events." Simply put, the trial court's determination that domestic violence remained a barrier to the success of any efforts to reunify respondent-mother with Marco has ample evidentiary support and reflects nothing more than a recognition that respondent-mother's struggle with domestic violence-related problems constituted an ongoing obstacle to her ability to reunite with Marco. *See In re M.A.W.*, 370 N.C. at 153.

¶ 41 Finally, the trial court found that respondent-mother had failed to consistently and appropriately participate in visitation with Marco and that DSS had been unable to expand the "frequency, duration or level of supervision due to [respondent-mother]'s lack of progress." Aside from the fact that respondent-mother only attended half of her scheduled visits with Marco, she was "unable to appropriately parent for [a] two hour [ ] [visitation period,]" having mocked and verbally abused Marco during certain of the visits that she did attend.

¶ 42 Thus, the trial court's findings that respondent-mother had failed to make adequate progress in satisfying the requirements of her case plan, that respondent-mother had persistent domestic violence-related problems, and that respondent-mother had failed to demonstrate the ability to employ appropriate parenting skills provide ample support for the trial court's conclusion that that there was a high likelihood that

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rights in Marco were subject to termination on the basis of neglect. Although the record in this case contains evidence tending to show that respondent-mother was both the victim and perpetrator of domestic violence, the trial court's neglect-related findings appropriately focused upon problematic conduct on the part of respondent-mother rather than upon the fact that respondent-mother was the victim of domestic violence.

the previous neglect that Marco had experienced would be repeated in the event that Marco was returned to respondent-mother's care. *See In re M.Y.P.*, 378 N.C. 667, 2021-NCSC-113, ¶¶ 19–20 (concluding that "the trial court properly determined that there was a high probability of a repetition of neglect" based, in part, upon the parent's failure to consistently visit with the child and to address issues of housing and substance abuse); *In re J.J.H.*, 376 N.C. 161, 185–86 (2020) (concluding that there was a likelihood of future neglect given that the parent's housing, although stable, was not appropriate for the children; that the parent "had missed at least twenty-two scheduled visits"; and that the parent had failed to interact appropriately with the children during visits).[6] As a result, since the trial court's properly supported findings demonstrate that respondent-mother's parental rights in Marco were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and since respondent-mother has not challenged the validity of the trial court's determination that the termination of respondent-mother's parental rights would be in Marco's best interests, N.C.G.S. § 7B-1110(a), the trial court's termination order is affirmed.

AFFIRMED.

6. As a result of the fact that "an adjudication of any single ground for terminating a parent's rights under N.C.G.S. § 7B-1111(a) will suffice to support a termination order," *In re M.S.*, ¶ 21, we need not address the validity of respondent-mother's challenge to the trial court's determination that her parental rights in Marco were subject to termination on the ground that she had willfully failed to make reasonable progress toward correcting the conditions that had led to Marco's removal from her home pursuant to N.C.G.S. § 7B-1111(a)(2).

KEITH v. HEALTH-PRO HOME CARE SERVS., INC.

[381 N.C. 442, 2022-NCSC-72]

THOMAS KEITH AND TERESA KEITH
v.
HEALTH-PRO HOME CARE SERVICES, INC.

No. 33A21

Filed 17 June 2022

1. Negligence—negligent hiring—elements—nexus between employment and injury—sufficiency of evidence

In an action brought against a home health agency based on a theory of negligent hiring after an aide the agency placed in plaintiffs' home orchestrated an off-duty home break-in and robbery of that home, the trial court properly denied the agency's motions for directed verdict and judgment notwithstanding the verdict because the evidence taken in the light most favorable to plaintiffs was sufficient on each element necessary to prove negligent hiring and to support a nexus between the aide's employment and the harm suffered by plaintiffs, which created a duty on the part of the agency. The harm to plaintiffs was foreseeable where the agency did not conduct a criminal background check on the aide, the aide provided false information on her job application, and the aide used information gained through her employment in plaintiffs' home to facilitate the robbery.

2. Negligence—negligent hiring—requested jury instruction—inclusion of elements not required

In an action brought against a home health agency based on a theory of negligent hiring after an aide the agency placed in plaintiffs' home orchestrated an off-duty home break-in and robbery of that home, the trial court properly denied the agency's request for the pattern jury instruction on negligent hiring, since it was not an accurate statement of the law in this case with regard either to the necessary elements of the claim or to the competency of the employee. To the extent the pattern instruction misstated the elements as set forth in case law, the Supreme Court recommended it be withdrawn and revised.

Chief Justice NEWBY concurring in part and dissenting in part.

Justice BERGER dissenting.

KEITH v. HEALTH-PRO HOME CARE SERVS., INC.

[381 N.C. 442, 2022-NCSC-72]

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 275 N.C. App. 43 (2020), reversing a judgment entered on 11 April 2018 by Judge Marvin K. Blount in Superior Court, Pitt County, and remanding for an order granting defendant's motion for judgment notwithstanding the verdict. Heard in the Supreme Court on 16 February 2022.

Ward and Smith, P.A., by Jeremy M. Wilson, Alex C. Dale, and Christopher S. Edwards, for plaintiff-appellants.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones, Michael S. Rothrock, and Linda Stephens, for defendant-appellee.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Heather Whitaker Goldstein, for the National Academy of Elder Law Attorneys and the North Carolina Chapter of the National Academy of Elder Law Attorneys, amici curiae.

Fox Rothschild LLP, by Troy D. Shelton, for the National Center for Victims of Crime, amicus curiae.

The Sumwalt Group, by Vernon Sumwalt, and White & Stradley, PLLC, by J. David Stradley, for the North Carolina Advocates for Justice, amicus curiae.

Parker Poe Adams & Bernstein LLP, by Jonathan E. Hall, Emily L. Poe, and Steven C. Wilson, for North Carolina Association of Defense Attorneys, North Carolina Retail Merchants Association and the Chamber Legal Institute, amici curiae.

BARRINGER, Justice.

¶ 1 In this matter, we must consider whether the Court of Appeals erred by reversing the judgment in favor of plaintiffs and remanding to the trial court for entry of an order granting defendant's motion for judgment notwithstanding the verdict and by determining that the trial court erred by denying defendant's requested instruction. After careful review of the record, we find that plaintiffs submitted sufficient evidence for each element of the claim.

¶ 2 Employers are in no way general insurers of acts committed by their employees, but as recognized by our precedent, an employer may owe a

duty of care to a victim of an employee's intentional tort when there is a nexus between the employment relationship and the injury. Here, when the evidence is viewed in the light most favorable to the plaintiffs, plaintiffs, who are an elderly infirm couple that contracted with a company to provide them a personal care aide in their home, have shown a nexus between their injury and the employment relationship. The employee was inadequately screened and supervised, being placed in a position of opportunity to commit crimes against vulnerable plaintiffs after her employer suspected her of stealing from plaintiffs. Therefore, we conclude that the Court of Appeals erred by reversing the judgment in favor of plaintiffs and by remanding for entry of a judgment notwithstanding the verdict in favor of defendant. Further, the Court of Appeals misinterpreted North Carolina precedent, and thus erred by holding the trial court erred by denying defendant's requested instructions.

I. Background

¶ 3 On 29 September 2016, plaintiffs Thomas and Teresa Keith (Mr. and Mrs. Keith), an elderly married couple with health and mobility issues, were the victims of a home invasion and armed robbery orchestrated by a personal care aide working for defendant Health-Pro Home Care Services, Inc. (Health-Pro). The aide, Deitra Clark, was assigned to assist the Keiths in their home. Clark subsequently pleaded guilty to first-degree burglary and second-degree kidnapping for her conduct.

¶ 4 In December 2016, the Keiths sued Health-Pro for negligence and punitive damages. The Keiths alleged that they hired Health-Pro as their in-home health care provider and "[d]espite Deitra Clark's criminal record, lack of a driver's license, and history of prior incidents [of suspected prior thefts from the Keiths' home], Health-Pro negligently allowed Deitra Clark to provide in-home care to the Keiths, and Health-Pro's conduct in assigning Deitra Clark to these responsibilities, as opposed to some other position in the company, was a proximate cause of the robbery of the Keiths and the consequent injuries sustained by them."

¶ 5 The case proceeded to trial and was tried before a jury at the 19 March 2018 session of superior court in Pitt County. At the conclusion of the Keiths' presentation of evidence, Health-Pro moved for directed verdict on the negligence claim pursuant to North Carolina Rule of Civil Procedure 50. Health-Pro argued that:

> As far as negligence, your Honor, we would contend there has been no evidence to meet the Plaintiffs' burden of proof. My understanding from the proposed jury instructions that the Plaintiffs have passed up

> is they treat this as an ordinary negligence case. The Defense contends this is negligence [sic] hiring retention and supervision case, which is part of our proposed instructions. That's very similar to what the Plaintiffs have pled. That type of case is what has essentially been argued to this jury and that's what the evidence has revealed. In order to succeed on that case . . . and even in an ordinary negligence case the Plaintiffs have to show that the events of September 29th, 2016, and Deitra Clarks' unfitness and participation in those events were foreseeable to my clients. Those are the events that have caused the Plaintiffs the only injury they complain of. And there is nothing in the record that suggests that it was foreseeable.

¶ 6 The trial court denied Health-Pro's motion for directed verdict at the close of the Keiths' evidence.

¶ 7 At the close of all evidence, Health-Pro renewed its motion for a directed verdict. The trial court denied the motion.

¶ 8 The trial court then held a charge conference for the jury instructions. As relevant to this appeal, the trial court proposed using for the negligence issue North Carolina Pattern Jury Instructions 102.10, 102.11, 102.19, and 102.50, which included an instruction on the general common law of negligence. Health-Pro objected to the foregoing Pattern Jury Instructions and instead requested Pattern Jury Instruction 640.42, entitled Employment Relationship - Liability of Employer for Negligence in Hiring, Supervision or Retention of an Employee. N.C.P.I.–Civil 640.42 (2009). Health-Pro's counsel contended that this is a negligent hiring case,[1] not an ordinary negligence case, and tendered its proposed instruction to the trial court in writing. The Keiths disagreed, arguing that their complaint pleaded an ordinary negligence claim and the facts in the case were beyond the Pattern Jury Instruction for negligent hiring. The trial court denied Health-Pro's requested jury instruction and instructed the jury in accordance with the trial court's proposed instruction.

¶ 9 After hearing the instructions from the trial court and deliberating, the jury returned a verdict in favor of the Keiths. The jury answered in the affirmative that both Mr. and Mrs. Keith were injured by the

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1. Like the Court of Appeals, we will use the shorthand "negligent hiring" to refer to the doctrine that includes negligent hiring, retention, and supervision for ease of reading. *See Keith v. Health-Pro Home Care Servs., Inc.*, 275 N.C. App. 43, 47 n.1 (2020). Similarly, we use the term "hiring" to refer to and include hiring, retention, and supervision.

negligence of Health-Pro. The jury found Mr. Keith entitled to recover $500,000 in damages from Heath-Pro for his personal injuries and found Mrs. Keith entitled to recover $250,000 in damages from Health-Pro for her personal injuries. The trial court then entered judgment to this effect on 11 April 2018.

¶ 10 Health-Pro subsequently moved for judgment notwithstanding the verdict under North Carolina Rule of Civil Procedure 50 and, in the alternative, for a new trial pursuant to North Carolina Rule of Civil Procedure 59. The trial court denied these post-trial motions on 3 May 2018. Health-Pro appealed the 11 April 2018 judgment and the 3 May 2018 order denying the post-trial motions.[2]

¶ 11 On appeal, a divided panel of the Court of Appeals reversed the judgment and remanded for entry of a judgment notwithstanding the verdict in Health-Pro's favor. *Keith v. Health-Pro Home Care Servs., Inc.*, 275 N.C. App. 43, 44 (2020).

¶ 12 To address Health-Pro's appeal of the trial court's denial of its motions for directed verdict and motion for judgment notwithstanding the verdict, the Court of Appeals determined that it "must first decide whether [the Keiths'] case was appropriately presented to the jury as an 'ordinary' negligence claim instead of an action for negligent hiring." *Id.* at 48–49. The Court of Appeals considered the allegations in the Keiths' complaint and the evidence presented at trial "within the context of precedent governing both ordinary negligence and negligent hiring." *Id.* at 51. The Court of Appeals ultimately indicated that it agreed with Health-Pro that the Keiths' "allegations and the facts of this case constituted a claim for negligent hiring," obligating the Keiths to prosecute their claim as one for negligent hiring. *Id.* at 61. The Court of Appeals explained as follows:

> *All* of Plaintiffs' relevant allegations and evidence directly challenge whether Defendant should have hired Ms. Clark as an in-home aide; whether Defendant acted appropriately in response to hearing from Plaintiffs that money had been taken from their home on two occasions—which would have involved either greater supervision of—such as moving Ms. Clark to a no-client-contact position, as suggested

2. The Keiths also appealed an issue to the Court of Appeals, but that issue has not been appealed to this Court. *Keith*, 275 N.C. App. at 44. Thus, we have omitted discussion of the Keiths' appeal.

> by Plaintiffs—or a decision regarding whether to retain her in Defendant's employ at all. Plaintiffs have cited no binding authority for the proposition that an action brought on allegations, and tried on facts, that clearly fall within the scope of a negligent hiring claim may avoid the heightened burden of proving all the elements of negligent hiring by simply designating the action as one in ordinary negligence, and we find none.

Id. at 64–65.

¶ 13 As such, the Court of Appeals held that the trial court erred by denying Health-Pro's motions for directed verdict and judgment notwithstanding the verdict "with respect to ordinary negligence, as that claim was not properly before the trial court, and no evidence could support it." *Id.* at 66. Given the Court of Appeals' conclusion that the Keiths' claim was not one of ordinary negligence, the Court of Appeals also held that it was error to deny Health-Pro's requested jury instruction on negligent hiring. *Id.* at 65.

¶ 14 The Court of Appeals then considered whether the Keiths' evidence was sufficient to survive a motion for judgment notwithstanding the verdict "based upon the theory of negligent hiring." *Id.* at 66. It began by discussing the Court of Appeals' case *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583 (2005), which this Court affirmed per curiam without written opinion, 360 N.C. 164 (2005). *Keith*, 275 N.C. App. at 66–67.

¶ 15 The Court of Appeals concluded that according to *Little*, "three specific elements . . . must be proven [by a plaintiff] in order to show that an employer had a duty to protect a third party from its employee's negligent or intentional acts committed outside of the scope of the employment." *Id.* at 67. Specifically,

> (1) the employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee, when the wrongful act occurred, as a direct result of the employment; and (3) the employer must have received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff that resulted in the plaintiff's injury.

Id. (cleaned up). The Court of Appeals held that there was no evidence to support any of the three elements in this case. *Id.* at 68.

¶ 16 Next, the Court of Appeals concluded that even if the requirements of *Little* are not applicable to this case, the trial court still erred by denying Health-Pro's motion for judgment notwithstanding the verdict based on a theory of negligent hiring. *Id.* at 69. Specifically, the Court of Appeals held that Health-Pro had no duty to protect the Keiths' from Clark's criminal acts on 29 September 2016, *id.* at 82, and the Keiths' "evidence was insufficient to demonstrate proximate cause," *id.* at 83.

