376 N.C.—No. 4 Pages 680-903

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

MAY 14, 2021

MAILING ADDRESS: The Judicial Department
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OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 12 MARCH 2021

ORDERS

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APPEAL AND ERROR

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Preservation of issues—waiver of appellate review—complex business case—distribution of punitive damages award—In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), plaintiff waived appellate review of his argument that any distributions defendants receive following the LLCs' judicial dissolution should be calculated by excluding the punitive damages the LLCs received from defendants in the case, where plaintiff neither objected to the trial court's jury instructions nor proposed alternative instructions on how to distribute a punitive damages award to the LLCs. **Chisum v. Campagna, 680.**

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DAMAGES AND REMEDIES

Compensatory damages—identical awards against individual defendants—no fatal ambiguity in verdict—After a complex business trial against two defendants where the jury awarded compensatory damages to a limited liability company against each defendant on a derivative claim for constructive fraud, the trial court did not abuse its discretion in declining to amend the judgment because the verdict was not fatally ambiguous as to damages. Defendants were not held to be jointly and severally liable, and therefore could be found to each be independently liable, and although plaintiff's counsel told the jury during closing arguments that the trial court would prevent a double recovery, which defendants argued could have made the jury think its award would be split in half between the two defendants, juries are presumed to follow trial courts' instructions. In this case, both the instructions and the verdict sheet were clear and did not contain confusing language regarding the effect of any damage award. **Chisum v. Campagna, 680.**

SEXUAL OFFENDERS

Secret peeping—sex offender registration—danger to the community— After defendant's conviction for felony secret peeping, the trial court did not err in finding as an ultimate fact that defendant was a danger to the community and ordering him to register as a sex offender where the evidentiary facts showed defendant took advantage of a close personal relationship, used a sophisticated scheme to avoid detection, deployed a hidden camera and obtained images of the victim over an extended period of time, repeatedly invaded the victim's privacy, caused significant and long lasting emotional harm to the victim, and could easily commit similar crimes in the future. **State v. Fuller, 862.**

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Declaratory judgment claims—based on breach of contract—applicable limitations period—triable issue of fact—In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the three-year limitations period for breach of contract claims applied to plaintiff's declaratory judgment claims regarding one of the LLCs, where plaintiff based those claims on a theory that defendants breached the LLC operating agreement by diluting his membership interest and assuming total control of the LLC. On appeal, the trial court's order directing a verdict in defendants' favor on these claims was reversed and remanded because a triable issue of fact existed regarding the date the limitations period began to run (the date when plaintiff knew or should have known about defendants' alleged breach). **Chisum v. Campagna, 680.**

Declaratory judgment claims—based on breach of contract—limitations period—date of notice of breach—In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the three-year limitations period applicable to plaintiff's declaratory judgment claims (based on breach of contract) began to run at the time he became aware or should have become aware of defendants' breach of the LLC operating agreements. Therefore, rather than dismissing the claims as time-barred, the trial court properly submitted to the jury the issue of when plaintiff had notice of defendants' breach where the record showed it was a triable issue of fact. **Chisum v. Campagna, 680.**

TERMINATION OF PARENTAL RIGHTS

Adjudicatory findings of fact—sufficiency of evidence—improperly based on dispositional evidence—Where several of the trial court's findings of fact, made in the adjudication phase of a termination of parental rights hearing, lacked evidentiary support or were improperly based on testimony from the dispositional phase, the Supreme Court disregarded those portions of the findings made in error when evaluating the trial court's determination that respondent-father's parental rights to his daughter should be terminated on the basis of neglect and willful abandonment. **In re Z.J.W., 760.**

Grounds for termination—neglect—insufficient findings—evidence from which determination could be made—The trial court's determination that respondent-father's parental rights to his daughter were subject to termination on the basis of neglect was vacated. The court's conclusion that respondent neglected his child by abandonment was not supported by its findings, which established that respondent paid child support, attended hearings, emailed his daughter's caregiver, and

complied with his case plan requirements. Although the court also concluded that grounds for neglect existed based on a prior adjudication of neglect and a likelihood of future neglect, the court's findings did not address the possibility of a repetition of neglect, despite record evidence from which sufficient findings could be made. The matter was remanded for entry of a new order addressing future neglect and best interests. **In re Z.J.W., 760.**

Grounds for termination—willful abandonment—sufficiency of findings—In a termination of parental rights proceeding, the trial court's conclusion that respondent-father willfully abandoned his daughter was reversed where the unchallenged findings established that respondent made child support payments, sent emails to the relative caring for his daughter, and completed certain aspects of his case plan during the determinative six-month period prior to the filing of the termination petition. Respondent's failure to visit with his daughter was not voluntary where a prior order precluded visitation absent a recommendation from the child's therapist, which had not been given. **In re Z.J.W., 760.**

Grounds for termination—willful failure to make reasonable progress—lack of participation in case plan—The trial court properly terminated respondent-mother's parental rights on the basis of willful failure to make reasonable progress where the findings established that respondent, whose pregnancy at thirteen resulted from a crime perpetrated against her and who was placed in foster care with her baby until aging out when she reached the age of majority, discontinued participation in and failed to comply with multiple aspects of her case plan despite having the ability to comply. The case plan had a sufficient nexus to the reason the child was removed from respondent's care because it included activities designed to foster stability and the acquisition of sufficient parenting skills. **In re Q.P.W., 738.**

Subject matter jurisdiction—non-resident parents—residence of the child—The trial court had subject matter jurisdiction in a termination of parental rights case because—even though the parents were not and had not been residents of North Carolina—jurisdiction depends on the residence of the child, not the parents. Since the child was born in North Carolina and had lived her entire life in this state, she was a resident of North Carolina. **In re N.P., 729.**

SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA SUPREME COURT

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

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

CHISUM v. CAMPAGNA

[376 N.C. 680, 2021-NCSC-7]

DENNIS D. CHISUM, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF JUDGES ROAD INDUSTRIAL PARK, LLC, CAROLINA COAST HOLDINGS, LLC, AND PARKWAY BUSINESS PARK, LLC

v.

ROCCO J. CAMPAGNA, RICHARD J. CAMPAGNA, JUDGES ROAD INDUSTRIAL PARK, LLC, CAROLINA COAST HOLDINGS, LLC, AND PARKWAY BUSINESS PARK, LLC

No. 406A19

Filed 12 March 2021

1. Statutes of Limitation and Repose—declaratory judgment claims—based on breach of contract—limitations period—date of notice of breach

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the three-year limitations period applicable to plaintiff's declaratory judgment claims (based on breach of contract) began to run at the time he became aware or should have become aware of defendants' breach of the LLC operating agreements. Therefore, rather than dismissing the claims as time-barred, the trial court properly submitted to the jury the issue of when plaintiff had notice of defendants' breach where the record showed it was a triable issue of fact.

2. Damages and Remedies—constructive fraud—breach of fiduciary duty—proof of nominal damages—sufficient

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the trial court properly entered judgment in plaintiff's favor on his claims for breach of fiduciary duty and constructive fraud, which included an award of punitive damages, even though plaintiff presented no evidence that he suffered actual damages as a result of defendants' conduct. Under North Carolina law, a showing of nominal damages is sufficient to support claims for breach of fiduciary duty and constructive fraud.

3. Fraud—constructive—breach of fiduciary duty—jury verdicts—not fatally inconsistent—consideration of different time periods

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the trial court did not err by allowing the jury to find one of the defendants liable for constructive fraud but not liable for breach of fiduciary duty. Although elements of the two claims overlap (namely, a breach of

a relationship of trust and confidence), different statutes of limitations apply to each claim, and therefore the jury—evaluating defendant's conduct over two different periods of time—could find that defendant's actions satisfied those elements within the ten-year limitations period for constructive fraud but not within the three-year limitations period for breach of fiduciary duty.

4. Fraud—constructive—jury instruction—no reference to rebuttable presumption

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the trial court did not err by declining to give defendants' requested jury instruction that a finding that defendants had acted openly, fairly, and honestly in their dealings with the LLCs would defeat plaintiff's constructive fraud claim. The requested instruction did not accurately state the applicable law because it did not explain that, even if evidence of defendants' open, fair, and honest conduct sufficed to rebut the presumption of constructive fraud, plaintiff could still be entitled to recovery if the jury found proof of actual fraud.

5. Damages and Remedies—compensatory damages—identical awards against individual defendants—no fatal ambiguity in verdict

After a complex business trial against two defendants where the jury awarded compensatory damages to a limited liability company against each defendant on a derivative claim for constructive fraud, the trial court did not abuse its discretion in declining to amend the judgment because the verdict was not fatally ambiguous as to damages. Defendants were not held to be jointly and severally liable, and therefore could be found to each be independently liable, and although plaintiff's counsel told the jury during closing arguments that the trial court would prevent a double recovery, which defendants argued could have made the jury think its award would be split in half between the two defendants, juries are presumed to follow trial courts' instructions. In this case, both the instructions and the verdict sheet were clear and did not contain confusing language regarding the effect of any damage award.