¶ 17 The dissent disagreed with the majority's holding that the judgment in favor of the Keiths must be reversed and that Health-Pro was entitled to judgment as a matter of law. *Id.* at 84 (Dillon, J., dissenting). The dissent contended that although the Keiths alleged that Health-Pro was negligent in hiring Clark, the evidence of negligent hiring "is merely a means by which a plaintiff proves ordinary negligence." *Id.* "[N]egligent [hiring] (like any other ordinary negligence claim) requires a plaintiff to show that the defendant owed a duty, that the defendant breached that duty, and that the plaintiff suffered an injury proximately caused by the breach." *Id.*

¶ 18 Further, the dissent argued that when viewed in the light most favorable to the Keiths, the evidence was sufficient to make out an ordinary negligence claim based on their evidence of Health-Pro's negligent hiring of a dishonest employee. *Id.* Unlike the majority, the dissent concluded that the Keiths did not have to prove that the robbery occurred while Clark was on duty. *Id.* The evidence was sufficient for a negligence claim because when viewed in the light most favorable to the Keiths, Health-Pro's "dishonest employee use[d] 'intel' learned while on duty to facilitate a theft." *Id.*

¶ 19 The dissent asserted its view that the majority misread *Little*, *id.* at 87–88, and analyzed how the evidence when viewed in the light most favorable to the Keiths, as the non-moving party, is sufficient for each element, rendering denial of the motions for directed verdict and judgment notwithstanding the verdict proper, *id.* at 86–91.

¶ 20 Further, as to the jury instructions, the dissent stated:

> The trial court's actual instruction was a correct statement of the law in this case, as Plaintiffs claim was one in ordinary negligence. But it would not have necessarily been inappropriate for the trial court to expound on some of the elements, provided the requested instructions were a correct statement of the law as supported by the evidence. I disagree, though, that the instruction on duty requested by

> Defendant, though maybe appropriate in certain negligent [hiring] cases, would have been appropriate in this case. No one disputes that the "wrongful act" occurred when Ms. Clark had no right to be in Plaintiffs' home. However, as explained above, it was enough for Plaintiffs to show that Ms. Clark used intel learned while she was on the job to facilitate the robbery which occurred after she had left work for the day. Accordingly, the instructions requested by Defendant would have confused the jury. If followed by the jury, the instructions would have necessarily resulted in a verdict for Defendant. In fact, if the instructions were an accurate statement of the law, as applied to the evidence in this case, then Defendant would have been entitled to judgment as a matter of law. Based on the requested instructions, Defendant owed no duty to Plaintiffs *solely* because the robbery occurred when Ms. Clark was off the clock, and therefore could not be held liable, notwithstanding that Defendant had been negligent in continuing to place Ms. Clark in Plaintiffs' home, that Ms. Clark provided the intel learned while placed in Plaintiffs' home to the perpetrators to facilitate the break-in, that it was foreseeable that Ms. Clark would try and steal from Plaintiffs again, and that the break-in would not have otherwise occurred.

Id. at 92–93.

¶ 21 The dissent acknowledged that reasonable minds may reach different conclusions concerning Health-Pro's liability for the criminal conduct of Clark in this case, but that decision was for the jury, and the jury has spoken in this case in favor of liability. *Id.* at 93.

¶ 22 The Keiths appealed based on the dissent pursuant to N.C.G.S. § 7A-30(2).

II. Standard of Review

¶ 23 Pursuant to North Carolina Rule of Appellate Procedure 16, this Court "reviews the decision of the Court of Appeals to determine whether it contains any errors of law." *State v. Melton*, 371 N.C. 750, 756 (2018) (citing N.C. R. App. P. 16(a); *State v. Mumford*, 364 N.C. 394, 398 (2010)). The Court of Appeals' majority and dissent disagreed on whether the trial court erred by denying Health-Pro's motions for directed verdict

and judgment notwithstanding the verdict under North Carolina Rule of Civil Procedure 50 and by denying Health-Pro's requested jury instruction under North Carolina Rule of Civil Procedure 51. The Keiths appealed based on this disagreement. Therefore, we address each of these issues. *See* N.C. R. App. P. 16(a), (b).

III. Analysis

A. Health-Pro's Rule 50 Motions

¶ 24 **[1]** To address the issues before us, we must summarize the relevant aspects of the law of this State concerning negligence and negligent hiring. The common law claim of negligence has three elements: (1) a legal duty owed by the defendant to the plaintiff, (2) a breach of that legal duty, and (3) injury proximately caused by the breach. *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328 (2006); *Kientz v. Carlton*, 245 N.C. 236, 240 (1957). Precedent decided by this Court further defines the contours of these three elements. For instance, this Court has recognized that "[n]o legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care." *Stein*, 360 N.C. at 328.

¶ 25 Given this limitation, a defendant rarely has a legal duty to prevent the criminal acts of others. *Id.* However, "a defendant may be liable for the criminal acts of another when the defendant's relationship with the plaintiff or the third person justifies making the defendant answerable civilly for the harm to the plaintiff." *Id.* at 329. For example, this Court has recognized that a common carrier owes to its passengers a duty to provide for their safe conveyance and that, in the performance of its duty, it must protect a passenger from assault by the carrier's employees and intruders when by the exercise of due care, the acts of violence could have been foreseen and avoided. *See Smith v. Camel City Cab Co.*, 227 N.C. 572, 574 (1947). Similarly, a store owner owes to a customer on its premises during business hours for the purpose of transacting business thereon a duty to protect or warn the customer of endangerment from the criminal acts of third persons when reasonably foreseeable by the store owner and when such acts could have been prevented by the exercise of ordinary care by the store owner. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638–40 (1981).

¶ 26 In the context of employment, this Court held that a defendant employer owes its employees the duty to exercise reasonable care in its employment and retention of employees, and if there be negligence in this respect, which is shown to be proximate cause of the injury to the employee, the defendant employer may be liable for the injury caused by the negligence of the fellow employee, *Walters v. Durham Lumber Co.*,

163 N.C. 536, 541 (1913), or by the intentional torts of the employer's supervisors, *Lamb v. Littman*, 128 N.C. 361, 362–65 (1901). Later precedent recognized that an employer's duty to exercise reasonable care in its employment and retention of employees could extend to third persons. *See Braswell v. Braswell*, 330 N.C. 363, 373 (1991) (quoting *O'Connor v. Corbett Lumber Corp.*, 84 N.C. App. 178, 182–83 (1987)); *Medlin v. Bass*, 327 N.C. 587, 590 (1990).

¶ 27 In *Braswell* and *Medlin*, this Court expressly recognized that North Carolina courts have recognized a cause of action for negligent hiring. *Braswell*, 330 N.C. at 373; *Medlin*, 327 N.C. at 590. In *Medlin*, this Court delineated what a plaintiff must prove for this claim:

> (1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision,' . . . and (4) that the injury complained of resulted from the incompetency proved.

327 N.C. at 591 (emphasis omitted) (quoting *Walters*, 163 N.C. at 541).

¶ 28 In *Little*, the Court of Appeals addressed whether there was sufficient evidence for a claim by third-person plaintiffs for negligent hiring against a defendant employer when the injury causing acts were intentional torts and criminal. 171 N.C. App. at 584–90. The Court of Appeals held that on the record before it, the defendant employer did not owe plaintiffs a duty of care and affirmed the trial court's granting of directed verdict in the defendant employer's favor. *Id.* at 589. The Court of Appeals explained:

> In the instant case Smith[, an independent contractor for defendant employer Omega,] was not in a place where he had a legal right to be since he broke in to plaintiffs' home; Smith and plaintiffs did not meet as a direct result of Smiths' relationship with defendants, since he did not enter plaintiffs' home as a salesman; finally, defendants received no benefit, direct, indirect or potential, from the tragic "meeting" between Smith and plaintiffs. We have found no authority in North Carolina suggesting that

> defendants owed plaintiffs a duty of care on these facts, and we hold that in fact none existed.
>
> We refuse to make employers insurers to the public at large by imposing a legal duty on employers for victims of their independent contractors' intentional torts that bear no relationship to the employment. We note that because this is a direct action against the employer, for the purposes of this appeal the result would be the same if Smith had been an employee of defendants instead of an independent contractor. Smith could have perpetrated the exact same crimes against these plaintiffs, in the exact same manner, and with identical chances of success, on a day that he was not selling Omega's meats and driving Omega's vehicle.

Id. at 588–89.

¶ 29 Prior to this analysis and holding, the Court of Appeals quoted three sentences from an article published in the Minnesota Law Review:

> Most jurisdictions accepting the theory of negligent hiring have stated that an employer's duty to select competent employees extends to any member of the general public who comes into contact with the employment situation. Thus, courts have found liability in cases where employers invite the general public onto the business premises, or require employees to visit residences or employment establishments. One commentator, in analyzing the requisite connection between plaintiffs and employment situations in negligent hiring cases, noted three common factors underlying most case law upholding a duty to third parties: (1) the employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee as a direct result of the employment; and (3) the employer must have received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff.

Id. at 587–88 (quoting Cindy M. Haerle, *MINNESOTA DEVELOPMENTS: Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 Minn.

L. Rev. 1303, 1308–09 (1984)). Citing this Article, the Court of Appeals in *Little* further stated, "[c]ourts in other jurisdictions have generally, though not exclusively, declined to hold employers liable for the acts of their independent contractors or employees under the doctrine of negligent hiring or retention when *any one* of these three factors was not proven." *Id.* at 588 (citing 68 Minn. L. Rev. 1303, 1308–09).

¶ 30 The dissent in *Little* contended that "our courts have already established a duty on the part of employers of independent contractors and that the majority opinion's conclusion that there is no duty in this case—as a matter of law—cannot be reconciled with this authority." *Id.* at 591–92 (Geer, J., dissenting). This Court affirmed per curiam the Court of Appeals' decision. *Little v. Omega Meats I, Inc.*, 360 N.C. 164, 164 (2005).

¶ 31 In the case before us, the Court of Appeals interpreted the aforementioned statements in *Little* as having "identified three specific elements that must be proven in order to show that an employer had a duty to protect a third party from its employee's negligent or intentional acts committed outside of the scope of the employment." *Keith*, 275 N.C. App. at 67. We hold that the Court of Appeals erred by reading *Little* as adopting such rigid requirements for reasons similar to those that the Court of Appeals' dissent in this case raised. *See id.* at 87 (Dillon, J., dissenting).

¶ 32 In *Little*, the Court of Appeals quoted a statement from a Minnesota Law Review article that "*[o]ne commentator* . . . noted three common *factors* underlying *most* case law upholding a duty to third parties" and cited this article for support that there is a *general*, but *not exclusive*, trend in other jurisdictions related to these factors. *Little*, 171 N.C. App. at 588 (emphasis added).[3] The Court of Appeals' analysis in *Little*

3. The Minnesota Law Review article cited as the "[o]ne commentator" a note by a Chicago-Kent Law Review staff member from 1977. Cindy M. Haerle, *MINNESOTA DEVELOPMENTS: Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 Minn. L. Rev. 1303, 1308–09 (1984) (citing John C. North, Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability*, 53 Chi-Kent L. Rev. 717, 724 (1977)). While published scholarship by law students and their attempts to deduce patterns in the holdings of various court rulings can be informative, such observations do not mean that other jurisdictions have adopted these three factors as requirements. On the same page as its description of the factors, the Minnesota Law Review article expressly recognized the lack of predictive relevance of one of these factors in determining when courts find an employer owes a duty of care to a particular plaintiff. *Id.* at 1309. The cases cited by *Little* in addition to the Minnesota Law Review article also do not identify or adopt a three-factor test. *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 588 (2005) (citing *McLean v. Kirby Co.*,

implicitly reflected consideration of these factors, but the Court of Appeals indicated that its decision turned on the lack of "authority in North Carolina suggesting that defendants owed plaintiffs a duty of care *on these facts*." *Id.* (emphasis added).

¶ 33 The Court of Appeals did not state that it adopted these factors. It further did not even describe other jurisdictions as holding these factors to be elements. Nowhere in the *Little* decision did it state that these factors must be alleged, proven, or shown in courts of this State to establish an employer's duty to a third-party injured by an employee to exercise reasonable care in its hiring of employees. *Cf. Walters*, 163 N.C. at 541 (using the terms "it is shown" and "must be established" when addressing an employer's liability). Nor is it said that these factors are required. Rather, the Court of Appeals "refuse[d] to make employers insurers to the public at large by imposing a legal duty on employers for victims of their independent contractors' intentional torts that bear no relationship to the employment," and thus "required [for a duty to third parties for negligent hiring] a nexus between the employment relationship and the injury." *Little*, 171 N.C. App. at 588–89. The *Little* court considered these factors, in the absence of existing North Carolina law, in determining whether there is a sufficient nexus between the employment relationship and the injury, but it did not adopt a requirement that all three factors be proven.

¶ 34 Thus, the Court of Appeals in this case erred by reading *Little* to have "identified three specific elements that must be proven," and by declining "to hold employers liable for the acts of their employees under the doctrine of negligent hiring or retention when any one of these three factors was not proven." *Keith*, 275 N.C. App. at 67 (cleaned up).

¶ 35 The Court of Appeals further erred by holding that the trial court erred by denying Health-Pro's motions for directed verdict and judgment notwithstanding the verdict. *Id.* at 66. The Court of Appeals agreed with defendant that the Keiths' were obligated to prosecute their claim as one for negligent hiring because the Keiths' allegations and facts of this case constituted a claim for negligent hiring. *Id.* at 61. However,

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490 N.W.2d 229 (N.D. 1992); *Baugher v. A. Hattersley & Sons, Inc.*, 436 N.E.2d 126, 129 (Ind. Ct. App. 1982); *Parry v. Davidson-Paxon Co.*, 73 S.E.2d 59 (Ga. Ct. App. 1952); *Goforth v. Off. Max*, No. L97-2972, 1999 WL 33722384 (Va. Cir. Ct. Apr. 16, 1999)). Regardless, while we need not and do reach not this issue, we observe as set forth in more detail that in this case, there is evidence reflecting that the Keiths and Clark met through her employment as their personal care aide; the Keiths paid defendant for Clark's services; and at the time of the armed robbery, the Keiths were in their home, and Clark was in her car awaiting her accomplices.

this conclusion and the analysis supporting it failed to properly apply the standard of review for Rule 50 motions, the matter before the Court of Appeals.

¶ 36 The standard of review for Rule 50 motions is well-established. Motions for directed verdict and judgment notwithstanding verdict are questions of law that appellate courts review de novo. *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 41 (2020). On appeal, the standard of review for both motions is the same: "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322–23 (1991). "In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor." *Turner v. Duke Univ.*, 325 N.C. 152, 158 (1989). "If, after undertaking such an analysis of the evidence, the [court] finds that there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for judgment notwithstanding the verdict should be denied." *Abels v. Renfro Corp.*, 335 N.C. 209, 215 (1993).