6. Corporations—judicial dissolution—appointment of receiver—sufficiency of evidence and findings—notice and opportunity to be heard

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the trial court

did not err in ordering that two of the LLCs be judicially dissolved and a receiver appointed to oversee the process without first giving defendants the opportunity to buy plaintiff's membership interests. The record evidence and the court's findings of fact supported dissolution under clause (i) of N.C.G.S. § 57D-6-02(2) (allowing judicial dissolution where it is not practicable to conduct an LLC's business); the allegations in plaintiff's complaint, the evidence at trial, and the court's statement during jury deliberations that it would likely order dissolution gave defendants sufficient notice that judicial dissolution was an issue; and the trial afforded defendants ample opportunity to be heard on the issue.

7. Statutes of Limitation and Repose—declaratory judgment claims—based on breach of contract—applicable limitations period—triable issue of fact

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the three-year limitations period for breach of contract claims applied to plaintiff's declaratory judgment claims regarding one of the LLCs, where plaintiff based those claims on a theory that defendants breached the LLC operating agreement by diluting his membership interest and assuming total control of the LLC. On appeal, the trial court's order directing a verdict in defendants' favor on these claims was reversed and remanded because a triable issue of fact existed regarding the date the limitations period began to run (the date when plaintiff knew or should have known about defendants' alleged breach).

8. Appeal and Error—preservation of issues—waiver of appellate review—complex business case—distribution of punitive damages award

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), plaintiff waived appellate review of his argument that any distributions defendants receive following the LLCs' judicial dissolution should be calculated by excluding the punitive damages the LLCs received from defendants in the case, where plaintiff neither objected to the trial court's jury instructions nor proposed alternative instructions on how to distribute a punitive damages award to the LLCs.

9. Corporations—individual claims—breach of fiduciary duty—constructive fraud—showing of injury

In a legal dispute concerning plaintiff's membership status in the parties' three limited liability companies (LLCs), the trial court

properly dismissed plaintiff's individual claims for breach of fiduciary duty and constructive fraud where, although plaintiff alleged facts describing the specific steps defendants took to deprive him of his ownership interests in the LLCs, plaintiff failed to show he suffered a legally cognizable injury as a result of defendants' conduct.

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an opinion and final judgment entered on 11 October 2018 and an order and opinion on post-trial motions entered on 25 April 2019 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, New Hanover County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 12 October 2020.

Sigmon Law, PLLC, by Mark R. Sigmon, and Whitfield Bryson & Mason, LLP, by Daniel K. Bryson, Matthew E. Lee, and Jeremy R. Williams, for plaintiff-appellee/appellant.

Reiss & Nutt, PLLC, by W. Cory Reiss, and Shipman & Wright, LLP, by James T. Moore and Gary K. Shipman, for defendants-appellants/appellees.

ERVIN, Justice.

¶ 1 In this appeal from the Business Court, we address a number of issues arising from a dispute between plaintiff Dennis Chisum and defendants Rocco Campagna and Richard Campagna concerning their respective membership interests in three related limited liability companies. For the reasons set out below, we affirm the trial court's judgment and orders, in part, and reverse this judgment and those orders and remand, in part.

I. Factual Background

A. Substantive Facts

1. Formation of Limited Liability Companies

¶ 2 Beginning in the 1990s, The Camp Group–an entity which was equally owned by Richard Campagna and Rocco Campagna–formed three limited liability companies–Judges Road Industrial Park, LLC; Carolina Coast Holdings, LLC; and Parkway Business Park, LLC–for the purpose of developing commercial real estate in Wilmington. Although Mr. Chisum was a founding member of Judges Road and Carolina Coast, he

did not become a member of Parkway until 16 October 2007. The members of each LLC entered into company-specific operating agreements which specified (1) the initial capital contributions that each member was required to make; (2) the membership interests of each owner, which were set forth in documents referred to as Schedule 1s[1]; (3) the managers of each LLC; and (4) the rules concerning "capital calls" for the LLCs, which governed requests for additional capital contributions from members over and above the members' initial contributions.

¶ 3 The operating agreements specified that member contributions were measured in "capital units," with each $1,000.00 in contributed capital constituting a single capital unit. The operating agreements further provided that members might be required to make additional capital contributions "ratably in accordance with such Members' then existing Membership Interest within the time period approved by the Majority in Interest of the Members" if, in the case of Judges Road and Carolina Coast, a capital call was requested by the managers and approved by "a Majority in Interest of the Members" or if, in the case of Parkway, a capital call was requested by a majority of the members. In the event that any member failed to make the payment required by a capital call, the managers could "elect to allow the remaining Members . . . to contribute to the Company, pro rata by Membership Interest, such Additional Capital Contribution." If one or more of the other members elected to proceed in that fashion, that member would be credited with additional capital units and would obtain a proportionate increase in his or her ownership interest that would be offset by a decrease in the noncontributing members' ownership interests.

¶ 4 The operating agreements further provided that any member's membership interest could be transferred by "sale, assignment, gift, pledge, exchange or other disposition" "after the Membership Interest has been offered to the Company and to the Members," with the seller being required to give "thirty . . . days written notice of his intention to sell or otherwise transfer all or any portion of his interest in the Company." In addition, the operating agreements included provisions governing the voluntary transfer of membership interests. Between 2007 and 2012, the Campagnas directed a number of capital calls for the three LLCs.

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1. The Camp Group transferred its interest in the LLCs to the Campagnas individually in 2007.

2. Dilution of Mr. Chisum's Interest in Judges Road

¶ 5 At the time of its formation in 1996, Mr. Chisum owned a 35% interest in Judges Road, with The Camp Group having served as the manager of Judges Road from its formation until 2007, when Richard Campagna was designated to fulfill the role. By 2010, Mr. Chisum's membership interest in Judge's Road had been reduced to 18.884%. On 25 June 2012, James MacDonald, the attorney for all three LLCs, mailed a letter to Mr. Chisum notifying him that there had been a $100,000.00 capital call for Judges Road and that a meeting had been scheduled for 2 July 2012 in order to amend the Judges Road operating agreement. In addition, the letter stated, in relevant part, that:

> [b]ased on the information provided by the accountant[,] [Richard Campagna] and [Rocco Campagna] have been advised by the accountant that your interest has been diluted to the point that you have no remaining equity in the Company. If you do not participate in this capital call, you will no longer be deemed a member and your interest will be considered diluted in full.

¶ 6 The 2 July 2012 meeting occurred in Mr. Chisum's absence. At the meeting, the Campagnas voted to fully dilute Mr. Chisum's membership interest based upon his failure to make the contribution required by the capital call. According to the meeting minutes, Mr. Chisum's "membership interest would be exhausted and extinguished if future capital calls were not timely made." The Campagnas, however, took control of the LLC at the conclusion of the 2 July 2012 meeting and failed to either include Mr. Chisum in the making of future operational decisions or correspond with him any further for the purpose of apprising him of his membership status. In addition, the Campagnas failed to amend the Judges Road operating agreement to reflect that Mr. Chisum's membership interest had been extinguished.

¶ 7 On 27 August 2012, the Campagnas paid the entire $100,000.00 capital call that had been made for Judges Road, with this amount being inclusive of Mr. Chisum's portion. In spite of the fact that the Campagnas believed that they each held a 50% ownership interest in Judges Road from and after the date of the 2 July 2012 meeting, Mr. Chisum continued to receive K-1s relating to Judges Road through the 2013 tax year, with Mr. Chisum's 2012 K-1 for Judges Road showing that he held an 18.884% ownership interest in the company and with his 2013 K-1 for Judges Road reflecting that, while he held an 18.884% interest in that company

at the beginning of the year, he held no interest whatsoever by its end. The 2013 K-1 for Judges Road that Mr. Chisum received indicated that it was his "[f]inal" Judges Road K-1.

3. Dilution of Mr. Chisum's Interest in Parkway

¶ 8 Parkway was formed in 1998 by The Camp Group and Caporaletti Development, LLC, with Anthony Caporaletti and Katrina Caporaletti serving as the company managers. In 2004, Caporaletti Development resigned from Parkway and sold its membership interest to Carolina Coast, with the Campagnas having become Parkway's managers at that time. Mr. Chisum joined Parkway in 2007 and held an 8.34% membership interest in the company.

¶ 9 After the 2 July 2012 Judges Road meeting, the Campagnas took control of Parkway as well. On 27 August 2013, Parkway mailed Mr. Chisum's 2012 Parkway K-1 to him; this K-1 showed that, at the end of 2012, Mr. Chisum held an 8.34% membership interest in the company. At some point in 2014, Parkway sent Mr. Chisum his 2013 K-1 by means of a letter dated 7 April 2014. The 2013 Parkway K-1 stated that, while Mr. Chisum held an 8.34% ownership interest at the beginning of the year, he had no interest in the company at the end of 2013, with his 2013 K-1 being marked as Mr. Chisum's "[f]inal" Parkway K-1.

4. Dilution of Mr. Chisum's Interest in Carolina Coast

¶ 10 At the time of its formation in 2000, Mr. Chisum had a 33.333% membership interest in Carolina Coast. Although Mr. Chisum and the Campagnas each served as managers at the time that the company was organized, the Carolina Coast operating agreement was changed in 2007 to provide for a single manager, a role that Richard Campagna was designated to fill. By 2010, Mr. Chisum's membership interest in Carolina Coast had been reduced to 16.667%.