¶ 37 Even when addressing an argument by Health-Pro that the negligence claim in this case is in fact a negligent hiring claim, a Rule 50 motion turns on the sufficiency of the evidence at the trial. Thus, we analyze the evidence at trial to assess whether there is support for each element of the nonmoving party's cause of action.[4]

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4. In addition to analyzing the evidence at trial, the Court of Appeals analyzed the pleadings and justified its review and analysis of the pleadings on *Burton v. Dixon*, 259 N.C. 473 (1963) and *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48 (2016). Keith, 275 N.C. App. at 51–54. *Burton* and *CommScope* addressed objections to the sufficiency of a pleading to state a claim. *CommScope*, 369 N.C. at 51; *Burton*, 259 N.C. at 476–77. This matter reaches us well past that stage. Thus, these cases do not inform our analysis. We are reviewing motions for directed verdict and judgment notwithstanding the verdict, which are made during and after a trial. Further, Health-Pro did not object to any of the evidence as outside the scope of the pleadings. Pursuant to North Carolina Rule of Civil Procedure 15(b), "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C.G.S. § 1A-1, Rule 15(b) (2021). Thus, even if evidence addressed issues beyond the scope of the pleadings, we must treat them as if raised in the pleadings pursuant to Rule 15(b) on account of the Keiths' and Health-Pro's implied consent. Therefore, we need not concern ourselves with the pleadings, and, instead, consistent with the standard of review for the matter before us, we concern ourselves with the evidence at trial.

¶ 38 The evidence at trial tended to show the following when viewed in the light most favorable to the nonmoving party, the Keiths. The Keiths were an elderly couple with serious health issues and limited mobility. Mr. Keith had just undergone heart surgery when they sought an at-home-care provider. The Keiths and their son, Fred Keith (Fred), met with Health-Pro's sole owner, Chief Executive Officer, and President, Sylvester Bailey III (Mr. Bailey). Health-Pro provided at-home personal and health care. During that meeting, Health-Pro, through Mr. Bailey, informed them that all employees undergo criminal background checks. After the meeting, the Keiths hired Health-Pro for their services in December 2012.

¶ 39 In 2015, Health-Pro received an employment application from Clark and permission to conduct a criminal background check. Pursuant to State law, "[a]n offer of employment by a home care agency licensed under [Chapter 131E on Health Care Facilities and Services] to an applicant to fill a position that requires entering the patient's home is conditioned on consent to a criminal history record check of the applicant." N.C.G.S. § 131E-265(a) (2021).

¶ 40 Health-Pro's criminal background investigation policy was that "[a]ll employees of Health-Pro must undergo a criminal background check by the State Bureau of Investigation or other approved entity" and "[i]f the criminal history involves a felony not listed above, a misdemeanor, a series of arrests, or a criminal conviction greater than seven years, the agency will review the offense, its relevance to the particular job performance, and to the length of time between conviction and the employment date." Further, "[a] decision regarding employment will be reached only after the nature, severity and date of the offense have been carefully evaluated."

¶ 41 Similarly, under State law,

> [w]ithin five business days of making [a] conditional offer of employment, a . . . home care agency shall submit a request to the Department of Public Safety under [N.C.]G.S. [§] 143B-939 to conduct a State or national criminal history record check required by [N.C.G.S. § 131E-265], or shall submit a request to a private entity to conduct a State criminal history record check required by [N.C.G.S. § 131E-265].

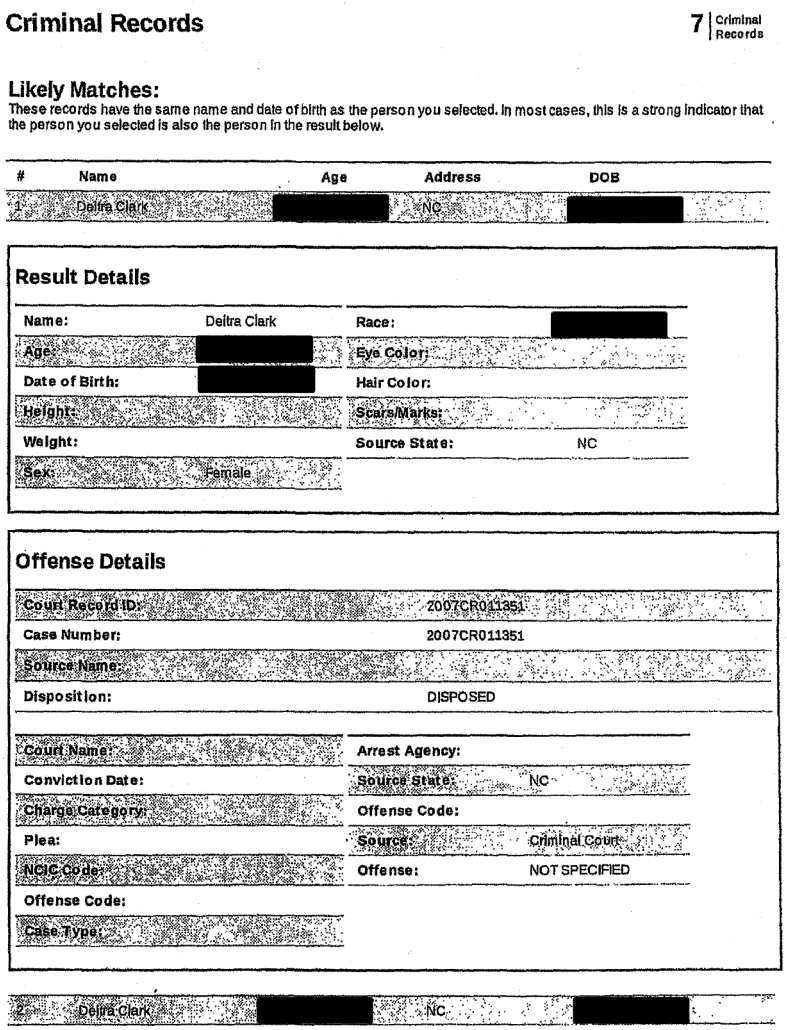
N.C.G.S. § 131E-265(a). "If an applicant's criminal history record check reveals one or more convictions of a relevant offense, the . . . home care agency . . . shall consider [the enumerated] factors [in this section] in

determining whether to hire the applicant[.]" N.C.G.S. § 131E-265(b). Relevant offense is defined as "a county, state, or federal criminal history of conviction or pending indictment of a crime, whether a misdemeanor or felony, that bears upon an individual's fitness to have responsibility for the safety and well-being of aged or disabled persons." N.C.G.S. § 131D-40(d) (2021); *see* N.C.G.S. § 131E-265(d) ("As used in this section, the term 'relevant offense' has the same meaning as in [N.C.]G.S. [§] 131D-40."). "An entity and officers and employees of an entity shall be immune from civil liability for failure to check an employee's history of criminal offenses if the employee's criminal history record check is requested and received in compliance with [N.C.G.S. § 131E-266.]" N.C.G.S. § 131E-265(g).

¶ 42 Health-Pro admitted that it did not run a criminal background check with the State Bureau of Investigation or other approved entity and admitted that the review and evaluation required by the policy was not completed. However, Health-Pro contended it ran a criminal background check and was aware of Clark's misdemeanor convictions and other charges. To the contrary, the only document in Health-Pro's employment file relating to a criminal background check was one page and only showed the following:[5]

[THIS SPACE INTENTIONALLY LEFT BLANK.]

5. This document has been redacted for purposes of this opinion to remove irrelevant personal information.



Criminal Records

7 | Criminal Records

Likely Matches:

These records have the same name and date of birth as the person you selected. In most cases, this is a strong indicator that the person you selected is also the person in the result below.

#	Name	Age	Address	DOB
1	Deitra Clark	[redacted]	NC	[redacted]

Result Details

Name:	Deitra Clark	Race:	[redacted]
Age:	[redacted]	Eye Color:	
Date of Birth:	[redacted]	Hair Color:	
Height:		Scars/Marks:	
Weight:		Source State:	NC
Sex:	Female		

Offense Details

Court Record ID:	2007CR011351		
Case Number:	2007CR011351		
Source Name:			
Disposition:	DISPOSED		
Court Name:		Arrest Agency:	
Conviction Date:		Source State:	NC
Charge Category:		Offense Code:	
Plea:		Source:	Criminal Court
NCIC Code:		Offense:	NOT SPECIFIED
Offense Code:			
Case Type:			

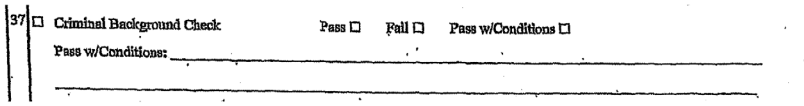
2	Deitra Clark	[redacted]	NC	[redacted]

Additionally, the company, from which Health-Pro contended it ran a criminal background check, stated on its website that its services cannot be used to conduct background checks for employees or applicants.

¶ 43 Mr. Bailey offered conflicting testimony at trial concerning why Health-Pro's employment file for Clark only contained this one page, first stating that Health-Pro culled down the file every year because some reports were fifteen pages and then later saying Health-Pro just prints one

page of a criminal background report for the file. Notably, Mr. Bailey also testified at his deposition that he conducted the criminal background check but did not have a specific memory of running the check or seeing the charges and convictions. Yet, he subsequently changed his testimony when deposed as the Rule 30(b)(6) representative of Health-Pro and when he testified at trial.

¶ 44 Health-Pro's criminal background investigation policy also dictated that the criminal history record information received from the criminal background check be stored in a separate locked file in the Human Resource Department, but this was not done. Additionally, the Interviewing and Hiring Process form used by Health-Pro for hiring Clark did not have checks next to the boxes for a criminal background check as reflected below:


37 ☐ Criminal Background Check Pass ☐ Fail ☐ Pass w/Conditions ☐
Pass w/Conditions: _____

¶ 45 Thus, viewed in the light most favorable to the Keiths, Health-Pro did not run a criminal background check of Clark upon hiring her as a personal care aide in September 2015. It did not check to confirm that she had a driver's license as indicated on her application. Health-Pro simply interviewed Clark after receiving her application and then hired her. Nevertheless, Health-Pro represented on its website that it carefully screened caregivers by calling previous employers and performing criminal background checks.

¶ 46 As of the date of her hiring, a criminal background check of Clark would have revealed the following: 2007 charge for no operator's license; 2008 found guilty of driving while license revoked; 2009 charge for possession of marijuana; 2009 found guilty of possession of drug paraphernalia; 2010 charge for possession of drug paraphernalia; 2010 charge for communicating threats (dismissed because of noncooperating witness); 2010 found guilty of criminal contempt; and 2011 charge for communicating threats (dismissed because of noncooperating witness). Further, at that time, Clark did not have a valid driver's license.

¶ 47 Clark, however, indicated on her employment application that she had never been convicted of or entered a plea of guilty in a court of law. Thus, as conceded by Health-Pro, Clark lied on her job application about her criminal background. Health-Pro acknowledged that this dishonesty would be concerning to Health-Pro if caught. Clark also identified that

she had a driver's license on her application, but she did not have a driver's license at the time of her application, just an identification card.

¶ 48 A few months later in November or December, Health-Pro assigned Clark to work for the Keiths as a personal care aide at their home. The Keiths understood that Health-Pro ran background checks on all their aides, including Clark, and would provide aides that would do a good job and not pose a danger.

¶ 49 Clark was one of the primary aides working for the Keiths. She helped in the home by cleaning the house, doing laundry, and driving Mrs. Keith for errands. Clark had access to the whole house and could move around the house freely. Through her employment, Clark learned about the Keiths, their valuables, their schedules, their collection of rolled coins, and their spare key.

¶ 50 On or about 25 May 2016, Health-Pro received a letter from Pitt County Child Support Enforcement indicating that a claim against Clark for nonpayment of child support was being pursued.

¶ 51 In 2016, after Clark had been assigned to the Keiths' home, the Keiths' granddaughter and daughter discovered that about $900 of rolled coins were missing. Additionally, $1,260 in cash went missing from Mrs. Keith's dresser. Before the cash went missing, an aide had seen Mrs. Keith remove money from her dresser drawer. Mrs. Keith thought the aide was Clark but was not positive, so she did not accuse her when the cash went missing. Cash also went missing from Mr. Keith's wallet on two occasions.

¶ 52 The Keiths informed Health-Pro about the missing money, and Mr. Bailey on behalf of Health-Pro came to the Keiths' home to discuss in July 2016. The missing money was not located at the meeting (nor was it ever found), but Health-Pro said it would investigate everything and removed Clark and the other aide assigned at the time from servicing the Keiths' home. Health-Pro also agreed to pay back the missing money to the Keiths.

¶ 53 Health-Pro determined that Clark and one other aide were the only aides in the home on the days that money went missing and spoke to them. Yet, Health-Pro did nothing further; it did not run a criminal background check or report the incident to the police.

¶ 54 Fred, the Keiths' son, also met with Mr. Bailey after he learned about the missing money. Mr. Bailey informed Fred that it was either Clark or the other aide but that he had a strong belief that Clark was the one involved. Mr. Bailey assured Fred that neither one of them would be back in his parents' home, and Fred made clear that he did not want Clark back in his parents' home.

¶ 55 Nevertheless, a few weeks later, Health-Pro assigned Clark back to the Keiths' home. Although Health-Pro contended that Fred asked for Clark to return to the home because Clark gave Mrs. Keith better baths than other aides, Fred testified that he disputed Health-Pro's contention, and the Keiths testified that they did not ask for Clark to be reassigned to their home. The Keiths assumed that Health-Pro, after completing its investigation, thought Clark did not pose a threat to the Keiths. Health-Pro also admitted that it did not inform Fred that they were sending Clark back to the home. Thus, viewing the evidence in the light most favorable to the Keiths, Health-Pro made the unilateral decision to reassign Clark as a personal care aide to the Keiths' home after the thefts.

¶ 56 On 9 September 2016, Health-Pro received another letter from Pitt County Child Support Enforcement.

¶ 57 A few weeks later on 28 September 2016, Clark used the information that she gleaned about the Keiths' home, the comings and goings of Health-Pro aides and the Keiths' family, and their valuables to accomplish a home invasion and robbery. Clark informed her accomplices about everything, including the location of the spare hidden key. Clark also knew and shared with her accomplices that the Health-Pro aide assigned to work that evening, Erica, would leave when her shift ended at 11:00 p.m. and no other family was visiting and staying with the Keiths that evening.

¶ 58 The assigned aide, Erica, did in fact leave in accordance with her shift schedule at 11:00 p.m. on the evening of 28 September 2016. Shortly thereafter, Clark drove her two accomplices in her car to the Keiths' house and dropped them off to complete the home invasion and robbery. Her accomplices dressed in dark clothing and wore masks. Between 11:30 p.m. and 12:00 a.m., the accomplices used the spare hidden key to enter the house and walked into the den where Mr. Keith was watching a movie. Mrs. Keith was in bed. The accomplices disconnected the telephone.

¶ 59 As testified by Mr. Keith, the accomplices knew exactly where to go in the house; they knew where everything was.

¶ 60 One accomplice had a gun and pointed the gun at Mr. Keith and ordered Mr. Keith to lay on the floor face down. The other accomplice walked into the bedroom where Mrs. Keith was lying in bed and took from the bed stand the .32 caliber Harrison and Richardson pistol belonging to Mr. Keith. The originally armed accomplice found Mr. Keith's ATM card in one of his desk drawers and started waiving it around like it was something for which he was searching. Additionally, while in the

home, the other accomplice stole the Keiths' two boxes of rolled coins, totaling $500. The Keiths had stored the boxes in a black bag under Mr. Keith's work desk in the den of their home. One of the accomplices also told Mrs. Keith that she should be sure to mention the name of Erica.

¶ 61 The originally armed accomplice forced Mr. Keith at gunpoint to drive him to an ATM. During the drive to the ATM, the accomplice asked Mr. Keith if he had a worker that comes over to the home named Erica. After Mr. Keith answered affirmatively, the accomplice told Mr. Keith that he needed to fire Erica because she left the door open. Arriving at the ATM around 12:30 a.m., the accomplice forced Mr. Keith to withdraw a thousand dollars. The accomplice then ordered Mr. Keith to drive him to an elementary school, where the accomplice got out of the car and ran away.