¶ 11 A Carolina Coast membership meeting was held on 4 October 2010, at which Mr. Chisum was told that he needed to repay a loan that he and his wife, Blanche Chisum, had obtained and that had been secured by the LLCs. In response, Mr. Chisum argued that the repayment of the loan was not his sole responsibility and that he lacked sufficient funds to repay the loan. In spite of Mr. Chisum's objections, the Campagnas assessed a capital call in the amount of $63,500.00 against Mr. Chisum, gave Mr. Chisum one week to make the required capital contribution, and warned Mr. Chisum that, in the event that he failed to make the required contribution, his interest in Carolina Coast would be diluted.

After Mr. Chisum failed to make the required payment, the Campagnas paid off the loan on 27 October 2010.

¶ 12 After the 4 October 2010 meeting, the Campagnas acted as if Mr. Chisum's membership interest in Carolina Coast had been extinguished in full. In 2011, Mr. Chisum received his 2010 K-1, which was marked as his "[f]inal" K-1 relating to Carolina Coast and which stated that Mr. Chisum's membership interest in that company had been reduced to zero. Although Mr. Chisum believed that his 2010 Carolina Coast K-1 was in error and that he continued to have an ownership interest in Carolina Coast, Mr. Chisum never received another K-1 from Carolina Coast after 2011.

B. Procedural History

¶ 13 Mr. Chisum did not take any action to ascertain the status of his membership interest in any of the LLCs until he initiated this action in 2016. In March 2016, Mr. Chisum went to a storage facility owned by Judges Road for the purpose of accessing his complimentary owner's unit. At that time, he was approached by the facility's property manager, who told Mr. Chisum that he could no longer use the storage unit given that Judges Road had sold the facility to a third-party buyer. Upon receiving this information, Mr. Chisum searched the relevant tax records and discovered the existence of a deed transferring the Judges Road storage facility to a new owner on 1 February 2016 for a payment of $5.75 million.

1. Original Complaint and Related Proceedings

¶ 14 On 19 July 2016, Mr. Chisum filed a verified complaint against the Campagnas, Judges Road, Parkway, and Carolina Coast in which he asserted claims for (1) conversion, on the theory that the Campagnas had wrongfully converted his ownership interests in the three LLCs to their own use while intentionally concealing their wrongful conduct from him; (2) unfair and deceptive trade practices, on the theory that the Campagnas had converted Mr. Chisum's ownership interests in the LLCs to their own use by making fraudulent capital calls for the purpose of fully diluting his ownership interests; (3) unjust enrichment; (4) a declaration that Mr. Chisum continued to own interests in each of the three LLCs; and (5) a claim seeking judicial dissolution of the LLCs. Based upon these claims for relief, Mr. Chisum sought an award of compensatory and punitive damages and the dissolution and liquidation of all three LLCs pursuant to N.C.G.S. § 57D-6-02.

¶ 15 On the same day that he filed his complaint, Mr. Chisum sought and obtained the entry of a temporary restraining order against the

Campagnas that prevented them from taking any further action that would have the effect of diminishing the LLCs' assets. On 3 August 2016, however, Judge Phyllis M. Gorham entered an order denying Mr. Chisum's request for the issuance of a preliminary injunction and dissolving the temporary restraining order. On 19 August 2016, the Chief Justice designated this case a complex business case. On 19 September 2016, the Campagnas filed an answer to Mr. Chisum's complaint in which they denied the material allegations of the complaint; asserted a number of affirmative defenses, including the expiration of the applicable statutes of limitation, laches, estoppel, waiver, and unclean hands; and sought the dismissal of Mr. Chisum's complaint for failure to state a claim for which relief could be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6).

2. Amended Complaint and Related Proceedings

¶ 16 On 8 February 2017, Mr. Chisum filed an amended complaint in which he reasserted the claims that he had alleged against the Campagnas in his original complaint and added derivative claims against the Campagnas on behalf of Judges Road, Parkway, and Carolina Coast. In addition, the amended complaint asserted claims against Mr. MacDonald; the MacDonald Law Firm, PLLC; Milton Hardison, who served as the accountant for all three LLCs; and Hardison & Chamberlain, CPAs, PA. Finally, the amended complaint asserted (1) derivative and individual claims for breach of fiduciary duty and constructive fraud against the Campagnas; (2) derivative and individual claims for breach of fiduciary duty, constructive fraud, and professional negligence or legal malpractice against Mr. MacDonald and the MacDonald Law Firm; (3) derivative and individual claims for breach of fiduciary duty, constructive fraud, and professional negligence against Mr. Hardison and Hardison & Chamberlain; (4) derivative and individual claims for civil conspiracy against the Campagnas, Mr. MacDonald, the MacDonald Law Firm, Mr. Hardison, and Hardison & Chamberlain; (5) individual claims for conversion and fraud in the inducement against the Campagnas; (6) individual claims for failure to pay distributions, unjust enrichment, and declaratory judgment against the Campagnas and the three LLCs; (7) individual claims for unfair and deceptive trade practices against the Campagnas, Mr. MacDonald, the MacDonald Law Firm, Mr. Hardison, and Hardison & Chamberlain; and (8) an individual claim for judicial dissolution against the LLCs pursuant to N.C.G.S. § 57D-6-02. As a result, based upon these claims, Mr. Chisum (1) derivatively and individually sought to recover punitive damages from the Campagnas, Mr. MacDonald, the MacDonald Law Firm, Mr. Hardison, and Hardison & Chamberlain; (2) individually

sought to pierce the corporate veil in order to hold the Campagnas personally liable "for the debts and obligations of the [three] LLCs, as alleged"; and (3) derivatively and individually sought to recover actual, compensatory, and consequential damages from all of the defendants, jointly and severally.

¶ 17 In March of 2017, each of the defendants filed answers to the amended complaint and moved to dismiss it. By 7 July 2017, each of the derivative and individual claims against Mr. MacDonald, the MacDonald Law Firm, Mr. Hardison, and Hardison & Chamberlain had been voluntarily dismissed, so that the only remaining claims were the individual and derivative claims that Mr. Chisum had asserted against the Campagnas and the LLCs.

3. Pre-Trial Rulings by the Trial Court

a. 20 July 2017 Order on Cross-Motions for Summary Judgment

¶ 18 On 8 February 2017, Mr. Chisum sought partial summary judgment in his favor with respect to the declaratory judgment claim that he had individually asserted against the Campagnas and Judges Road concerning his status as an owner or member of Judges Road. In response, defendants moved for summary judgment in their favor with respect to this claim on the grounds that it was barred by the applicable statute of limitations. On 20 July 2017, the trial court entered an order concluding that Mr. Chisum's declaratory judgment claims were not subject to any statute of limitations given that the amended complaint "allege[d] an actual controversy between [Mr. Chisum] and Rocco and Richard [Campagna] over their respective rights and obligations as members of Judges Road, irrespective of the claim for conversion"; that the trial court "[could] not find, and [d]efendants [did] not reference[ ], any North Carolina authority citing to a specific statute of limitations for a declaratory judgment claim"; and that the timeliness of a declaratory action was more appropriately challenged through the assertion of a defense of laches, which defendants had failed to raise in response to Mr. Chisum's declaratory judgment claim. As a result, the trial court denied defendants' summary judgment motion. In addition, after granting Mr. Chisum's summary judgment motion, in part, and determining that the Judges Road operating agreement "would not permit a member's interest to be diluted to zero, or extinguished entirely, by the failure to contribute capital in response to a capital call," the trial court denied the remainder of Mr. Chisum's summary judgment motion.

b. 7 November 2017 Order on the Campagnas' Motion to Dismiss

¶ 19 On 14 March 2017, defendants filed a motion seeking the dismissal of Mr. Chisum's claims for breach of fiduciary duty, constructive fraud, fraud in the inducement, unjust enrichment, and unfair and deceptive trade practices for failure to state a claim for which relief could be granted pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) and seeking the dismissal of the fraud in the inducement claim for lack of particularity pursuant to N.C.G.S. § 1A-1, Rule 9(b). On 7 November 2017, the trial court entered an order granting defendants' motion to dismiss the derivative claims for breach of fiduciary duty and constructive fraud to the extent that they rested upon allegations that defendants had engaged in making "sham" capital calls, improperly attempted to amend the operating agreements, and "[g]enerally attempt[ed] to freeze Mr. Chisum out of the LLCs" while denying defendants' dismissal motions directed to those same claims to the extent that they rested upon allegations that the Campagnas had improperly funneled money and misappropriated corporate opportunities to and from themselves and the LLCs and had sold assets belonging to the LLCs while diverting the proceeds of the relevant transactions to themselves and other entities. Finally, the trial court dismissed Mr. Chisum's individual claims for breach of fiduciary duty, constructive fraud, fraud in the inducement, unjust enrichment, and unfair and deceptive trade practices.

c. 2 March 2018 Order on Cross-Motions for Summary Judgment

¶ 20 On 15 May 2017, Mr. Chisum filed a motion seeking partial summary judgment in his favor with respect to his claim for a declaration concerning his status as an owner or member of Parkway and Carolina Coast. On 28 July 2017, Mr. Chisum filed a motion seeking partial summary judgment in his favor with respect to his individual claim against Richard Campagna for constructive fraud and his request for the entry of a declaratory judgment against each of the defendants concerning both his status as a member in each of the LLCs and the amount of his membership interest in each of the LLCs. On 2 August 2017, defendants filed a motion seeking the entry of summary judgment in their favor with respect to each of the remaining claims asserted in the amended complaint.

¶ 21 On 2 March 2018, the trial court entered an order determining that the Parkway and Carolina Coast operating agreements did not permit a member's interest to be extinguished for failure to contribute capital

in response to a capital call. On the other hand, the trial court declined to enter summary judgment in Mr. Chisum's favor with respect to the issue of whether Mr. Chisum continued to own an interest in Parkway or Carolina Coast. Finally, the trial court dismissed Mr. Chisum's conversion claim while denying the remainder of defendants' summary judgment motion.

d. 27 July 2018 Order Vacating Prior Declaratory Judgment Order

¶ 22 On 27 July 2018, the trial court, acting on its own motion, entered an order vacating its prior order determining that the Parkway and Carolina Coast operating agreements did not permit the extinguishment of membership interests based upon a member's failure to comply with a capital call. In making this determination, the trial court stated that, "[u]pon further consideration," "statutes of limitations are appropriately applied to declaratory judgment claims, and . . . laches also may apply under appropriate facts." Based upon that logic, the trial court determined that the three-year statute of limitations for breach of contract actions applied to Mr. Chisum's declaratory judgment claims and that it lacked the authority to decide the declaratory judgment claims on the grounds that the record reflected the existence of a jury question concerning the extent to which these claims were barred by the applicable statute of limitations.

4. Trial

¶ 23 This case came on for trial before the trial court and a jury beginning on 6 August 2018. During the course of the trial, the trial court struck defendants' laches defense as a sanction for discovery violations. On 13 August 2018, the trial court directed a verdict in favor of defendants with respect to all of Mr. Chisum's claims relating to Carolina Coast on statute of limitations grounds and summarized its decision by stating that:

> no reasonable juror could conclude from the evidence that has been presented that Mr. Chisum . . . would not reasonably have known that the Campagnas were in breach of the operating agreement and considered him ousted as an LLC member any later than July—the—prior to the July date in 2013. That would be the three-year mark. . . .
>
> [A]gain, no reasonable juror could conclude that [Mr. Chisum] would not have known that there was

> a potential breach of his rights under the LLC under the operating agreement as of no later than October of 2011.

On the other hand, at the close of all of the evidence, the trial court denied the defendants' motion for a directed verdict with respect to all of the other remaining claims and submitted those claims for the jury's consideration after rejecting defendants' request that the trial court instruct the jury with respect to Mr. Chisum's constructive fraud claim that defendants would have rebutted any presumption of fraud arising from a breach of fiduciary duty by showing that they acted openly, fairly, and honestly in their dealings with the LLCs and Mr. Chisum.

¶ 24 On 15 August 2018, the jury returned the following verdict:

> 1. Did Dennis Chisum file this lawsuit within three years of the date that he knew, or reasonably should have known, that the Campagnas no longer considered Dennis Chisum to be a member of Parkway and were excluding him from his membership rights in Parkway?
>
>   Yes.
>
> 2. Was Parkway damaged by a failure of Richard Campagna to discharge his fiduciary duties as manager of the company?
>
>   Yes.
>
> 3. Did Richard Campagna take advantage of a position of trust and confidence to bring about the transfer of money and real property from Parkway to himself or his other companies, including the Camp Group, LLC?
>
>   Yes.
>
> 4. What amount, if any, is Parkway entitled to recover from Richard Campagna as damages?
>
> $128,757.00
>
> 5. Was Parkway damaged by a failure of Rocco Campagna to discharge his fiduciary duties as manager of the company?
>
>   No.

6. Did Rocco Campagna take advantage of a position of trust and confidence to bring about the transfer of money and real property from Parkway to himself or his other companies, including the Camp Group, LLC?

   Yes.

7. What amount, if any, is Parkway entitled to recover from Rocco Campagna as damages?

   $128,757.00

8. Did Dennis Chisum file this lawsuit within three years of the date that he knew, or reasonably should have known, that the Campagnas no longer considered Dennis Chisum to be a member of Judges Road and were excluding him from his membership rights in Judges Road?

   Yes.

9. Was Judges Road damaged by a failure of Richard Campagna to discharge his fiduciary duties as manager of the company?

   Yes.

10. Did Richard Campagna take advantage of a position of trust and confidence to bring about the transfer of money from Judges Road to himself or his other companies, including the Camp Group, LLC?

    Yes.

11. What amount, if any, is Judges Road entitled to recover from Richard Campagna as damages?

    $1.00

12. Was Judges Road damaged by a failure of Rocco Campagna to discharge his fiduciary duties as manager of the company?

    No.

13. Did Rocco Campagna take advantage of a position of trust and confidence to bring about the

transfer of money from Judges Road to himself or his other companies, including the Camp Group, LLC?

Yes.

14. What amount, if any, is Judges Road entitled to recover from Rocco Campagna as damages?

$1.00

15. Did Richard Campagna and Rocco Campagna conspire to divert money and property from Parkway to the Camp Group, LLC?

No.

16. Did Richard Campagna and Rocco Campagna conspire to divert money and property from Judges Road to the Camp Group, LLC?

Yes.

17. What amount of unpaid distributions is Dennis Chisum entitled to receive from Parkway?

$10,695.00

18. What amount of unpaid distributions is Dennis Chisum entitled to receive from Judges Road?

$3,927.00

Later that day, the trial court instructed the jury with respect to the amount of punitive damages, if any, that Mr. Chisum was entitled to recover.

¶ 25 On 16 August 2018, the trial court informed the parties that it was "highly likely" that it would order dissolution of Judges Road and Parkway. On the same day, the jury returned a verdict determining that:

19. Is Richard Campagna liable to Parkway for punitive damages?

Yes.

20. What amount of punitive damages, if any, does the jury in its discretion award against Richard Campagna to Parkway?

$150,000.00

21. Is Richard Campagna liable to Judges Road for punitive damages?

    Yes.

22. What amount of punitive damages, if any, does the jury in its discretion award against Richard Campagna to Judges Road?

    $350,000.00

23. Is Rocco Campagna liable to Parkway for punitive damages?

    No.

24. What amount of punitive damages, if any, does the jury in its discretion award against Rocco Campagna to Parkway?

    N/A

25. Is Rocco Campagna liable to Judges Road for punitive damages?

    Yes.

26. What amount of punitive damages, if any, does the jury in its discretion award against Rocco Campagna to Judges Road?

    $250,000.00

¶ 26 On 11 October 2018, the trial court entered a final judgment which required the Campagnas to pay the compensatory and punitive damages amounts determined to be appropriate by the jury while reflecting the following additional determinations:

> IT IS FURTHER ORDERED, in the Court's discretion, that judgment is entered for [Mr. Chisum] as to [Mr. Chisum]'s claims for declaratory judgment with regard to Parkway and Judges Road. The Court declares that [Mr. Chisum] remains a member of Parkway, with a current percentage of ownership in the company of 8.34%. The Court declares that [Mr. Chisum] remains a member of Judges Road, with a current percentage of ownership in the company of 18.884%.

> IT IS FURTHER ORDERED that, in the Court's discretion, judgment is entered for [Mr. Chisum] against Defendants on [Mr. Chisum]'s claims for judicial dissolution of Parkway and Judges Road pursuant to [N.C.G.S.] § 57D-6-02(2)(i).[2] The evidence at the trial established that it is not practicable for [Mr. Chisum] and the Campagnas to conduct the business of Parkway and Judges Road in conformance with the operating agreements. Parkway, once it is reinstated, and Judges Road are hereby dissolved.
>
> IT IS FURTHER ORDERED that, in the Court's discretion, pursuant to [N.C.G.S] §§ 1-502(2) and 57D-6-04, in order to carry the judgment into effect, the Court in its discretion shall appoint a receiver for Parkway and for Judges Road under the authority and subject to the duties as set forth in the separately entered orders of this date.

On the same date, the trial court entered orders appointing George M. Oliver to serve as the receiver for Parkway and Judges Road.

5. Post-Trial Motions

¶ 27 On 22 October 2018, defendants filed a number of post-trial motions. First, defendants filed a motion seeking the entry of judgment in their favor notwithstanding the verdict pursuant to N.C.G.S. § 1A-1, Rule 50(b), on the grounds that (1) Mr. Chisum's claims for declaratory judgment were barred by the statute of limitations, a fact that deprived him of the standing needed to maintain the derivative claims, or, in the alternative, that judgment should be entered in defendants' favor with respect to the derivative claims for breach of fiduciary duty and constructive fraud on the grounds that Mr. Chisum had failed to prove the actual damages that were necessary to support those claims; (2) concerning the verdict in favor of Judges Road regarding the derivative claims that had been asserted against Rocco Campagna, it was legally inconsistent for the jury to have found Rocco Campagna liable for constructive fraud without also finding him liable for breach of fiduciary duty; (3) with respect to the derivative claims for constructive fraud, the evidence elicited at trial

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2. Subsection 57D-6-02(2) provides that "[t]he superior court may dissolve an LLC in a proceeding brought by . . . [a] member, if it is established that (i) it is not practicable to conduct the LLC's business in conformance with the operating agreement and this Chapter or (ii) liquidation of the LLC is necessary to protect the rights and interests of the member." N.C.G.S. § 57D-6-02(2) (2019).

demonstrated that the Campagnas had acted in an open, fair, and honest manner, with this fact sufficing to rebut the presumption that they were liable for constructive fraud; and (4) the punitive damages awards in favor of Judges Road and Parkway cannot be predicated upon the underlying claims for liability or, in the alternative, that the punitive damages claim by Judges Road cannot stand in light of the jury's determination that Judges Road had not suffered any actual damages of the type necessary to support a claim for breach of fiduciary duty or constructive fraud.