¶ 62 Clark picked up both accomplices along with the stolen cash, coins, and gun. Thereafter, she and the accomplices took her car to Walmart to convert the stolen coins into cash by using a Coinstar machine at around 1:00 a.m.

¶ 63 Health-Pro terminated Clark after it identified her in the video footage from the police showing the conversion of the coins to cash at the Coinstar machine.Only after the home invasion and robbery and after firing Clark did Health-Pro run a criminal background check on Clark.

¶ 64 After undertaking an analysis of the evidence and considering it in the light most favorable to the Keiths, we find that there is evidence to support each element of the Keiths' cause of action and that the motion for directed verdict and subsequent motion for judgment notwithstanding the verdict should be denied. *See Abels v. Renfro Corp.*, 335 N.C. at 215.

¶ 65 Here, the Keiths pursued a negligence claim against the employer of the intentional tortfeasor, Health-Pro, premised on Health-Pro's own negligence in hiring, retaining, and/or assigning Clark, the intentional tortfeasor, to work as a personal care aide at their home. Given that the Keiths' claim relied on negligence by the employer in hiring, retaining, and/or assigning an employee, our precedent recognizes this claim under the theory of liability known as negligent hiring, or more commonly framed as a claim for negligent hiring. While the elements of negligence are a legal duty, breach, and injury proximately caused by the breach, appellate precedent further defines the contours of these elements in specific contexts as previously discussed. Thus, when a plaintiff alleges an employer negligently hired, retained, or supervised an employee, and seeks recovery from the employer for injury caused by the employee, the

Medlin elements for negligent hiring and the *Little* nexus requirement for duty must be satisfied to show a negligence claim in this context.

¶ 66 Therefore, to survive a motion for directed verdict or judgment notwithstanding the verdict for their negligence claim, the Keiths had to present evidence to support each element set forth in *Medlin* and to support a nexus between the employment and the injury as required by *Little*.[6] The evidence when viewed in the light most favorable to the Keiths, as summarized previously, satisfied the elements in *Medlin* and the nexus requirement in *Little*. In addition to evidence supporting each of the elements, there is enough distinguishing this case from *Little* and enough similarity with *Lamb* to preclude our precedent from foreclosing the claim as a matter of law.

¶ 67 Unlike *Little*, the evidence viewed in the light most favorable to plaintiffs suggests a sufficient nexus between the injurious act and employment relationship to create a duty. The plaintiffs in this case were daily customers of the defendant employer and had been for years. The defendant employer assigned the intentional tortfeasor employee to work for the plaintiffs inside plaintiffs' home. Thus, defendant employer participated in the meeting between the intentional tortfeasor employee and the plaintiffs and gained financially from their continued meeting. When viewed in the light most favorable to the Keiths, the intentional tortfeasor employee also injured the plaintiff customer, the Keiths, by disclosing and using the intel she gained through her employment to orchestrate a robbery at the intentional tortfeasor employee's place of employment, the Keiths' home.

¶ 68 When the evidence is viewed in the light most favorable to the Keiths, the intentional tortfeasor employee was skilled at her work but incompetent to work for vulnerable customers in the customers' home without supervision by another, rendering this case similar to *Lamb*. *See Lamb*, 128 N.C. at 363. In *Lamb*, the defendant's supervisor had command over the department in which plaintiff, a ten-year-old boy, worked as floor sweeper. *Id.* at 362. The supervisor shoved plaintiff causing him injury, and plaintiff sued the supervisor's employer. *Id.* at 361–62, 365. While there was no evidence of the unskillfulness of the supervisor, he had treated the plaintiff poorly the day before the injury and had a general reputation for his cruelty and temper. *Id.* at 362. This Court concluded that "the evidence shows that he was unfit and incompetent to

6. Since we conclude that the Keiths' claim is one of negligent hiring pursuant to our precedent, in this particular case liability under a negligence theory is not available, and, thus, we do not address its application.

perform the duties of supervising children and the help under him by reason of his cruel nature and high temper." *Id.* at 363. Given the foregoing, this Court found that the trial court erred by not submitting the case to the jury and reversed the motion dismissing the case for nonsuit. *Id.* at 361–62.

¶ 69 In this case, evidence concerning the falsities in Clark's employment application, Health-Pro's belief that she committed the prior thefts, and the particulars of her criminal background support the inference that Health-Pro knew or should have known of Clark's incompetence for her assignment to the Keiths' home. *See id.* at 362. Health-Pro's personal care aides served elderly and vulnerable adults and by the nature of their work gained information about their clients' daily routine, personality, finances, and home and were not supervised while in the home. The Keiths, in fact, retained Health-Pro because Mr. Keith needed an at-home-care provider after his heart surgery and throughout their engagement of Health-Pro's services were elderly and with serious health issues and limited mobility.

¶ 70 In addition to the foregoing, evidence also supports the foreseeability of the injury to the Keiths from such incompetence. "Proximate cause is a cause which in natural and continuous sequence produces a plaintiff's injuries and one from which a person of ordinary prudence could have reasonably foreseen that such a result or some similar injurious result was probable." *Murphey v. Ga. Pac. Corp.*, 331 N.C. 702, 706 (1992). "It is not necessary that a defendant anticipate the particular consequences which ultimately result from his negligence. It is required only that a person of ordinary prudence could have reasonably foreseen that such a result, *or some similar injurious* result, was probable under the facts as they existed." *Sutton v. Duke*, 277 N.C. 94, 107 (1970) (cleaned up).

¶ 71 In this matter, Health-Pro acknowledged that it must discipline employees when Health-Pro knows the employee did something out of compliance because absent discipline, there is a risk that the conduct would get worse. Health-Pro also knew or should have known that Clark was under financial strain on account of the child support enforcement letters and that Clark may retaliate against the Keiths for disclosing the prior thefts given particulars in her criminal background, including charges of communicating threats and a conviction for criminal contempt. Health-Pro further knew or should have known that Clark committed prior thefts in the Keiths' home. Additionally, because of their age, medical conditions, and limited mobility, the Keiths were vulnerable to adverse conduct against them in their home by an incompetent

Health-Pro employee. Thus, when viewed in the light most favorable to the Keiths, a person of ordinary prudence could have reasonably foreseen that as a result of Health-Pro's negligent hiring, the home invasion and robbery of the Keiths' home or some similar injurious result was probable and that the trauma from such event would injure the Keiths.

¶ 72 Thus, in this case, the jury, not the court, must decide the outcome of the Keiths' claim. The Court of Appeals in this matter erred by not considering the evidence in the light most favorable to the Keiths, just as Health-Pro's arguments urge us to do. Health-Pro contends that Clark's actions bore no relationship to her employment and no action or inaction by Health-Pro proximately caused the Keiths' injuries because "[a]ny information Clark learned about [the Keith]s' home on the job could have been ascertained just as easily by others watching the home from the street." The jury could have agreed with Health-Pro and weighed the evidence in its favor but given the testimony and evidence before the trial court supporting a contrary interpretation of the facts, this argument cannot justify judgment in Health-Pro's favor as a matter of law. We must view all of the evidence which supports the Keith's claim as true and consider the evidence in the light most favorable to the Keiths, giving them the benefit of every reasonable inference that may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in their favor. *Turner*, 325 N.C. at 158. Therefore, we conclude that the Court of Appeals erred by reversing the trial court and remanding for entry of judgment in favor of Health-Pro.

B. Jury Instructions

¶ 73 **[2]** "In evaluating the validity of a party's challenge to the trial court's failure to deliver a particular jury instruction, 'we consider whether the instruction requested is correct as a statement of law and, if so, whether the requested instruction is supported by the evidence.' " *Chisum v. Campagna*, 376 N.C. 680, 2021-NCSC-7, ¶ 52 (quoting *Minor v. Minor*, 366 N.C. 526, 531 (2013)). When the requested jury instruction does not accurately state the applicable law, even if from a North Carolina Pattern Jury Instruction, the trial court does not err by failing to the instruct the jury as requested. *Id.* ¶ 54.

¶ 74 In this matter, the trial court proposed using the North Carolina Pattern Jury Instructions on negligence, specifically 102.10, 102.11, 102.19, and 102.50. Health-Pro counsel objected and requested instead Pattern Jury Instruction 640.42. The requested instruction, however, does not accurately state the applicable law.

¶ 75 First, as previously discussed, this Court has not adopted the factors discussed in *Little* as elements necessary to prove a claim for negligent hiring. Thus, the requested instruction as reproduced below is an inaccurate statement of the law.

> First, the plaintiff must prove that the defendant owed the plaintiff a legal duty of care. This means that the plaintiff *must* prove that Deitra Clark and the plaintiff were in places where each had a right to be when the wrongful act occurred, that the plaintiff encountered Deitra Clark as a direct result of her employment by the defendant, and that the defendant *must* reasonably have expected to receive some benefit, even if only potential or indirect, from the encounter between Deitra Clark and the plaintiff.

(emphasis added).

¶ 76 While the *Little* factors are relevant in assessing whether an employer has a legal duty to a third party for its employee's intentional torts as exemplified by the analysis conducted in *Little* and in this opinion, *Little* did not hold that they "must" be proven by the plaintiff. *Little*, 171 N.C. App. at 588–89.

¶ 77 Second, the instruction concerning the employee's incompetence is not an accurate statement of the law in this case. The Keiths have not contended, nor does the evidence support, that Clark lacked the physical capacity, natural mental gifts, skill, training, or experience needed for her job or that Clark previously committed acts of carelessness or negligence. As recognized in *Lamb*, incompetence and unfitness for employment is *not* so limited; incompetence and unfitness can exist on account of the employee's disposition, such as the cruel nature and high temper of the supervisor of children as in *Lamb*. 128 N.C. at 363; *see also Walters*, 163 N.C. at 542 ("[I]t may be well to note that this term, incompetency, is not confined to a lack of physical capacity or natural mental gifts or of technical training when such training is required, but it extends to any kind of unfitness which renders the employment or retention of the servant dangerous to his fellow-servant[.]" (cleaned up)).

¶ 78 In this case, the incompetence alleged and supported by the evidence when viewed in the light most favorable to the Keiths is Clark's dishonesty and propensity to steal and break the law. Thus, the requested instruction as reproduced below would not have been proper in this case.

> Second, the plaintiff must prove that Deitra Clark was incompetent. This means that Deitra Clark was not fit for the work in which she was engaged. Incompetence may be shown by inherent unfitness, such as the lack of physical capacity or natural mental gifts, or the absence of skill, training or experience.
>
> Incompetence may also be inferred from previous specific acts of careless or negligent conduct by Deitra Clark, or from prior habits of carelessness or inattention on the part of Health-Pro Home Care Services, Inc. in any kind of work where careless or inattentive conduct is likely to result in injury. However, evidence, if any, tending to show that Deitra Clark may have been careless or negligent in the past may not be considered by you in any way on the question of whether Deitra Clark was negligent on the occasion in question, but may only be considered in your determination of whether Deitra Clark[ ]was incompetent, and whether such incompetence was known or should have been known to the defendant.

¶ 79 Because Health-Pro's requested instruction was not an accurate statement of the law, we agree with the dissent in the Court of Appeals that it would have been inappropriate in this case and that the trial court did not err by denying the request. However, as we have concluded that the Keiths' claim was a claim for negligence dependent on a theory of negligent hiring, requiring satisfaction of the *Medlin* elements and *Little* nexus requirement, we do not endorse the use of the generic common law negligence instruction in a case substantially similar to this matter. This Court has refused and continues to "refuse to make employers insurers to the public at large by imposing a legal duty on employers for victims of their [employee]s' intentional torts that bear no relationship to the employment," *Little*, 171 N.C. App. at 588–89, *aff'd per curiam*, 360 N.C. 164 (2005), and the generic common law negligence instructions fail to account for our holdings to this effect.

¶ 80 Where our precedent requires an element to support a claim or theory, the jury should be instructed to this effect. *Cf. Calhoun v. State Highway & Pub. Works Comm'n*, 208 N.C. 424, 426 (1935) ("The rule of practice is well established in this jurisdiction that when a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language

of the prayer, is nevertheless required to give the instruction, in substance at least[.]"). Nevertheless, under current law, an argument concerning an error in the jury instructions must be preserved for review by this Court by tendering a requested instruction that is an accurate statement of the law and that is supported by the evidence. *See Chisum*, 2021-NCSC-7, ¶ 52. Since we conclude that the trial court did not err in denying Health-Pro's requested jury instructions because the requested jury instruction was not an accurate statement of the law, we reverse the Court of Appeals' holding to the contrary.[7]

IV. Conclusion

¶ 81 We agree with the Court of Appeals that plaintiffs' negligence claim was dependent on a theory of negligent hiring, which is commonly plead as a negligent hiring claim. However, the evidence, taken in the light most favorable to plaintiffs, was sufficient as a matter of law to be presented to the jury. There was evidence to support each element of the claim, the *Medlin* elements, and the *Little* nexus requirement. Therefore, the Court of Appeals erred by reversing the judgment in favor of plaintiffs and by remanding to the trial court for entry of an order granting defendant's motion for judgment notwithstanding the verdict. Further, the Court of Appeals misinterpreted precedent from *Little*, and under a proper reading of that case and other precedent, the jury instruction requested by defendant was not an accurate statement of the law. Therefore, the Court of Appeals also erred by holding that the trial court erred by denying defendant's requested instruction. Accordingly, we reverse the Court of Appeals' decision.

REVERSED.

Chief Justice NEWBY concurring in part and dissenting in part.

¶ 82 I agree with the majority that plaintiffs' claim was one for negligent hiring and that to prove a claim for negligent hiring, a plaintiff must "present evidence to support each element set forth in *Medlin* [*v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1990)] and to support a nexus between the employment and the injury as required by *Little* [*v. Omega Meats I, Inc.*, 171 N.C. App. 583, 615 S.E.2d 45 (2005)]." The majority also properly holds that in the light most favorable to the

7. Given our holding, it is recommended that the North Carolina Pattern Jury Instruction Committee promptly withdraw N.C.P.I.–Civil 640.42 (2009) and revise it consistent with this opinion.

plaintiffs, the evidence was sufficient to submit the case to the jury on a negligent hiring theory. Moreover, the majority correctly concludes that N.C. Pattern Jury Instruction 640.42 wrongly uses the *Little* factors to define the required legal duty and improperly focuses on an employee's "incompetence" as opposed to the employee's "unfitness." Finally, I agree that when a plaintiff presents a negligent hiring claim, a trial court errs by instructing the jury on ordinary negligence instead of negligent hiring. I write separately, however, because I would hold that the trial court's failure to give a negligent hiring instruction prejudiced defendant such that defendant is entitled to a new trial. Accordingly, I concur in part and dissent in part.

¶ 83 "According to well-established North Carolina law, a party's decision to request the delivery of a particular instruction during the jury instruction conference suffices to preserve a challenge to the trial court's refusal to deliver that instruction to the jury." *State v. Benner*, 380 N.C. 621, 2022-NCSC-28, ¶ 32; *see also* N.C. R. App. P. 10(a)(2) (2021) ("A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection."). "It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence without special request and to apply the law to the various factual situations presented by the conflicting evidence." *Griffin v. Watkins*, 269 N.C. 650, 653, 153 S.E.2d 356, 359 (1967) (quoting 4 Strong's N.C. Index: *Trial*, § 33, at 331 (1961)). "A charge which fails to submit one of the material aspects of the case presented by the allegation and proof is prejudicial." *W. Conf. of Original Free Will Baptists of N.C. v. Miles*, 259 N.C. 1, 13, 129 S.E.2d 600, 607 (1963) (quoting 4 Strong's N.C. Index: *Trial*, § 33, at 331–32 (1961)).