¶ 28 In an alternative motion for a new trial, defendants contended that a new trial was necessary because (1) the jury had been erroneously instructed that the statute of limitations applicable to Mr. Chisum's declaratory judgment claims did not begin to run until Mr. Chisum had been put on notice of the existence of these claims; (2) the derivative claims for breach of fiduciary duty and constructive fraud required proof of actual, rather than merely nominal, damages; (3) with respect to the breach of fiduciary duty and constructive fraud claims involving Judges Road, the jury had failed to find the existence of actual damages; (4) the jury returned legally inconsistent verdicts given that it had found Rocco Campagna liable for constructive fraud while refraining from finding him liable for breach of fiduciary duty; and (5) the trial court erred by failing to instruct the jury that a finding that the Campagnas had acted openly, fairly, and honestly sufficed to rebut the presumption of constructive fraud. In an alternative motion to alter or amend the judgment pursuant to N.C.G.S. § 1A-1, Rules 59(a) and (e), defendants argued that (1) the total amount of punitive damages awarded to Judges Road should be reduced to the maximum statutory cap of $250,000.00 pursuant to N.C.G.S. § 1D-25(b) and that it was unclear as to whether the jury had intended to return identical damage awards against Richard Campagna and Rocco Campagna or whether the jury believed that the trial court would divide a single award of $128,757.00 between those two defendants; (2) the judgment concerning the dissolution of the LLCs and the appointment of a receiver should be altered or amended based upon a contention that the record did not contain sufficient evidence to justify the adoption of dissolution as a remedy, that the trial court had failed to afford the Campagnas a hearing with respect to dissolution-related issues as required by statute, and that the appointment of a receiver was "unnecessary and unwarranted"; (3) they should have been given the option of purchasing Mr. Chisum's remaining membership interests in the LLCs pursuant to N.C.G.S. § 57D-6-03(d); and (4) the required hearing was not held prior to the trial court's appointment of a receiver. In addition, defendants filed a motion for relief from the trial court's orders

appointing a receiver and for the trial court to direct that the LLCs pay the receiver-related fees and expenses specified in the trial court's orders appointing receivers for Judges Road and Parkway and a motion seeking the entry of a stay of the trial court's final judgment and of the orders appointing receivers for Judges Road and Parkway pending disposition of their other post-trial motions.

¶ 29 Similarly, Mr. Chisum filed a series of post-trial motions on 22 October 2018 in which he sought (1) the entry of judgment notwithstanding the verdict with respect to the declaratory judgment claim relating to his ownership interest in Carolina Coast or, in the alternative, a new trial or an alteration or amendment of the judgment relating to that claim; (2) a new trial concerning the other claims that Mr. Chisum had asserted related to Carolina Coast; (3) an amendment to the judgment cancelling the deeds that transferred the property to The Camp Group; and (4) an amendment to the judgment to bar the Campagnas from receiving distributions that included any of the punitive damages amounts that they had been ordered to pay to Parkway or Judges Road.

¶ 30 On 5 December 2018, the trial court stayed the execution of the final judgment and its orders appointing a receiver for Judges Road and Parkway while directing the Campagnas to post bond in the amount of $600,000.00, an action that the Campagnas took on or about 5 February 2019. On 6 February 2019, the trial court entered an order divesting the receiver who had been appointed to operate and dissolve Parkway and Judges Road of his authority to act in that capacity pending the resolution of the post-trial motions. On 25 April 2019, the trial court entered an order addressing the parties' post-trial motions. In its order, the trial court amended its judgment by reducing the amount of punitive damages awarded to Judges Road against Richard Campagna to the statutorily-prescribed sum of $145,825.00 and reduced the amount of punitive damages awarded to Judges Road against Rocco Campagna to the statutorily-prescribed amount of $104,175.00 while denying the remainder of the parties' post-trial motions. Defendants noted an appeal to this Court from the trial court's final judgment and post-trial orders while Mr. Chisum noted a cross-appeal to this Court from the trial court's final judgment and certain preliminary and post-trial orders.

II. Substantive Legal Analysis

A. Standard of Review

¶ 31 This Court reviews a trial court's legal determinations, including its decisions to grant or deny motions to dismiss for failure to state a claim for which relief can be granted, *see Sykes v. Health Network Sols., Inc.*,

372 N.C. 326, 332 (2019), and the correctness of the trial court's instructions to the jury, *see Chappell v. N.C. Dep't of Transp.*, 374 N.C. 273, 281 (2020), using a de novo standard of review. The issue before a reviewing court in determining whether a motion for a directed verdict or judgment notwithstanding the verdict should have been allowed or denied focuses upon "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 (1991) (citation omitted). In view of the fact that trial court decisions to dissolve an LLC pursuant to N.C.G.S. § 57D-6-02 and to appoint a receiver pursuant to N.C.G.S. § 57D-6-04 (stating that a trial court "*may* appoint . . . a receiver . . . if dissolution is decreed by the court to wind up the LLC" (emphasis added)), are discretionary in nature, we review such determinations using an abuse of discretion standard of review. *See Campbell v. Church*, 298 N.C. 476, 483 (1979) (stating that "the use of 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act"); *Mitchell*, *Brewer*, *Richardson*, *Adams*, *Burge & Boughman*, *PLLC v. Brewer*, 209 N.C. App. 369, 392 (2011) (stating that "the issuance of . . . an order of [judicial] dissolution is within the trial court's discretion"). In the same vein, "[t]he trial judge has the discretionary power to set aside a verdict when, in his opinion, it would work injustice to let it stand"; "if no question of law or legal inference is involved in the motion, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion." *Piazza v. Kirkbride*, 372 N.C. 137, 143 (2019) (quoting *Selph v. Selph*, 267 N.C. 635, 637 (1966)). A ruling committed to the trial court's discretion will not be overturned for an abuse of discretion in the absence of "a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 241 (2017) (quoting *In re Foreclosure of Lucks*, 369 N.C. 222, 228 (2016)).

B. Defendants' Appeal

1. Accrual of the Statute of Limitations

¶ 32 **[1]** As an initial matter, defendants contend that, as far as Mr. Chisum's declaratory judgment claims are concerned, the trial court erred by submitting to the jury the issue of when Mr. Chisum had notice of the Campagnas' breach of the operating agreements for Judges Road and Parkway. According to defendants, the trial court erred by submitting the issue of the date upon which Mr. Chisum had notice of the Campagnas' alleged breaches of the operating agreements to the jury on the grounds that the applicable statute of limitations began running at the moment

of the breach regardless of the extent to which the injured party had notice that the breach had occurred. In defendants' view, the undisputed record evidence tended to show that any breaches of the operating agreements for Judges Road and Parkway that the Campagnas might have committed occurred outside of the three-year limitations period applicable to breach of contract-based declaratory judgment claims. In support of this contention, defendants direct our attention to Mr. Chisum's testimony that the Campagnas took control of Judges Road and Parkway in 2012 and sold Parkway's assets in January 2013 in violation of the applicable operating agreements and to Richard Campagna's testimony that, after he and Rocco Campagna had made a capital contribution to Judges Road in August 2012 following Mr. Chisum's refusal to do so, the Campagnas assumed total ownership and control over both Judges Road and Parkway. In addition, defendants point to evidence that, as of 1 January 2013, Mr. Chisum had ceased making decisions for either LLC and was no longer receiving benefits as a member of either Judges Road or Parkway. As a result, defendants contend that Mr. Chisum's declaratory judgment claims involving Judges Road and Parkway were time-barred at the time that he filed his initial complaint in this case in July 2016.

¶ 33 In seeking to persuade us to reject defendants' contention, Mr. Chisum contends that established North Carolina law requires the existence of notice before the limitations period associated with a breach of contract claim begins to accrue and that an analysis of the record evidence demonstrates the existence of triable issues of fact with respect to the date upon which he had notice of the Campagnas' breaches of the Judges Road and Parkway operating agreements. Mr. Chisum claims that he cannot be said to have been on actual or constructive notice that a breach of the Judges Road and Parkway operating agreements had occurred given that the Campagnas had never amended the Schedule 1s associated with either entity to reflect the extinguishment of his ownership interests in light of Mr. MacDonald's testimony that the Schedule 1s provided the "definitive" statement of a member's interest in the LLCs and the fact that he had informed Mr. Chisum that he was a member to the extent shown on the Schedule 1s within three years of Mr. Chisum filing the complaint in this lawsuit. In addition, Mr. Chisum asserts that the Campagnas continued to send him K-1s showing that he was a member of Judges Road and Parkway, "including [documents transmitted] within 3 years of when he filed the lawsuit." In the event that notice of breach is required before the applicable statute of limitations began to run, Mr. Chisum points out that "[defendants] do not argue that the evidence was insufficient in that event."