¶ 84 To show ordinary negligence, a plaintiff must show "(1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 267 (2006). The tort of negligent hiring, which this Court has recognized for over a century, focuses on whether an employee was unfit for the work the employee was hired to perform. *See Lamb v. Littman*, 128 N.C. 361, 362, 38 S.E. 911, 911 (1901). In *Lamb*, we considered whether an owner of a mill could be liable under a theory of negligent hiring when a supervisor assaulted a ten-year-old employee. *Id.* We noted that "the evidence show[ed] that [the supervisor] was unfit and incompetent to perform the duties of supervising children and the help under him by

reason of his cruel nature and high temper," *id.* at 363, 38 S.E. at 912, and that this unfitness "ought to have been known to defendant," *id.* at 362, 38 S.E. at 911. We further stated that

> [w]e do not wish to be understood as holding that the [employer] is generally an insurer of the good conduct of his representative, or an insurer against his violence resulting from his own malice or ill will, or sudden outbursts of temper, although in charge of the [employer]'s business; but only when he puts in such representative as is by him known, or ought to have been known, to be violent and mean, and the injury is the natural result of such character.

Id. at 364, 38 S.E. at 912. Accordingly, because the supervisor was unfit, and the employer should have known of the supervisor's unfitness, the employer could be liable under a negligent hiring theory. *Id.* at 364–65, 38 S.E. at 912.

¶ 85 We again addressed the tort of negligent hiring in *Walters v. Durham Lumber Co.*, 163 N.C. 536, 538, 80 S.E. 49, 50 (1913). We stated that an employer "is held . . . to the exercise of reasonable care in selecting employees who are competent and fitted for the work in which they are engaged." *Id.* at 541, 80 S.E. at 51. Thus, we held that

> [t]he burden of proving negligence in selecting or continuing an unfit [employee] is upon the plaintiff. He must prove (1) the specific negligent act on which the action is founded, which may, in some cases, but not generally, be such as to prove incompetency, but never can, of itself, prove notice to the [employer]; (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the [employer] of such unfitness or bad habits, or constructive notice, by showing that the [employer] could have known the facts had he used ordinary care in oversight and supervision, or by proving general reputation of the [employee] for incompetency or negligence; and (4) that the injury complained of resulted from the incompetency proved.

Id. (internal quotation marks omitted). We further clarified that "incompetency" is not limited "to a lack of physical capacity or natural mental gifts or of technical training when such training is required, but it extends

to any kind of unfitness which renders the employment or retention of the [employee] dangerous." *Id.* at 542, 80 S.E. at 52 (internal quotation marks omitted). Thus, we held that whether an employee was unfit and whether an employer had notice of the unfitness were questions for the jury. *Id.* at 543, 80 S.E. at 52.

¶ 86 In *Lamb* and *Walters*, this Court referred to the "incompetence" of the employee. The term "incompetent" is now often understood to refer to a person's mental fitness. *See Incompetent Person*, Ballentine's Law Dictionary (3d ed. 2010) ("[O]ne lacking competency, physical or mental. Usually having reference in the law to an insane or feeble-minded person."). As used in *Lamb* and *Walters*, however, "incompetent" is synonymous with "unfitness." *See Lamb*, 128 N.C. at 363, 38 S.E. at 912 ("[T]he evidence show[ed] that [the employee] was unfit and incompetent to perform the duties of supervising children and the help under him . . . ."); *Walters*, 163 N.C. at 542, 80 S.E. at 52 (holding that "incompetency" properly "extends to any kind of unfitness which renders the employment or retention of the [employee] dangerous." (internal quotation marks omitted)); *see also Incompetency*, Black's Law Dictionary (1st ed. 1891) ("Lack of ability . . . or fitness to discharge the required duty."). Accordingly, the proper inquiry is whether an employee was unfit for the work the employee was hired to perform.

¶ 87 During the jury charge conference, the trial court proposed using the pattern jury instructions for common law negligence. Defendant twice objected to the trial court's proposed instructions and requested that the trial court instead use N.C. Pattern Jury Instruction 640.42, titled "Employment Relationship—Liability of Employer for Negligence in Hiring, Supervision, or Retention of an Employee." In addition to the elements from *Medlin*, that instruction included the disputed factors from *Little* and a requirement that the employee be found "incompetent." These latter two requirements, which this Court has now correctly deemed too inflexible, made the defendant's requested jury instruction partially inappropriate for this case. The trial court, however, declined to use any aspect of defendant's requested jury instruction on negligent hiring. Instead, the trial court instructed the jury only on ordinary common law negligence. Defendant then renewed its objection after the trial court instructed the jury. In response, the trial court stated, "I'll, again, overrule [the objections], but they are preserved for the record." Thus, defendant requested a specific instruction during the jury charge conference and objected to the trial court's instructions both before and after the instructions were given. Accordingly, defendant's objections to the jury instructions were properly preserved for appellate review.

¶ 88 The majority has properly "concluded that the Keiths' claim was a claim for negligence dependent on a theory of negligent hiring." As the majority also notes, "[w]here our precedent requires an element to support a claim or theory, the jury should be instructed to this effect." By instructing only on ordinary common law negligence, however, the trial court did not require the jury to find: (1) that Clark was unfit for the work she was hired to perform; (2) that defendant had notice of Clark's unfitness; or (3) that there was a nexus between the employment relationship and the injury. These are factual questions that must be resolved by a jury. As the majority notes, "in this case, the jury, not the court, must decide the outcome of the Keiths' claim." Because the jury was not properly instructed on the elements of negligent hiring and retention, defendant was prejudiced. Accordingly, I would reverse the Court of Appeals and remand this case for a new trial. Therefore, I respectfully concur in part and dissent in part.

Justice BERGER dissenting.

¶ 89 This Court has recognized the law's reluctance to hold individuals and organizations responsible for the criminal acts committed by others. *See Stein v. Asheville City Bd. Of Educ.*, 360 N.C. 321, 328, 626 S.E.2d 263, 268 (2006). Where no duty exists, liability should not be imposed. Today's opinion, however, increases the business community's exposure to liability for the intentional and unforeseeable acts of their employees. Because the Court of Appeals properly reversed and remanded to the trial court for entry of judgment notwithstanding the verdict in favor of defendant, I respectfully dissent.

¶ 90 To establish a claim for negligence, a plaintiff must show "the existence of a legal duty or obligation, breach of that duty, proximate cause and actual loss or damage." *Little v. Omega Meats I, Inc.*, 171 N.C. App. 583, 586, 615 S.E.2d 45, 48 (2005). "[T]he threshold question is whether [a] plaintiff[ ] successfully allege[s] [a] defendant had a legal duty to avert the attack on [plaintiff]." *Stein*, 360 N.C. at 328, 626 S.E.2d at 267. Absent this legal duty, a defendant cannot be liable to a plaintiff for negligence. This Court has recognized that, "[n]o legal duty exists unless the injury to the plaintiff was foreseeable and avoidable through due care." *Id.* Moreover, foreseeability generally depends on the facts of the particular case. *Id.* at 328, 626 S.E.2d at 267–68.

¶ 91 In cases where a plaintiff asserts liability founded on a defendant's relationship to a third party who injured them, the establishment of a legal duty hinges on whether defendant held a special relationship with

the third party. *See Id.* at 329, 626 S.E.2d at 268. This Court explained further that:

> [N]o special relationship exists between a defendant and a third person unless (1) the defendant knows or should know of the third person's violent propensities and (2) the defendant has the ability and opportunity to control the third person at the time of the third person's criminal acts.

Id. at 330, 626 S.E.2d at 269. Under a negligence theory, employment alone does not establish a special relationship.

¶ 92 In *Stein*, the plaintiffs brought a negligence claim against the defendant for the actions of third parties. *Id.* at 328, 626 S.E.2d at 268. There, the plaintiffs rested their claim on the failure of the defendant, a special school for behaviorally and emotionally handicapped children, to take reasonable steps to stop two gunmen who were students at the school. *Id.* This Court noted that the plaintiffs' asserted liability depended on whether the defendant's relationship with the gunmen amounted to a special relationship which would impose a duty on the defendant. *Id.* at 329, 626 S.E.2d at 268. Because the shooting occurred "entirely outside of [the] defendant's custody" as it took place well after normal school hours and not on property belonging to the defendant, this Court concluded that the defendant did not owe the plaintiff a legal duty to prevent the shooting. *Id.* at 332, 626 S.E.2d at 270.

¶ 93 Here, the claim against defendant based on the actions of Clark similarly hinges on whether a legal duty existed. Defendant could not have known or reasonably anticipated that Clark was a violent individual who would engage in a home invasion and armed robbery. After all, at worst, Clark's previous convictions were for non-violent misdemeanors, and defendant had not received any complaints concerning Clark's work or character. Moreover, at the time of the robbery, defendant had no ability or authority to exercise supervision or control over Clark's actions. The robbery in the instant case took place outside of Clark's normal working hours. An employer is not the guarantor of employee conduct at all times and for all purposes. Defendant did not and could not have reasonably anticipated that Clark would orchestrate a home invasion and armed robbery against one of defendant's clients. Because Clark's intentional criminal acts were not foreseeable, defendant did not owe plaintiffs a legal duty.

¶ 94 For similar reasons, I would also conclude that the Court of Appeals correctly determined that plaintiffs' evidence was insufficient

to establish a claim upon the theory of negligent hiring. As stated above, before an employer may be held liable to a plaintiff for negligent hiring, it must be shown that the employer owes the plaintiff a legal duty. *Little*, 171 N.C. App. at 587, 615 S.E.2d at 48.

¶ 95 The Court of Appeals in *Little* delineated three factors to determine when an employer owes a duty to a plaintiff under a negligent hiring theory:

> (1) [T]he employee and the plaintiff must have been in places where each had a right to be when the wrongful act occurred; (2) the plaintiff must have met the employee as a direct result of the employment; and (3) the employer must have received some benefit, even if only potential or indirect, from the meeting of the employee and the plaintiff.

171 N.C. at 588, 615 S.E.2d at 49. Courts decline to hold employers "liable for the acts of their . . .employees under the doctrine of negligent hiring or retention when *any one* of these three factors [i]s not proven." *Id.* at 588, S.E.2d at 49.

¶ 96 Here, Clark did not have a right to be in plaintiff's home and was not acting as a health care aide at the time the home invasion and robbery were committed. In addition, defendant has not received any benefit from Clark's actions in orchestrating the robbery. To the contrary, defendant's reputation is undoubtedly damaged due to Clark's actions. While Clark did indeed meet plaintiffs through her employment, all three factors must be met for a duty to be established. As a result, I would affirm the Court of Appeals.

KNC TECHNOLOGIES, LLC
v.
ERIC TUTTON AND i-TECH SECURITY AND NETWORK SOLUTIONS, LLC

No. 277A21

Filed 17 June 2022

Appeal and Error—interlocutory orders—of a business court judge—statement of grounds for appellate review

An appeal from a partial summary judgment order in a mandatory complex business case was dismissed where appellant failed to show that the order affected a substantial right or satisfied any of the other requirements under N.C.G.S. § 7A-27(a)(3) for an appeal as of right from an interlocutory order of a business court judge. Specifically, appellant's statement for the grounds of appellate review in its brief contained only bare assertions that the order met section 7A-27(a)(3)'s requirements while failing to allege sufficient facts and arguments to support those assertions.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion on plaintiff's motion for partial summary judgment and defendants' motion for summary judgment entered on 8 April 2021 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Davidson 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 9 May 2022.

Matthew W. Georgitis, Alexander L. Turner, and R. Matthew Van Sickle for plaintiff-appellant.

D. Stuart Punger Jr. for defendant-appellees.

BARRINGER, Justice.

¶ 1 In this matter, the appellant KNC Technologies, LLC noted an appeal as of right of an interlocutory order but has failed to show that the order affects a substantial right or otherwise satisfies the requirements for an appeal as of right to this Court from an interlocutory order of a business court judge. *See* N.C.G.S. § 7A-27(a)(3) (2021). Accordingly, we dismiss the appeal.

¶ 2 Pursuant to N.C.G.S. § 7A-27(a)(3), an appeal of right lies to this Court from an interlocutory order of a business court judge only if it "[a]ffects a substantial right," "[i]n effect determines the action and prevents a judgment from which an appeal might be taken," "[d]iscontinues the action," or "[g]rants or refuses a new trial." N.C.G.S. § 7A-27(a)(3). "It is the appellant's burden to present appropriate grounds for . . . acceptance of an interlocutory appeal, . . . and not the duty of this Court to construct arguments for or find support for appellant's right to appeal[.]" *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 218 (2016) (alterations in original) (quoting *Johnson v. Lucas*, 168 N.C. App. 515, 518, *aff'd per curiam*, 360 N.C. 53 (2005)). Additionally, "the North Carolina Rules of Appellate Procedure require that the appellant's brief contain a 'statement of the grounds for appellate review,' which must allege 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Id.* at 219 (quoting N.C. R. App. P. 28(b)(4)).

¶ 3 The appellant must present more than a bare assertion that the order affects a substantial right, in effect determines the action and prevents a judgment from which an appeal might be taken, discontinues the action, or grants or refuses a new trial. *See id.*; *see also* N.C. R. App. P. 28(b)(4). Appellants must demonstrate why the order has the claimed effect under N.C.G.S. § 7A-27(a)(3). *See Hanesbrands*, 369 N.C. at 219; *see also* N.C. R. App. P. 28(b)(4). If an appellant fails to carry its burden to present appropriate grounds for an interlocutory appeal as of right, this Court will on its own motion dismiss the appeal. *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 201 (1978) ("If an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves." (footnote omitted)); *cf. Hanesbrands*, 369 N.C. at 218 ("An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." (cleaned up)).

¶ 4 KNC Technologies acknowledges that it has appealed an interlocutory order. However, KNC Technologies' basis for this Court's review is limited to two statements: (1) that the interlocutory order affects a substantial right because the trial court "erroneously denied" its partial summary judgment motion on various claims and (2) that the order in effect determines the action and prevents a judgment from which an appeal might be taken because "[t]he denial of summary judgment prevents entry of a final order on those claims from which [KNC Technologies]

might appeal." This is a bare assertion, which is clearly not sufficient to satisfy an appellant's burden to present appropriate grounds for an interlocutory appeal as of right to this Court. Therefore, we dismiss KNC Technologies' appeal.

DISMISSED.

DAWN REYNOLDS-DOUGLASS
v.
KARI TERHARK

No. 43A21

Filed 17 June 2022

Attorney Fees—contract to purchase real estate—obligation to pay earnest money deposit and due diligence fee—evidence of indebtedness

After a buyer breached a contract to purchase real estate, which provided that the prevailing party in an action to recover the earnest money deposit would be entitled to collect "reasonable" attorney fees from the opposing party, the district court properly awarded attorney fees to the seller in her action to recover the earnest money deposit (and a due diligence fee) from the buyer. The contract—as a printed instrument signed by both parties that, on its face, evidenced a legally enforceable obligation for the buyer to pay both the deposit and the fee to the seller—constituted an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.1 (allowing parties to any "evidence of indebtedness" to recover attorney fees resulting from a breach). Further, the court did not err in awarding attorney fees exceeding the statutory cap set forth in section 6-21.2 because the additional amount represented what the seller incurred in the course of defending the award she initially received from a magistrate (and which the buyer appealed to the district court).