¶ 34 As a general proposition, "a statute of limitations should not begin running against [a] plaintiff until [the] plaintiff has knowledge that a wrong has been inflicted upon him." *Black v. Littlejohn*, 312 N.C. 626, 639 (1985). On the other hand, "as soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run." *Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc.*, 313 N.C. 488, 493 (1985). The Court recognized the validity of this principle in the breach of contract context in *Christenbury Eye Center, P.A. v. Medflow, Inc.*, 370 N.C. 1 (2017), in which the parties had entered into an agreement requiring the defendants to provide the plaintiff with software improvements and the defendants failed to make a required royalty payment on 20 October 2000; failed to make another payment at any subsequent time; failed to provide written reports; and made prohibited sales—all of which were actions constituting a breach pursuant to the agreement. *Id.* at 3. Although the defendants remained in breach of the contract for the next decade, plaintiff did not file suit until 22 September 2014. *Id.* In affirming the trial court's decision to dismiss the plaintiff's breach of contract claim on the grounds that it was time-barred, we noted that "North Carolina law has long recognized the principle that a party must timely bring an action *upon discovery* of an injury to avoid dismissal of the claim" and held that "[s]tatutes of limitations require the pursuit of claims to occur within a certain period *after discovery*." *Id.* at 2 (emphases added). As a result, given that the plaintiff "had notice of its injury as early as 20 November 1999," when the defendants did not submit their first monthly report, "and certainly by 20 October 2000, when [the] defendants failed to pay the first $500 minimum royalty payment," we held that, "[b]ecause [the] plaintiff had notice of its injury yet failed to assert its rights, all of [the] plaintiff's claims are time barred." *Id.* at 6–7.

¶ 35 We recognized the same principle in *Parsons v. Gunter*, 266 N.C. 731 (1966), in which the parties had agreed to jointly develop, patent, and sell cotton card drive machines and to divide any resulting profits. *Id.* at 731. After the machines became successful, the defendant independently formed a separate corporation to market the machines, began realizing large profits, and patented the machinery. *Id.* at 731–32. When the plaintiff demanded an accounting in May 1960, the defendant responded by saying that "there was not enough room for both of us in selling these card drives." *Id.* at 733. Over three years later, the plaintiff brought a breach of contract action against the defendant in reliance upon the parties' earlier agreement. *Id.* In upholding the trial court's determination that the plaintiff's action was time-barred, we noted that the plaintiff had filed suit "[m]ore than three years . . . after [the]

plaintiff *was put on notice of* [the defendant's] disavowal of any obligation to [the] plaintiff and the institution of this action." *Id.* at 734 (emphasis added).

¶ 36 Admittedly, a number of our prior decisions have been somewhat opaque in addressing the issue that is before us in this case. *See, e.g.*, *Pearce v. N.C. State Hwy. Patrol Voluntary Pledge Comm.*, 310 N.C. 445 (1984); *Penley v. Penley*, 314 N.C. 1 (1985). However, the entire principle upon which defendants' argument hinges, which is that the statute of limitations begins to run against a plaintiff who has no way of knowing that the underlying breach has occurred, runs afoul of both our recent decisions, such as *Christenbury*, and basic notions of fairness. The evidence contained in the present record demonstrates that, even though the operating agreements specified the manner in which "all notices, demands and requests" were required to be given, Mr. MacDonald was unable to recall whether the 25 June 2012 letter that he sent to Mr. Chisum concerning Judges Road complied with the terms of the operating agreements, while Mr. Chisum testified that he never received the letter in question. In addition, even though Mr. Chisum's 2013 Parkway K-1 was dated 7 April 2014, Mr. Chisum testified that he did not receive it until October 2014 and that he first became aware that the Campagnas had attempted to extinguish his ownership interests in the LLCs in March 2016, when he unsuccessfully attempted to access his complimentary Judges Road storage unit. As a result, we affirm the trial court's determination that the statute of limitations applicable to the declaratory judgment claims that Mr. Chisum asserted against defendants began running at the time that he became aware or should have become aware of the Campagnas' breaches of the operating agreements and that the record contained sufficient evidence that Mr. Chisum's declaratory judgment claims relating to Judges Road and Parkway were not time-barred to support the submission of the statute of limitations issue to the jury.

2. Necessity for Proof of Actual Damages

¶ 37 **[2]** Secondly, defendants argue that the trial court erred by failing to direct a verdict or enter judgment notwithstanding the verdict in their favor with respect to the derivative claims for breach of fiduciary duty and constructive fraud relating to Judges Road. In support of this contention, defendants contend that the record contained no evidence that Judges Road had suffered actual damages, a deficiency that defendants believe to be fatal to Mr. Chisum's chances for success with respect to the relevant claims. In defendants' view, nominal damages, standing alone, are insufficient to support claims for constructive fraud and breach of fiduciary duty, with Mr. Chisum having failed to elicit any evi-

dence that Judges Road had sustained any actual damages as a result of the Campagnas' conduct.

¶ 38 In response, Mr. Chisum begins by arguing that defendants did not properly preserve this contention for purposes of appellate review by failing to raise it at trial and invited any error that the trial court might have committed by requesting the trial court to instruct the jury with respect to the breach of fiduciary duty and constructive fraud claims in such a manner as to permit the jury to find in Mr. Chisum's favor based upon an award of nothing more than nominal damages. In addition, Mr. Chisum contends that he did, in fact, offer evidence tending to show that Judges Road had sustained actual damages as the result of the Campagnas' conduct, including evidence which demonstrated that the Campagnas had made loans to themselves from the LLCs, sold essentially all of Judges Road's assets without either informing or obtaining consent from Mr. Chisum, and paid themselves large "management fees" from the LLCs despite their admission that they were "not supposed to get such fees." Finally, Mr. Chisum asserts that North Carolina law allows the assertion of breach of fiduciary duty and constructive fraud claims based upon nothing more than an award of nominal damages.

¶ 39 Although this Court has not previously addressed the issue of whether a plaintiff is required to prove actual damages in support of breach of fiduciary duty and constructive fraud claims, the Court of Appeals has addressed this issue on a number of occasions. In *Sloop v. London*, 27 N.C. App. 516 (1975), the plaintiffs sought to recover damages for wrongful foreclosure in reliance upon a breach of fiduciary duty theory. *Id.* at 518. After the trial court directed a verdict in favor of the defendants on the grounds that the record was devoid of any evidence tending to show that a wrongful foreclosure had occurred or that the plaintiffs were entitled to recover actual damages from the defendants, the Court of Appeals reversed the trial court's decision on the grounds that, "regardless of proof of any actual damages, [the] plaintiffs would be entitled to at least nominal damages should the jury find there was a wrongful foreclosure." *Id.* (citing *Bowen v. Fid. Bank*, 209 N.C. 140 (1936); 5 Strong, N.C. Index 2d, Mortgages and Deeds of Trust, § 39, pp. 594–95).

¶ 40 Similarly, in *Mace v. Pyatt*, 203 N.C. App. 245 (2010), the plaintiff asserted claims for trespass, conversion, forgery, fraud, and damage to personal property; prevailed upon all of those claims before a jury; and was awarded compensatory and punitive damages. *Id.* at 250. On appeal, the defendant argued that, given the absence of evidence concerning the amount of compensatory damages that the plaintiff was entitled to recover, the jury should not have been allowed to consider whether

either compensatory or punitive damages should be awarded. *Id.* at 253. Although the Court of Appeals vacated the jury's award on the grounds that the compensatory damages issue should not have been submitted to the jury, *id.* at 254–55, it recognized that the record contained evidence tending to show that the plaintiff had suffered nominal damages and upheld the jury's punitive damages award for that reason, *id.* at 255–57, stating that:

> [i]t is well established that merely nominal damages may support a substantial award of punitive damages. Once a cause of action is established, [a] plaintiff is entitled to recover, as a matter of law, nominal damages, which in turn support an award of punitive damages. Nominal damages need only be *recoverable* to support a punitive damages award, and a finding of nominal damages by the jury is not required where [a] plaintiff has sufficiently proven the elements of her cause of action.

Id. at 255 (cleaned up). As a result of its determination that the plaintiff was entitled to recover nominal damages, the Court of Appeals concluded that the jury's punitive damages award should be upheld. *Id.* at 256–57.

¶ 41 The plaintiff in *Bogovich v. Embassy Club of Sedgefield, Inc.*, 211 N.C. App. 1 (2011), asserted claims for breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices against multiple defendants, including a husband and wife. *Id.* at 2. After the trial court granted summary judgment in favor of the plaintiff with respect to her constructive fraud and unfair and deceptive trade practices claims, the jury found for the plaintiff with respect to her claim for breach of fiduciary duty and awarded her $12,165.00 in compensatory damages against the couple, $510,000.00 in punitive damages against the husband, and $1.00 in punitive damages against the wife. *Id.* at 7. On appeal, the defendants challenged the trial court's decision to grant summary judgment in favor of the plaintiff with respect to her constructive fraud claim on the grounds that the plaintiff had failed to establish the amount of compensatory damages to which she was entitled. *Id.* at 11. In rejecting the defendants' argument, the Court of Appeals concluded that "the undisputed evidence established the existence of all of the elements required for a finding of liability for constructive fraud" and that, "[a]ccording to well-established law, once a cause of action [has been] established, [the] plaintiff is entitled to recover, as a matter of law, nominal damages." *Id.* at 12 (second alteration in original).

¶ 42 In *Collier v. Bryant*, 216 N.C. App. 419 (2011), the plaintiffs asserted claims for actual and constructive fraud. However, the trial court granted summary judgment in favor of the defendant with respect to those claims. *Id.* at 423. On appeal, the plaintiffs contended that the record reflected the existence of genuine issues of material fact relating to the damages issue, *id.* at 430, while the defendants asserted that the plaintiffs were not entitled to recover punitive damages on the grounds that the plaintiffs could not prove the elements of their underlying substantive claims, *id.* at 434. In rejecting the defendants' argument, the Court of Appeals held that punitive damages are "incidental damages to a cause of action" and "can be awarded if either actual or constructive fraud is shown." *Id.* In other words, the Court of Appeals held that, even though "nominal damages must be recoverable" in order to support a punitive damages award, "there is no requirement that nominal damages actually be recovered." *Id.*

¶ 43 Similarly, the plaintiff in *Harris v. Testar, Inc.*, 243 N.C. App. 33 (2015), asserted a wrongful termination claim while the defendants counterclaimed for fraud and breach of fiduciary duty. *Id.* at 36. The trial court granted summary judgment in favor of the defendants, who were awarded $1.00 in nominal damages. *Id.* at 36–37. On appeal, the plaintiff challenged the trial court's decision to grant summary judgment in favor of the defendants with respect to the breach of fiduciary duty counterclaim. *Id.* at 37. The Court of Appeals, however, concluded that the plaintiff had breached a fiduciary duty to the defendants and allowed the trial court's ruling to stand despite the fact that nothing more than nominal damages had been awarded to the defendants. *Id.* at 38–39.

¶ 44 As a result of our belief that the Court of Appeals decisions discussed above were correctly decided, we adopt the reasoning of the Court of Appeals and hold that potential liability for nominal damages is sufficient to establish the validity of claims for breach of fiduciary duty and constructive fraud and can support an award of punitive damages. Aside from the fact that nothing in the prior decisions of this Court indicates that proof of actual injury is necessary in order to support a claim for breach of fiduciary duty or constructive fraud, we see no basis for treating the incurrence of nominal damages as a second-class legal citizen in this context, particularly given that such damages do reflect the existence of a legal harm and the fact that the policy of North Carolina law is to discourage breaches of fiduciary duty and acts of constructive fraud. As a result, we affirm the trial court's decision to enter judgment in Mr. Chisum's favor with respect to the claims for breach of fiduciary

duty and constructive fraud relating to Judges Road, including its award of punitive damages.

3. Inconsistent Verdicts

¶ 45 **[3]** Thirdly, defendants contend that the trial court erred by allowing the jury to find Rocco Campagna liable for constructive fraud given that it failed to find him liable for breach of fiduciary duty. According to defendants, given that the existence of a breach of fiduciary duty is an element of a constructive fraud claim, the jury could not rationally have found Rocco Campagna liable for constructive fraud once it failed to find that he had breached a fiduciary duty. In other words, defendants claim that, having found that Rocco Campagna was not liable for breach of fiduciary duty, it was precluded from finding him liable on a constructive fraud theory.

¶ 46 Mr. Chisum, on the other hand, contends that the trial court correctly determined that the jury's verdicts were not fatally inconsistent given that the jury was instructed to evaluate Rocco Campagna's conduct over two different periods of time in determining whether he should be held liable for breach of fiduciary duty and constructive fraud, with a ten-year period of time being applicable to the constructive fraud claim and a three-year period of time being applicable to the breach of fiduciary duty claim. In addition, Mr. Chisum asserts that defendants have failed to cite any authority in support of their argument that the jury's verdicts with respect to the relevant claims are fatally inconsistent.

¶ 47 The Court of Appeals has explicitly held that, "[a]lthough the elements of [constructive fraud and breach of fiduciary duty] overlap, each is a separate claim under North Carolina law." *White v. Consol. Plan., Inc.*, 166 N.C. App. 283, 293 (2004) (citing *Governor's Club, Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 249 (2002), *aff'd per curiam*, 357 N.C. 46 (2003)). This Court has implicitly endorsed the logic inherent in the Court of Appeals' treatment of this question, having allowed plaintiffs to assert claims for both breach of fiduciary duty and constructive fraud in the same case. *See, e.g.*, *Orlando Residence, Ltd. v. All. Hosp. Mgmt., LLC*, 375 N.C. 140 (2020) (involving separate claims for breach of fiduciary duty and constructive fraud).

¶ 48 A successful claim for breach of fiduciary duty requires proof that "(1) the defendants owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff." *Sykes*, 372 N.C. at 339. A successful claim for constructive fraud requires proof of facts and circumstances "(1) which created the relation of trust and confidence [between

the parties], and (2) [which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff." *Terry v. Terry*, 302 N.C. 77, 83 (1981) (second alteration in original) (quoting *Rhodes v. Jones*, 232 N.C. 547, 548–49 (1950)). Although the statute of limitations applicable to breach of fiduciary duty claims is three years, N.C.G.S. § 1-52(1) (2019), the limitations period applicable to constructive fraud claims is ten years, N.C.G.S. § 1-56(a) (2019).

¶ 49 In rejecting defendants' challenge to the consistency of the jury's verdicts with respect to these claims, the trial court pointed out that:

> [t]he jury was permitted to consider Rocco's conduct for the 10 years preceding January 6, 2017, in deciding whether he had committed constructive fraud, but for only 3 years preceding January 6, 2017, for the claim of breach of fiduciary duty. [Mr. Chisum] presented detailed, voluminous evidence regarding Judges Road financial transactions from 2010 through 2017. The jury could have concluded that Rocco engaged in acts in breach of the trust and confidence he owed Judges Road for which he should be held liable that occurred prior to, but not after, January 6, 2014.

After carefully reviewing the record, we agree with the trial court that the jury's verdicts with respect to the breach of fiduciary duty and constructive fraud claims are not fundamentally inconsistent in light of the differing statutes of limitation applicable to those claims. Simply put, the jury's determination that Rocco Campagna engaged in tortious conduct prior to 2014 has no bearing upon the issue of whether he engaged in tortious conduct between 2014 and 2017. As a result, we affirm the trial court's determination that the jury did not act in an impermissibly inconsistent manner when it found Rocco Campagna liable for constructive fraud while declining to find him liable for breach of fiduciary duty.

4. Instruction Concerning Open, Fair, and Honest Conduct

¶ 50 **[4]** Next, defendants contend that the trial court erred by declining to instruct the jury concerning the effect of evidence tending to show that they acted openly, fairly, and honestly in their dealings with Judges Road and Parkway upon the viability of Mr. Chisum's constructive fraud claim. Defendants assert that, if the trial court had delivered the requested instruction, the jury would have found that the presumption of constructive fraud had been rebutted, so that Mr. Chisum would have been required to prove actual fraud and would not have been able to

do so. In defendants' view, the record contained evidence tending to show that both Mr. Chisum and the LLCs sought and relied upon independent advice in connection with their dealings with the Campagnas, with this evidence being sufficient to support the delivery of the requested instruction. In addition, defendants contend that the trial court erroneously informed the jury that the principal issue that it was required to consider in addressing this claim was whether the Campagnas had been open, fair, and honest in their dealings with Mr. Chisum rather than in their dealings with the LLC, so that the trial court's instructions shifted their fiduciary obligations "away from the party to whom the fiduciary duty is actually owed" to a third person.

¶ 51 In response, Mr. Chisum argues that the trial court had correctly recognized that defendants had failed to elicit evidence tending to show that Mr. Chisum or the LLCs relied upon independent advice in the course of Mr. Chisum's dealings with the Campagnas and the LLCs. In addition, Mr. Chisum points to the presence of evidence tending to show that the Campagnas had exclusive control over the LLCs and relied upon the LLCs' lawyer and accountant to do their bidding, while ignoring the advice provided by the Companies' attorney that Mr. Chisum remained a member of the LLCs to the extent shown on the Schedule 1s, with these facts serving to defeat defendants' assertion that they had acted in an open, fair, and honest manner. Mr. Chisum also asserts that the trial court's focus upon whether the Campagnas had acted openly, fairly, and honestly in their dealings with him as an individual was proper given that the underlying issue at trial was the propriety of the elimination of Mr. Chisum's individual interests in the LLCs. Finally, Mr. Chisum contends that defendants cannot show prejudice from the trial court's failure to deliver the requested instruction.

¶ 52 "It is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in their entirety." *Desmond v. News & Observer Publ' Co.*, 375 N.C. 21, 66 (2020), *reh'g denied*, 848 S.E.2d 486 (N.C. 2020) (quoting *Murrow v. Daniels*, 321 N.C. 494, 497 (1988)). 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." *Minor v. Minor*, 366 N.C. 526, 531 (2013).