Justice BERGER dissenting.

Justice BARRINGER joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, No. COA-20-112, 2020

WL 7974326 (N.C. Ct. App. Dec. 31, 2020), finding no error in an order entered on 20 September 2019 by Judge Ned W. Mangum in District Court, Wake County. Heard in the Supreme Court on 14 February 2022.

David G. Omer for plaintiff-appellee.

Williams Mullen by Michael C. Lord for defendant-appellant.

ERVIN, Justice.

¶ 1 This case involves the issue of whether the trial court erred by awarding attorney's fees in an action seeking the recovery of money owed under a contract to purchase real estate which obligated the buyer to pay the seller a due diligence fee and an earnest money deposit. After the buyer breached the real estate contract, the seller brought an action in small claims court for the purpose of recovering the due diligence fee that was owed to her pursuant to that agreement. The real estate contract also provided that the prevailing party in an action seeking to recover the earnest money deposit was entitled to collect "reasonable attorney's fees" from the opposing party. After the trial court awarded the requested attorney's fees on appeal from a decision of the magistrate in plaintiff's favor, the buyer appealed, arguing that the contract did not constitute an "evidence of indebtedness" pursuant to N.C.G.S. § 6-21.2 and that the requested attorney's fee award lacked sufficient support in the relevant statutory provision. A majority of the Court of Appeals found no error in the challenged attorney's fees award. After careful consideration of the record in light of the applicable law, we affirm the decision of the Court of Appeals.

¶ 2 In mid-2017, plaintiff Dawn Reynolds-Douglass and her husband employed a real estate agent named Dee Love to assist them in listing their home for sale. As part of that process, Ms. Love advised plaintiff and her husband to complete a "Residential Property and Owners' Association Disclosure Statement" as required by Chapter 47E of the General Statutes of North Carolina. Plaintiff and her husband completed the required disclosure statement, except for leaving two items blank, the first of which addressed whether the property was "subject to any utility or other easements, shared driveways, party walls or encroachments" and the second of which addressed whether "any fees [were] charged by the association or by the association's management company in connection with the conveyance or transfer of the lot or property to a new owner."

¶ 3 On 23 July 2017, Ms. Love hosted an open house at which plaintiff's residence could be viewed by potential buyers, including defendant Kari Terhark. On the following day, defendant met with Ms. Love for the purpose of reviewing the disclosure statement that plaintiff and her husband had completed. At the conclusion of the review process, defendant signed each page of the disclosure statement and executed an "Offer to Purchase and Contract" in which she agreed to purchase plaintiff's property for $250,000. The Offer to Purchase and Contract provided, in pertinent part:

> (d) "Purchase Price":
>
> $250,000.00 paid in U.S. Dollars upon the following terms:
>
> $2,000.00 BY DUE DILIGENCE FEE made payable and delivered to Seller by the Effective Date.
>
> . . . .
>
> $2,500.00 BY (ADDITIONAL) EARNEST MONEY DEPOSIT made payable and delivered to Escrow Agent named in Paragraph 1(f) by cash, official bank check, wire transfer or electronic transfer no later than August 14, 2017 . . . .
>
> . . . .
>
> $245,500.00 BALANCE of the Purchase Price in cash at Settlement (some or all of which may be paid with the proceeds of a new loan).

In addition, the Offer to Purchase and Contract provided:

> (e) "Earnest Money Deposit": The Initial Earnest Money Deposit, the Additional Earnest Money Deposit and any other earnest monies paid or required to be paid in connection with this transaction, collectively the "Earnest Money Deposit," shall be deposited and held in escrow by Escrow Agent until Closing, at which time it will be credited to Buyer, or until this Contract is otherwise terminated. . . . In the event of breach of this Contract by Buyer, the Earnest Money Deposit shall be paid to Seller as liquidated damages and as Seller's sole and exclusive remedy for such breach, but without limiting Seller's rights under Paragraphs 4(d) and 4(e) for damage to the

> Property or Seller's right to retain the Due Diligence Fee. It is acknowledged by the parties that payment of the Earnest Money Deposit to Seller in the event of a breach of this Contract by Buyer is compensatory and not punitive, such amount being a reasonable estimation of the actual loss that Seller would incur as a result of such breach. The payment of the Earnest Money Deposit to Seller shall not constitute a penalty or forfeiture but actual compensation for Seller's anticipated loss, both parties acknowledging the difficulty [of] determining Seller's actual damages for such breach. If legal proceedings are brought by Buyer or Seller against the other to recover the Earnest Money Deposit, the prevailing party in the proceeding shall be entitled to recover from the non-prevailing party reasonable attorney fees and court costs incurred in connection with the proceeding.
>
> . . . .
>
> (i) "Due Diligence Fee": A negotiated amount, if any, paid by Buyer to Seller with this Contract for Buyer's right to terminate the Contract for any reason or no reason during the Due Diligence Period. It shall be the property of Seller upon the Effective Date and shall be a credit to Buyer at Closing. The Due Diligence Fee shall be non-refundable except in the event of a material breach of this Contract by Seller . . . .

On the same date, plaintiff and her husband accepted defendant's offer by initialing each page of the Offer to Purchase and Contract and signing the final page. After both parties had executed the Offer to Purchase and Contract, plaintiff and her husband removed their residence from the real estate market in anticipation of closing.

¶ 4 On 27 July 2017, defendant sent an e-mail to Ms. Love in which she stated that she intended to cancel the contract unless plaintiff and her husband agreed to reduce the purchase price by $5,500. In response, Ms. Love told defendant that she was in breach of the contract that she had made with plaintiff and plaintiff's husband. Defendant did not pay the $2,000 due diligence fee or the $2,500 earnest money deposit fee that were due to plaintiff and plaintiff's husband under the contract, with further negotiations that were intended to facilitate a closing ultimately proving unsuccessful.

¶ 5 On 29 September 2017, plaintiff, proceeding *pro se*, filed a complaint against defendant in small claims court seeking to recover the $2,000 due diligence fee. On 30 October 2017, the magistrate entered a judgment in favor of plaintiff and against defendant in the amount of $2,000. After defendant noted an appeal to the district court from the magistrate's judgment, the matter was referred to arbitration on 24 January 2018, with the arbitrator ultimately entering an award in the amount of $2,000 in favor of plaintiff. On 26 January 2018, defendant filed a separate claim against plaintiff in small claims court in which she sought $4,500 in damages and alleged that plaintiff had breached the purchase contract and was in "violation of the Property Disclosure Act" and in "violation of form 352-T," with plaintiff having retained an attorney in light of the filings of defendant's separate claim.

¶ 6 On or about 27 April 2018, plaintiff, acting through counsel, filed an amended complaint in which she sought to recover $2,000 for non-payment of the due diligence fee; $2,500 in damages for non-payment of the earnest money deposit; attorney's fees and court costs; and $9,000 in compensatory damages, an amount which plaintiff claimed to be the "reasonable difference between (i) the purchase price of the Property pursuant to the Agreement and (ii) the market value of the Property after it had to be re-listed." On 29 June 2018, defendant, who was also acting through an attorney at this point in the litigation, filed an answer to plaintiff's amended complaint. On 20 December 2018, plaintiff filed a motion seeking the entry of summary judgment in her favor, with defendant having filed a cross-motion seeking summary judgment in her own favor on 4 February 2019.

¶ 7 On 26 February 2019, the trial court entered an order granting summary judgment in favor of plaintiff. On 19 September 2019, plaintiff filed a motion seeking to have the trial court determine the amount of damages that she was entitled to recover and an application seeking an award of $15,564.74 in fees and costs, including attorney's fees, with plaintiff's counsel having asserted in an attached affidavit that plaintiff had incurred $13,067.70 in attorney's fees and $577.04 in court costs in prosecuting this action and $1,920 in attorney's fees relating to a bankruptcy petition that defendant had also filed. On 20 September 2019, the trial court entered an order finding that plaintiff was entitled to recover $18,343.92 from defendant, including $2,000 relating to the due diligence fee; $2,500 relating to the earnest money deposit; $776.22 in pre-judgment interest relating to the due diligence fee and earnest money deposit; and $13,067.70 in attorney fees. Defendant noted an appeal to the Court of Appeals from the trial court's order.

¶ 8 In seeking relief from the trial court's order before the Court of Appeals, defendant, proceeding *pro se*, argued that the trial court had erred by (1) granting summary judgment in plaintiff's favor in spite of the existence of genuine issues of material fact concerning the extent to which plaintiff had complied with the Residential Property Disclosure Act; (2) denying defendant's summary judgment motion; and (3) finding that plaintiff was entitled to recover attorney's fees. In rejecting defendant's challenge to the trial court's decision to enter summary judgment in plaintiff's favor with respect to the merits of plaintiff's claim, the Court of Appeals held that the trial court had correctly concluded that there were no genuine issues of material fact concerning the extent to which plaintiff was entitled to recover the due diligence fee and earnest money deposit from defendant. *Reynolds-Douglass v. Terhark*, No. COA-20-112, 2020 WL 7974326, at *2 (N.C. Ct. App. Dec. 31, 2020) (unpublished). In reaching this result, the Court of Appeals noted that plaintiff had filled out a standard disclosure statement; that defendant had "attested that she had received and examined [the s]tatement by signing each page, including the pages upon which [the inadvertently missing items] appeared"; that defendant had been "given the opportunity to read and review both documents"; that defendant had "attested that she did so" without having sought clarification regarding the statement before making an offer to purchase the property; and that defendant "did not argue that the Disclosure Statement was invalid until well after litigation had commenced in this matter." *Reynolds-Douglass*, 2020 WL 7974326, at *3.

¶ 9 In rejecting defendant's challenge to the trial court's attorney's fees award, the Court of Appeals held that the trial court had correctly awarded $13,067.70 in attorney's fees to plaintiff. *Id.* After noting that a party attempting to overturn an award of attorney's fees must prove that the trial court had abused its discretion, the Court of Appeals determined that defendant had not "challenge[d] the amount of the attorney's fees award, only the award itself." *Id.* According to the Court of Appeals, the trial court was authorized to award attorney's fees in this case pursuant to N.C.G.S. § 6-21.2, which provides that "parties to 'any note, conditional sale contract or other evidence of indebtedness' [can] recover attorney's fees resulting from a breach of the same, 'not in excess of fifteen percent (15%) of the outstanding balance owing.' " *Reynolds-Douglass*, 2020 WL 7974326, at *4 (citing N.C.G.S. § 6-21.2). In the Court of Appeals' view, the Offer to Purchase and Contract, which obligated defendant to pay the due diligence fee and earnest money deposit to plaintiff and provided that, "[i]f legal proceedings [we]re brought by Buyer or Seller against the other to recover the Earnest Money Deposit, the prevailing party in the proceeding shall be entitled to recover from the non-prevailing

party reasonable attorney's fees and costs incurred in connection with the proceeding," constituted an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2, so that an award of attorney's fees was authorized in this instance. *Reynolds-Douglass*, 2020 WL 7974326, at *3–4. In reaching this conclusion, the Court of Appeals relied upon *Stillwell Enters., Inc. v. Interstate Equip. Co.*, 300 N.C. 286 (1980), in which this Court determined that "[t]he term 'evidence of indebtedness' as used in N.C.[G.S.] § 6-21.2 refers to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money." *Reynolds-Douglass*, 2020 WL 7974326, at *4 (quoting *Stillwell*, 300 N.C. at 294). In light of the fact that the Offer to Purchase and Contract in this case "was a printed instrument signed by both parties" which "on its face evidenced a legally enforceable obligation for Defendant to pay the Due Diligence fee and Earnest Money Deposit to Plaintiff," the Court of Appeals reasoned that the contract constituted an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2, so that the trial court was authorized to make an award of attorney's fees in plaintiff's favor. *Id.*

¶ 10 Although Judge Murphy agreed with his colleagues in concluding that the trial court had not erred by granting summary judgment in plaintiff's favor, he disagreed with his colleagues' decision to uphold the trial court's attorney's fees award. *Reynolds-Douglass*, 2020 WL 7974326, at *5 (Murphy, J., concurring, in part, and dissenting, in part). As an initial matter, Judge Murphy concluded that the Offer to Purchase and Contract did not authorize the recovery of attorney's fees because the appropriateness of such an award hinged upon whether "legal proceedings [we]re brought . . . to recover the Earnest Money Deposit" and because this proceeding had initially been brought for the purpose of recovering the due diligence fee rather than the earnest money deposit. *Reynolds-Douglass*, 2020 WL 7974326, at *5–6.

¶ 11 In addition, Judge Murphy concluded that N.C.G.S. § 6-21.2 did not authorize an award of attorney's fees in this case given that the Offer to Purchase and Contract did not constitute an "evidence of indebtedness" or a "note or conditional sale contract" as required by the relevant statutory provision. *Reynolds-Douglass*, 2020 WL 7974326, at *6. According to Judge Murphy, the majority at the Court of Appeals had erroneously extended *Stillwell* to encompass a real estate contract even though the principle enunciated in *Stillwell* was "only relevant for commercial transactions" in light of our statements that the definition of an "evidence of indebtedness" adopted in that case did "no violence to any of the statute's specific provisions and accords well with its general

purpose to validate a debt collection remedy expressly agreed upon by contracting parties" and that N.C.G.S. § 6-21.2 was intended to "supplement those principles of law generally applicable to commercial transactions." *Reynolds-Douglass*, 2020 WL 7974326, at *7 (quoting *Stillwell*, 300 N.C. at 293–94). As a result, Judge Murphy would have held that the Offer to Purchase and Contract at issue in this case was not an "evidence of indebtedness" for purposes of *Stillwell* and that his colleagues' determination to the contrary was "overbroad" and would authorize an award of attorney's fees pursuant to "every contract where one party is to pay money [as an] evidence of indebtedness." *Id.*

¶ 12 In the same vein, Judge Murphy would have held that the Offer to Purchase and Contract was not an "evidence of indebtedness" for purposes of the relevant statutory provision given that "[t]he general purpose of N.C.G.S. § 6-21.2 is to 'validate a debt collection remedy expressly agreed upon by contracting parties' " and that, at least in his view, a contract to purchase real estate did not fit within the confines of this stated purpose. *Reynolds-Douglass*, 2020 WL 7974326, at *8. Finally, Judge Murphy noted that, even if the Offer to Purchase and Contract in this case constituted an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2, the amount of attorney's fees awarded in this case should be capped at 15% of the $2,000 due diligence fee, making the trial court's decision to award a total of $13,067.70 in attorney's fees unlawfully excessive. *Id.* Defendant noted an appeal to this Court from the Court of Appeals' decision based upon Judge Murphy's dissent.[1]

¶ 13 In seeking relief from the Court of Appeals' decision before this Court, defendant, who is currently represented by counsel, begins by arguing that the Offer to Purchase and Contract did not authorize an award of attorney's fees in plaintiff's favor given that, while the contract authorized such an award in an action brought "to recover the Earnest Money Deposit," the present case had been initiated for the purpose of recovering the due diligence fee. In view of the fact that she had never paid the earnest money deposit to plaintiff, defendant contends that there had never been an earnest money deposit that plaintiff was entitled to recoup and that the $2,500 amount that plaintiff was authorized to collect pursuant to the Offer to Purchase and Contract relating to the earnest money deposit constituted nothing more than an award of liquidated damages.

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1. Although defendant sought discretionary review of the Court of Appeals' decision with respect to certain additional issues, this Court denied defendant's petition.

¶ 14 Secondly, defendant argues that the Offer to Purchase and Contract did not constitute an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2 as defined in *Stillwell* given that the relevant statutory provision "applies to 'supplement those principles of law generally applicable to commercial transactions' and is only relevant for financial debt instruments akin to promissory notes and conditional sale contracts." In defendant's view, neither the due diligence fee nor the earnest money deposit resemble the recurring rental payments provided for in the lease agreement that was at issue in *Stillwell*, with the essential thrust of the Offer to Purchase and Contract as a real estate agreement precluding it from being "an instrument of indebtedness within the scope of Section 6-21.2[ ]." As further support for this contention, defendant directs our attention to *Forsyth Mun. Alcoholic Beverage Control Bd. v. Folds*, 117 N.C. App. 232, 238 (1994), which she describes as holding that attorney's fees could not be collected in an action arising from the breach of a contract for the sale of real property, and *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 604 (2006), in which the Court of Appeals analyzed whether an employer-employee agreement came within the scope of N.C.G.S. § 6-21.2. As a result, defendant contends that the Court of Appeals' determination that the Offer to Purchase and Contract constituted an "evidence of indebtedness" conflicts with the purpose sought to be served by N.C.G.S. § 6-21.2, which is to "validate a debt collection remedy expressly agreed upon by contracting parties." *Stillwell*, 300 N.C. at 294.

¶ 15 Thirdly, defendant argues that, in accordance with the literal language of the Offer to Purchase and Contract, she cannot be held liable to plaintiff for the earnest money deposit given that the deposit was to be "payable and delivered to Escrow Agent." Defendant asserts that her obligation to pay the earnest money deposit had not "matured" at the time that the agreement was cancelled on 27 July 2017 since the earnest money deposit was not due to be paid until 14 August 2017. Defendant also notes that N.C.G.S. § 6-21.2(5) requires a party seeking to recover attorney's fees to provide notice to the debtor "that the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' [of the debt] shall be enforced" and contends that plaintiff had failed to provide proper notice that she intended to seek an award of attorney's fees in this action. Finally, defendant claims that Judge Murphy correctly concluded that the trial court's decision to award a total of $13,067.70 in attorney's fees violated the statutory cap on attorney's fees awards set out in N.C.G.S. § 6-21.2.

¶ 16 In seeking to persuade us to affirm the Court of Appeals' decision, plaintiff begins by arguing that defendant's contentions that the earnest

money deposit was owed to the escrow agent rather than plaintiff, that plaintiff's claim for the earnest money deposit had not "matured," and that plaintiff had failed to provide proper notice of its attorney's fees claim were not properly before this Court given that these issues had not been mentioned by either the majority or dissenting opinions at the Court of Appeals, citing N.C. R. App. P. 16(b) (providing that, "[w]hen the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals," this Court's review "is limited to a consideration of those issues that are . . . specifically set out in the dissenting opinion as the basis for that dissent"). In addition, plaintiff contends that she was allowed to collect attorney's fees under the contract pursuant to N.C.G.S. § 6-21.2 given that the Offer to Purchase and Contract expressly allowed for the recovery of attorney's fees by "the prevailing party" in a proceeding brought to recover the earnest money deposit.

¶ 17 According to plaintiff, defendant's contention that the Offer to Purchase and Contract does not constitute an "evidence of indebtedness" as defined in *Stillwell* is "inconsistent with both established case law and the plain language of" N.C.G.S. § 6-21.2. More specifically, plaintiff contends that the Offer to Purchase and Contract is "(i) a printed or written instrument, (ii) signed or otherwise executed by the obligor(s), (iii) which evidences on its face a legally enforceable obligation to pay money," with this being all that is required of an "evidence of indebtedness" in accordance with *Stillwell*, 300 N.C. at 294. In plaintiff's view, defendant's assertion that N.C.G.S. § 6-21.2 only applies to "commercial" agreements lacks merit given that nothing in the relevant statutory language limits the applicability of N.C.G.S. § 6-21.2 to commercial agreements, with plaintiff having pointed to the decisions of the Court of Appeals in *Crist v. Crist*, 145 N.C. App. 418 (2001) (holding that a promissory note provided in the context of a domestic relations dispute was subject to N.C.G.S. § 6-21.2), and *Four Seasons Homeowners Ass'n, Inc. v. Sellers*, 72 N.C. App. 189, 192 (1984) (holding that a "Declaration of Covenants, Conditions and Restrictions" applicable to a subdivision constituted an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2), as further support for this contention. According to plaintiff, treating the Offer to Purchase and Contract as an "evidence of indebtedness" is "directly" consistent with the purpose sought to be served by N.C.G.S. § 6-21.2, which is intended to "validate a debt collection remedy expressly agreed upon by contracting parties." *Stillwell*, 300 N.C. at 294.

¶ 18 Finally, plaintiff asserts that she is entitled to retain the full amount of the trial court's attorney's fees award, with the $13,067.70 amount set out in the trial court's order not being excessive given that she had

incurred these fees in the course of defending the judgment that she had previously obtained before the magistrate and that was affirmed multiple times throughout defendant's subsequent appeals. More specifically, plaintiff asserts that, although she represented herself in the initial small claims proceeding before the magistrate and in the subsequent arbitration proceeding, she had decided that she needed to hire an attorney after defendant sought relief from the magistrate's decision and the arbitrator's award and asserted separate claims against plaintiff. In the absence of an award of attorney's fees "for time expended in defense of" her judgment, plaintiff contends that it would not have been "economically feasible . . . to try and preserve that judgment," citing *City Fin. Co. of Goldsboro v. Boykin*, 86 N.C. App. 446, 449 (1987) (holding that, "[u]pon a finding that defendants were entitled to attorney's fees in obtaining their judgment, any effort by defendants to protect that judgment" during subsequent appeals "should likewise entitle them to attorney's fees"), and *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 377 (2005) (holding that, "because plaintiff was entitled to attorneys' fees for hours expended at the trial level, we hold plaintiff is entitled to attorneys' fees on appeal, especially in light of the limited amount of money at issue in the litigation"). As a result, plaintiff urges us to affirm the Court of Appeals' decision in its entirety.

¶ 19 According to well-established North Carolina law, "to overturn the trial judge's determination on the issue of attorneys' fees, the defendant must show an abuse of discretion," unless the "appeal presents a question of statutory interpretation," in which case "full review is appropriate," with the trial court's conclusions of law being subject to de novo review. *Finch v. Campus Habitat, L.L.C.*, 220 N.C. App. 146, 147 (2012) (quoting *Bruning & Federle Mfg. Co. v. Mills*, 185 N.C. App. 153, 155–56 (2007)). As a result, we will decide any issues of statutory construction de novo while evaluating the nature and extent of any statutorily authorized attorney's fees awards for an abuse of discretion.

¶ 20 "[T]he general rule [in North Carolina] has long obtained that a successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such a recovery is expressly authorized by statute." *Stillwell*, 300 N.C. at 289 (citing *Hicks v. Albertson*, 284 N.C. 236 (1973)). According to N.C.G.S. § 6-21.2, which authorizes an award of attorney's fees in certain actions,

> [o]bligations to pay attorney['s] fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and

> enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:
>
> (1) If such note, conditional sale contract or other evidence of indebtedness provides for attorney['s] fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.
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> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C.G.S. § 6-21.2 (2021). As a result, N.C.G.S. § 6-21.2 creates an exception to the general rule providing that each party to civil litigation is responsible for bearing his or her own attorney's fees applicable to "any note, conditional sale contract, or other evidence of indebtedness." For that reason, the next issue that we must address is whether the Offer to Purchase and Contract comes within the ambit of N.C.G.S. § 6-21.2.

¶ 21 After carefully considering the record and the applicable law, we hold that the majority at the Court of Appeals correctly concluded that the Offer to Purchase and Contract at issue in this case constituted an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2. In *Stillwell*, 300 N.C. at 287, this Court examined an agreement pursuant to which the defendant had leased a road scraper to the plaintiff. According to the lease agreement, the plaintiff was required to make "monthly rental payments" to the defendant, with the plaintiff "further agree[ing] to pay to lessor a reasonable attorney's fee if the obligation evidenced hereby be collected by an attorney at law after maturity." *Id.* at 289. After granting summary judgment in the defendant's favor following the plaintiff's refusal to make payments required under the lease, the trial court awarded over $24,000 to the defendant, with this amount having included more than $2,000 in attorney's fees. *Id.* at 288. Although the Court of Appeals vacated the trial court's attorney's fee award "on the grounds that the

lease was not the type of agreement which would entitle defendant to recover for attorneys' fees under the general provisions of [N.C.]G.S. [§] 6-21.2," this Court reinstated the trial court's decision on the grounds that the lease agreement did, in fact, constitute an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2. *Id.* at 289, 294.

¶ 22 In construing the reference to an "evidence of indebtedness" contained in N.C.G.S. § 6-21.2, we began by acknowledging that we were required to "give that interpretation to the term at issue which best harmonizes with the language, spirit, and intent of the act in which it appears." *Id.* at 292 (citing *Stevenson v. City of Durham*, 281 N.C. 300 (1972)). After noting that N.C.G.S. § 6-21.2 had "become effective on the same date as the Uniform Commercial Code," we concluded that the relevant statutory provision "was intended to supplement those principles of law generally applicable to commercial transactions,"[2] *id.* at 293 (cleaned up), before holding that

> the term "evidence of indebtedness" in N.C.G.S. § 6-21.2 is intended to encompass more than security agreements or traditional debt financing arrangements. It is of course clear that a "note" or "conditional sale contract" is the most common type of "evidence of indebtedness" contemplated by the statute; indeed, it is in connection with these types of agreements that attorneys' fee provisions are most commonly employed. However, the express terms of Section 5 of the statute, along with the terms employed in other provisions, demonstrate that G.S. 6-21.2 applies not only to notes and conditional sale contracts, but also to such "other evidence of indebtedness" as "other writings evidencing an unsecured debt" or "any other such security agreement which evidences both a monetary obligation and a lease of specific goods." N.C.G.S. § 6-21.2(5). We agree, therefore, that "these provisions indicate, either explicitly or implicitly, that an evidence of indebtedness is a writing which acknowledges a debt or obligation and which is executed by the party obligated thereby."

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2. The fact that a particular statutory provision was enacted in part to "supplement" the law relating to "commercial transactions" does not, as matter of logic, mean that the application of the relevant statutory provision should be limited to such transactions in the event that the literal language of the statute suggests that it should be given a broader scope.

> More specifically, we hold that the term "evidence of indebtedness" as used in N.C.G.S. § 6-21.2 has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money. Such a definition, we believe, does no violence to any of the statute's specific provisions and accords well with its general purpose to validate a debt collection remedy expressly agreed upon by contracting parties.
>
> Viewed in light of this definition, defendant's lease agreement with plaintiff is obviously an "evidence of indebtedness." The contract acknowledges a legally enforceable obligation by plaintiff-lessee to remit rental payments to defendant-lessor as they become due, in exchange for the use of the property which is the subject of the lease. The contract, including the provision in Paragraph 21 for attorneys' fees, is in writing and is executed by the parties obligated under its terms. Plaintiff has made no assertion that the contract represents anything less than an arm's length transaction consummated by mutual agreement between the parties. Under these circumstances, we see no reason why the obligation by plaintiff to pay attorneys' fees incurred by defendant upon collection of the debts arising from the contract itself should not be enforced to the extent allowed by N.C.G.S. § 6-21.2.

Id. at 293–95 (cleaned up). Thus, the appropriate definition of an "evidence of indebtedness" for purposes of N.C.G.S. § 6-21.2 is the one that this Court enunciated in *Stillwell*.

¶ 23 As the Court of Appeals recognized, the Offer to Purchase and Contract at issue in this case was signed by both parties and, on its face, evidences a legally enforceable obligation that defendant pay the plaintiff both the due diligence fee and the earnest money deposit. As was the case in *Stillwell*, there has been "no assertion that the contract represents anything less than an arm's length transaction consummated by mutual agreement between the parties." *See Stillwell*, 300 N.C. at 294. In light of this set of circumstances, there is no reason for treating the attorney's fees provision contained in the Offer to Purchase and Contract as anything other than an "evidence of indebtedness" that is enforceable pursuant to N.C.G.S § 6-21.2.

¶ 24 A careful examination of the language in which N.C.G.S. § 6-21.2 is couched, the circumstances surrounding its enactment, and the subsequent decisions construing the relevant statutory language provides no support for defendant's contention that N.C.G.S. § 6-21.2 does not apply outside the context of a commercial agreement. As we noted in *Stillwell*, "[t]he statute, being remedial, 'should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.' " 300 N.C. at 293 (quoting *Hicks v. Albertson*, 284 N.C. 236, 239 (1973)). For that reason, this Court has previously rejected any contention that N.C.G.S. § 6-21.2 should be construed narrowly. Moreover, while our opinion in *Stillwell* did indicate that the "legislative history [of N.C.G.S. § 6-21.2] demonstrate[d] that it was intended to supplement those principles of law generally applicable to commercial transactions," we did not hold that the relevant statutory language only applied in the context of a commercial transaction, note that *Stillwell* expressly rejected such a limited reading of the relevant statutory language, and reiterate that this Court described N.C.G.S. § 6-21.2 as having been "enacted to amend certain provisions of the State's Uniform Commercial Code 'and other related statutes.' " *Id.* at 293 (quoting Chapter 562 of the 1967 Session Laws). As a result, *Stillwell* reflects a much more expansive interpretation of the relevant statutory language, pursuant to which "the term 'evidence of indebtedness' as used in [N.C.]G.S. [§] 6-21.2 has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money," *id.* at 294, than that advocated for by defendant.

¶ 25 As we have already noted, defendant has directed our attention to *Forsyth Mun. Alcoholic Beverage Control Bd. v. Folds*, 117 N.C. App. 232, 238 (1994), which she describes as holding that attorney's fees awards are not available in actions arising from the breach of a contract for the sale of real property. In that case, the Court of Appeals stated that:

> As a general rule contractual provisions for attorney's fees are invalid in the absence of statutory authority. This is a principle that has long been settled in North Carolina and fully reviewed by our Supreme Court in *Stillwell* . . . .
>
> This Court has recently enunciated an exception to that principle in the case of separation agreements in particular, *Edwards v. Edwards*, 102 N.C. App. 706, 403 S.E.2d 530, *cert. denied* 329 N.C. 787, 408 S.E.2d 518 (1991); *Bromhal v. Stott*, 116 N.C. App. 250, 447

> S.E.2d 481 (1994) (Greene, J. dissenting in part), and indeed in the case of settlement agreements in general. *Carter v. Foster*, 103 N.C. App. 110, 404 S.E.2d 484 (1991).
>
> Nevertheless, we know of no basis in North Carolina law for the allowance of attorney's fees in a dispute arising out of a contract for the sale of real property, as is involved in this case. Therefore, on the basis of those well-settled principles, we reverse the judgment of the trial court insofar as it allowed attorney's fees to the plaintiffs . . . .

Id. at 238. In addition, defendant relies upon *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 604 (2006), in which the Court of Appeals attempted to determine whether N.C.G.S. § 6-21.2 allowed for the collection of attorney's fees in an action relating to the breach of an employer-employee agreement. As a result of the fact that the trial court had "made no findings of fact [as to] whether the contract at issue [wa]s a 'printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money' or whether this contract relates to commercial transactions" as required by *Stillwell*, the Court of Appeals remanded that case to the trial court for further findings of fact. *Id.* at 604–05. In view of the fact that neither of these decisions purports to alter the definition of an "evidence of indebtedness" set out in *Stillwell* or addresses claims for the recovery of specific fees of the sort that are at issue in this case, neither of them supports defendant's argument that N.C.G.S. § 6-21.2 has no application outside the context of a commercial agreement.[3]

¶ 26 Defendant's other arguments concerning the applicability of N.C.G.S. § 6-21.2 to the circumstances at issue in this case are equally unavailing. Although plaintiff attempted to recover the due diligence fee in her

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3. As an aside, we note that nothing in either the relevant statutory language or in *Stillwell* suggests that any sort of transaction or category of transactions is categorically excluded from the definition of an "evidence of indebtedness" for which an award of attorney's fees is authorized pursuant to N.C.G.S. § 6-21.2. Instead, the test for determining whether a particular instrument is or is not an "evidence of indebtedness" is the more generic one set out in *Stillwell*. Similarly, we note that *Stillwell* involved a contract for a lease of equipment, which does not fall within the category of "notes, securities, mortgages, [or] deeds of trust." *See also Four Seasons Homeowners Ass'n, Inc. v. Sellers*, 72 N.C. App. 189, 192 (1984) (holding that a "Declaration of Covenants, Conditions and Restrictions" signed by homeowners in a subdivision was an "evidence of indebtedness" pursuant to N.C.G.S. § 6-21.2); *Crist v. Crist*, 145 N.C. App. 418 (2001) (holding that a note provided in the context of a domestic relations dispute was subject to N.C.G.S. § 6-21.2).

initial small claims action, she restated her pleadings on appeal to assert a claim for the earnest money deposit as well. As a result, this action clearly involves a "legal proceeding[ ] . . . brought by Buyer or Seller against the other to recover the Earnest Money Deposit" in which plaintiff is authorized to seek and obtain an award of attorney's fees.

¶ 27 Moreover, as plaintiff notes, defendant's contentions relating to the identity of the party to whom the earnest money deposit was due, the "maturity" of plaintiff's claim for the earnest money deposit, and the absence of notice were not mentioned in either of the opinions filed at the Court of Appeals and are not properly before the Court for that reason. In addition, none of those arguments have any substantive merit. Although the Offer to Purchase and Contract did provide that the earnest money deposit should be made "payable and delivered to Escrow Agent," defendant's failure to make the required payment to the escrow agent constituted a breach of contract sufficient to trigger plaintiff's right to recover the earnest fee deposit from defendant as liquidated damages. The same provision of the contract defeats defendant's contention that plaintiff's right to recover the amount of the earnest money deposit had not yet "matured." Finally, defendant is not entitled to any relief from the trial court's attorney's fees award based upon an alleged lack of notice given that defendant continued to participate in the litigation of this case before the trial court without objecting on the basis of an alleged lack of notice after having been informed in the amended complaint that plaintiff sought to obtain an award of attorney's fees from defendant.

¶ 28 Finally, we hold that the trial court did not err in awarding $13,067.70 in attorney's fees to plaintiff given that the relevant fees were incurred in the course of defending the judgment that plaintiff had initially received from the magistrate. In *City Fin. Co. of Goldsboro*, 86 N.C. App. at 449, the Court of Appeals held that the trial court had erred by refusing to award additional attorney's fees that the defendants had incurred while defending a judgment that they had obtained in an action brought pursuant to N.C.G.S. § 75-1.1 from a motion for relief from judgment pursuant to N.C.G.S. § 1A-1, Rule 60, on the theory that, "[u]pon a finding that defendants were entitled to attorney's fees in obtaining their judgment, any effort by defendants to protect that judgment should likewise entitle them to attorney's fees." In reaching this conclusion, the Court of Appeals noted that this Court had previously upheld an award of attorney's fees pursuant to N.C.G.S. § 6-21.1(a) on the theory that

> [t]he obvious purpose of this statute is to provide relief for a person who has sustained injury or property

> damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that [it] is not economically feasible to bring suit on his claim. In such a situation the Legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. . . . This statute, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.

City Fin. Co. of Goldsboro, 86 N.C. App. at 449–50 (second and third alterations in original) (quoting *Hicks v. Albertson*, 284 N.C. 236, 239 (1973)); *see also Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 76 (2000) (allowing the consideration of a request for an award of attorney's fees on remand in reliance upon *City Fin. Co. of Goldsboro*); *Eley v. Mid/East Acceptance Corp. of N.C., Inc.*, 171 N.C. App. 368 (2005); *Garlock v. Henson*, 112 N.C. App. 243, 247 (1993). Similarly, in this case, it "would not have been economically feasible," *id.* at 450, for plaintiff to continue to defend the judgment that she had obtained before the magistrate if the trial court lacked the authority to award attorney's fees in connection with the proceedings before the district court, with a contrary determination necessarily placing plaintiff in the position of either incurring legal fees in excess of the judgment amount in order to defend it or abandoning her attempts to seek relief based upon defendant's breaches of contract. As a result, in light of the general principle enunciated by the Court of Appeals in *City Fin. Co. of Goldsboro* and upheld by this Court in *Gray*, the trial court did not err by awarding plaintiff $13,067.70 in attorney's fees in this case.

¶ 29 A careful review of the record demonstrates that defendant owed plaintiff the due diligence fee, the amount of the earnest money deposit, and attorney's fees incurred during the legal proceedings undertaken to recover those fees. In view of the fact that these terms are clear and unambiguous and the fact that the parties agreed to them, we are unable to discern any reason for concluding that the Offer to Purchase and Contract does not constitute a written "obligation to pay money" or an "evidence of indebtedness" pursuant to N.C.G.S. § 6-21.2. In addition, we are unable to see why the limitation upon the amount of attorney's fees set out in N.C.G.S. § 6-21.2 should hinder plaintiff's ability to recoup attorney's fees incurred in defense of the judgment that she obtained before the magistrate. As a result, for all of these reasons, the decision of the Court of Appeals is affirmed.

AFFIRMED.

Justice BERGER dissenting.

¶ 30 The Court's approach today marks a significant change in the jurisprudence of our State. Because the majority has turned away from the principle that "the non-allowance of counsel fees has prevailed as the policy of this state at least since 1879," *Stillwell Enters., Inc. v. Interstate Equip. Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980), I respectfully dissent.

¶ 31 This Court previously stated that "[a]lthough [N.C.]G.S. [§] 6-21.2 was not itself codified as a constituent section of Chapter 25 of the General Statutes (the Uniform Commercial Code [or UCC]), we believe its legislative history clearly demonstrates that it was intended to supplement those principles of law generally applicable to commercial transactions." *Id.* at 293, 266 S.E.2d at 817. Relying on *Stillwell*, the Court of Appeals has held that there is "no basis in North Carolina law for the allowance of attorney's fees in a dispute arising out of a contract for the sale of real property." *Forsyth Mun. Alcoholic Beverage Control Bd. v. Folds*, 117 N.C. App. 232, 238, 450 S.E.2d 498, 502 (1994). Thus, N.C.G.S. § 6-21.2 is not applicable to this case and recovery of attorney's fees is not permitted by the statute.

¶ 32 Even assuming that recovery of attorney's fees was allowable here, subsection 6-21.2(2) sets forth a specific formula to be used in calculating allowable attorney's fees absent such a formula or designation in the contract, as is the case here. Because no such formula is stated in the contract, the statutory formula must be used in calculating attorney's fees. The majority today expands the application of section 6-21.2 beyond what this Court has previously determined to be the intent of the legislature by failing to utilize the calculation method expressly called for in the statute.

¶ 33 "[T]he jurisprudence of North Carolina traditionally has frowned upon contractual obligations for attorney's fees as part of the costs of an action." *Stillwell*, 300 N.C. at 289, 266 S.E.2d at 814 (quoting *Supply, Inc. v. Allen*, 30 N.C. App. 272, 276, 227 S.E.2d 120, 123 (1976)). The rule has "long obtained" that attorney's fees are not awarded "unless such a recovery is expressly authorized by statute[,] . . . [e]ven in the face of a carefully drafted contractual provision indemnifying a party for such attorneys' fees." *Id.* at 289, 266 S.E.2d at 814–15 (citation omitted); *see also Baxter v. Jones*, 283 N.C. 327, 330, 196 S.E.2d 193, 196 (1973) ("Except as so provided by statute, attorneys' fees are not allowable.").

In other words, a statute must expressly allow for recovery of attorney's fees before a court can order payment of the same.

¶ 34 Section 6-21.2 allows for recovery of reasonable attorney's fees for collection "upon any note, conditional sale contract or other evidence of indebtedness." N.C.G.S. § 6-21.2 (2021). When applying N.C.G.S. § 6-21.2, we have instructed that the statute " 'should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly falling within its intended scope.' " *Stillwell*, 300 N.C. at 293, 266 S.E.2d at 817 (quoting *Hicks v. Albertson*, 284 N.C. 236, 239, 200 S.E.2d 40, 42 (1972)).

¶ 35 The majority contends that "*Stillwell* reflects a much more expansive interpretation of the relevant statutory language" to include any written "evidence of indebtedness." This interpretation would allow collection of attorney's fees for any case in which there is written evidence of a legally enforceable debt. This determination runs counter to this Court's stated goal in *Stillwell* to interpret the statute based on the legislature's purpose in enacting the law and its subsequent determination that the statute's purpose was to supplement laws intended to govern commercial transactions.

¶ 36 The term "evidence of indebtedness" is used throughout the General Statutes of North Carolina to refer to notes, securities, mortgages, deeds of trust, and similar written documents.[1] *See*, *e.g.*, N.C.G.S. § 25-9-109(d)(14) (2021); N.C.G.S. § 45-36.3(a) (2021); N.C.G.S. § 47-20(d) (2021); N.C.G.S. § 53-232.10(a) (2021); N.C.G.S. § 54B-244(b)(3)(h) (2021); N.C.G.S. § 58-7-173(1), (6)–(7) (2021); N.C.G.S. § 78A-2(11) (2021); N.C.G.S. § 115C-413 (2021); N.C.G.S. § 122D-3(4) (2021). The residential sales

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1. The majority appears to quote this language in footnote 3 to support its expansive reading. However, the majority omits "or similar documents" from the quoted language. This omission is meaningful because a lease of equipment is a "similar document." For example, in a mortgage, title remains with the seller while the buyer makes installment payments until the debt is paid off. While not exactly the same, a lease contemplates an ongoing debt relationship in which an owner of property retains title while the terms of the lease are satisfied. In addition, a lease is also similar to the definition of a conditional sales contract, which is defined as "[a] contract for the sale of goods under which the buyer makes periodic payments and the seller retains title to or a security interest in the goods." *Retail Installment Contract*, *Black's Law Dictionary* (11th ed. 2019); (the definition of conditional sales contract in *Black's* says *see Retail Installment Contract*); *see also North Carolina Estate Settlement Practice Guide* § 18:5 (2013).

At any rate, while the lease in *Stillwell* is similar to a mortgage or a conditional sales contract, it is clearly distinguishable from a residential real estate contract like the one at issue in this case because a residential real estate contract does not on its face contemplate an ongoing debt relationship between the buyer and seller and does not provide for installment payments or one party retaining title to the property.

contract here is far different from the written evidence of indebtedness contemplated by the statute.

¶ 37 Furthermore, the majority's reading of *Stillwell* as an "expansive interpretation" of section 6-21.2 goes against North Carolina's history of barring the recovery of attorney's fees unless expressly authorized by the legislature. Because this Court previously determined that the legislature intended section 6-21.2 to apply solely to commercial transactions under the UCC, it should not be applied to a private sale of real property. Our inquiry should end there.

¶ 38 However, even if we assume that section 6-21.2 applies, the majority disregards the statutory formula set forth therein concerning the calculation of attorney's fees. Subsection (2) of this statute, expressly provides that

> [i]f such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

N.C.G.S. § 6-21.2(2).

¶ 39 The contract at issue states that if legal proceedings are brought "to recover the Earnest Money Deposit, the prevailing party in the proceeding shall be entitled to recover . . . reasonable attorney fees." If section 6-21.2 applies here, as the majority holds, the 15% limitation on recovery is applicable because the contract gives no specific formula for calculating attorney's fees. The statute does not provide any alternative calculation method.

¶ 40 Instead, the trial court based the amount granted for attorney's fees in this case, $13,067.70, on an attorney's affidavit of fees incurred. The majority justifies this amount based on a single Court of Appeals decision to award attorney's fees based on the attorney's time spent on an appeal in order to make it "economically feasible" to defend a judgment. *See City Fin. Co. of Goldsboro v. Boykin*, 86 N.C. App. 446, 450, 358 S.E.2d 83, 85 (1987).

¶ 41 The legislature has never authorized payment of attorney's fees based on an attorney's time spent on a case. Furthermore, the statute at issue in *City Fin. Co. of Goldsboro*, N.C.G.S. § 75-16.1, is similar to N.C.G.S. § 6-21.1, which differs significantly from the statute at issue

here. Section 6-21.1 provides no formula for attorney's fees to be awarded and only applies to recovery of attorney's fees in suits for personal injury, suits for property damage, or suits against insurance companies; none of which are at issue today.

¶ 42 The statute at issue today is clear: to determine the proper amount for attorney's fees we simply ascertain the outstanding balance of the contract and award fifteen percent of that amount. N.C.G.S. § 6-21.2(2). Here, the contract designates that "[i]n the event of breach of this Contract by Buyer, the Earnest Money Deposit shall be paid to Seller as liquidated damages and as Seller's sole and exclusive remedy for such breach." It further states that this amount "is compensatory and not punitive, [with] such amount being a reasonable estimation of the actual loss that Seller would incur as a result of such breach." This provision clarifies that it does not preclude the seller from the right to retain the due diligence fee, which a separate section designates as $2,000, but it also expressly states that the award of attorney's fees is "to recover the Earnest Money Deposit." Thus, the contract ties the recovery of attorney's fees directly and exclusively to the earnest money deposit.

¶ 43 Having determined that section 6-21.2 applies, subsection (2) calls for recovery of attorney's fees based on a percentage of the outstanding balance. The contractual provision at issue expressly ties attorney's fees to the earnest money deposit. Therefore, the proper calculation of attorney's fees would be: $2,500 (earnest money deposit) x 15% (statutory rate) = $375 (in attorney's fees). There is no basis for an award of $13,067.70 under any statute, and such a large award would appear to incentivize costly litigation.

¶ 44 Ultimately, the majority's decision to allow the collection of attorney's fees in any case involving written evidence of a debt, and to allow the collection of any amount of attorney's fees spent defending such a judgment, including on appeal, are policy decisions that have no statutory basis. "The General Assembly is the 'policy-making agency [of this State]' because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004). Regardless of whether these changes may be perceived as beneficial for litigants, the justice system, or this State, they have no basis in our General Statutes, and any such a policy shift should be undertaken by the legislature, not this Court.

Justice BARRINGER joins in this dissenting opinion.

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