¶ 53 In *Forbis v. Neal*, 361 N.C. 519 (2007), the plaintiff brought an action on behalf of the estates of her two aunts against the aunts' nephew based upon certain transactions in which the nephew had engaged in reliance upon his authority as the aunts' attorney in fact. *Id.* at 521. After

the trial court granted summary judgment in the nephew's favor, *id.* at 523, this Court held, in connection with the plaintiff's constructive fraud claim, that, "[w]hen, as here, the superior party obtains a possible benefit through the alleged abuse of the confidential or fiduciary relationship, the aggrieved party is entitled to a presumption that constructive fraud occurred," *id.* at 529 (citation omitted), with this presumption arising "not so much because the fiduciary has committed a fraud, but because he may have done so," *id.* (cleaned up). After noting that the nephew was entitled to rebut the presumption of fraud "by showing, for example, that the confidence reposed in him was not abused," *id.* (cleaned up), we noted that the nephew had failed to make a sufficient showing to successfully rebut the presumption, *id.* at 530. We have also held that, once rebutted, the presumption of fraud "evaporates, and the accusing party must shoulder the burden of producing actual evidence of fraud." *Watts v. Cumberland Cnty. Hosp. Sys., Inc.*, 317 N.C. 110, 116 (1986).

¶ 54 Although the jury instruction that the Campagnas requested the trial court to deliver is couched in the language of the pattern jury instructions, that fact is not determinative of the issue that we are required to resolve in this case. *Desmond*, 375 N.C. at 70 (concluding that the pattern jury instructions did not accurately state the applicable law). The instruction that the Campagnas requested the trial court to deliver with respect to Judges Road—which is identical to the instruction that they requested relating to Parkway—did not include the burden-shifting language that is found in our decisions with respect to this issue. Instead, the ultimate import of the instruction that defendants requested the trial court to deliver to the jury in this case stated that, if the jury found that the Campagnas had acted openly, fairly, and honestly in their dealings with him, Mr. Chisum would be completely barred from obtaining a recovery on the basis of his constructive fraud claim. In view of the fact that the requested instruction did not inform the jury that, if the Campagnas had managed to rebut the presumption of fraud, Mr. Chisum would still be entitled to a recovery in the event that the jury found that actual fraud had occurred, it did not accurately state the applicable law. As a result, the trial court did not err by failing to instruct the jury concerning the manner in which it should consider evidence tending to show that the Campagnas acted in an open, fair, and honest manner in accordance with defendants' requested instruction.

5. Identical Compensatory Damage Awards

¶ 55 **[5]** Next, defendants argue that the jury's decision to award $128,757.00 in compensatory damages to Parkway against each of the Campagnas created an impermissible ambiguity in the jury's verdict. In support of

this contention, defendants note that Mr. Chisum's trial counsel suggested in his closing argument to the jury that the jury could award the same amount of compensatory damages against each defendant with the assurance that the trial court would ensure that no double recovery occurred. In light of this statement, defendants contend that a reviewing court cannot be certain whether the jury intended to award identical amounts to Parkway against each defendant or if it believed that the trial court would split a single award of $128,757.00 in favor of Parkway between Richard Campagna and Rocco Campagna. Although defendants acknowledge that they failed to lodge a contemporaneous objection to this portion of Mr. Chisum's jury argument, they contend that this omission has no bearing upon the proper resolution of their challenge to the compensatory damages award relating to Parkway because the resulting ambiguity did not become apparent until the jury had rendered its verdict.

¶ 56 In response, Mr. Chisum notes that defendants did not object to the statements that his trial counsel made during his closing argument and have not challenged the trial court's determination that the record contained sufficient evidence to support a total compensatory damage award in favor of Parkway in the amount of $257,514.00. In light of that set of circumstances, Mr. Chisum argues that the trial court did not abuse its discretion by refusing to disturb the jury's compensatory damages verdict.

¶ 57 A verdict "should be certain and import a definite meaning free from ambiguity," *Gibson v. Cent. Mfrs. Mut. Ins. Co.*, 232 N.C. 712, 716 (1950), with an uncertain or ambiguous verdict being insufficient to support the entry of a judgment, *id.* at 715. As a general proposition, reviewing courts presume that the jury has followed the trial court's instructions. *See Smith v. Perdue*, 258 N.C. 686, 690 (1963). For that reason, we have held jury verdicts to be fatally ambiguous in the event that the verdict sheet or the underlying instructions were vague, making it unclear precisely what the jury intended by its verdict. *See State v. Lyons*, 330 N.C. 298, 309 (1991); *State v. McLamb*, 313 N.C. 572, 577 (1985). However, defendants' argument does not focus upon any alleged deficiency in the trial court's instructions and rests, instead, upon a statement made by Mr. Chisum's trial counsel during closing arguments.

¶ 58 As a result of the fact that this Court has never had an opportunity to directly address the validity of identical compensatory damage verdicts returned against different defendants, defendants have directed our attention to *City of Richmond, Virginia v. Madison Management Group*,

Inc., 918 F.2d 438 (4th Cir. 1990), and *ClearOne Communications, Inc. v. Biamp Systems*, 653 F.3d 1163 (10th Cir. 2011), in which defendants contend that similar verdicts were held to be impermissibly ambiguous. The decisions upon which defendants rely are, however, distinguishable from this case given that the defendants in those cases were treated as being jointly and severally liable, making it unclear whether the juries intended to apportion total damages between the defendants or to require the defendants to pay the same damage amount jointly and severally. *See City of Richmond*, 918 F.2d at 460–61; *ClearOne*, 653 F.3d at 1179. In view of the fact that the Campagnas have not been held to be jointly and severally liable in this case, the rationale upon which the decisions relied upon by defendants is based has no application in this case.

¶ 59 A careful review of the record shows that the jury was clearly instructed to award the damages that Parkway sustained as a proximate result of the fact that both Richard Campagna and Rocco Campagna took "advantage of a position of trust and confidence to bring about the transfer of money and real property from Parkway to himself or his other companies." At trial, Mr. Chisum elicited evidence tending to show "lost profits, loans and transfers of funds by the Campagnas to themselves, and losses associated with the sales of Parkway's assets." According to the trial court, the combined compensatory damages award to Parkway was "well within the range of compensatory damages sought for Parkway." Moreover, the verdict sheet and the trial court's instructions in this case did not contain any language that could reasonably have been expected to confuse the jury as to the effect of any damage award that it intended to make, so we have no basis for believing that the jury failed to act in accordance with the trial court's instructions regardless of any statements that might have been made by Mr. Chisum's trial counsel during the closing arguments to the jury. As a result, we hold that the trial court did not abuse its discretion by refraining from deciding that the jury's compensatory damages verdict with respect to Parkway was impermissibly ambiguous.

6. Judicial Dissolution and Appointment of Receiver

¶ 60 **[6]** Finally, defendants argue that the trial court erred by judicially dissolving Judges Road and Parkway and appointing a receiver to handle the operation and dissolution of the two LLCs. As an initial matter, defendants contend that the trial court failed to make findings of fact and conclusions of law in support of its determination that the dissolution of Judges Road and Parkway was necessary. In addition, defendants claim, in reliance upon testimony from Mr. Chisum that he continued to consider the Campagnas to be his "good friends," that their working

relationship with one another was "good," and that they all "got along very well," that the record did not support the trial court's decision to dissolve the two LLCs. Moreover, defendants assert that they were deprived of their statutory right to purchase Mr. Chisum's interests in lieu of dissolution. Similarly, defendants contend that they were statutorily entitled to notice and an opportunity to be heard prior to the entry of an order judicially dissolving Judges Road and Parkway, with the trial itself being insufficient to serve as the required hearing given that the issue of whether the LLCs should be judicially dissolved was not at issue between the parties during the trial. In the same vein, defendants assert that, given Mr. Chisum's failure to seek judicial dissolution of Judges Road and Parkway pursuant to clause (i) of N.C.G.S. § 57D-6-02(2) in his amended complaint, they had not received notice concerning the exact nature of the judicial dissolution claim that Mr. Chisum was asserting as required by N.C.G.S. § 1A-1, Rule 8. Finally, defendants argue that the trial court failed to provide them with notice and an opportunity to be heard before appointing a receiver as required by N.C.G.S. § 57D-6-04.

¶ 61 Mr. Chisum has responded to defendants' arguments by asserting that the trial court did make sufficient findings to support the entry of an order of judicial dissolution and that there was ample support in the record evidence for such a decision. In addition, Mr. Chisum claims that the Campagnas were not entitled to purchase his interests in Judges Road and Parkway in lieu of judicial dissolution given that such a "buy-out" opportunity is only available when judicial dissolution is ordered pursuant to clause (ii) of the applicable statute while the trial court predicated its decision to judicially dissolve Judges Road and Parkway upon clause (i). Finally, Mr. Chisum contends that the trial and related proceedings provided defendants with ample notice and an opportunity to be heard with respect to both the judicial dissolution of Judges Road and Parkway and the appointment of a receiver.

¶ 62 According to N.C.G.S. § 57D-6-02(2),

> [t]he superior court may dissolve an LLC in a proceeding brought by . . . [a] member, if it is established that (i) it is not practicable to conduct the LLC's business in conformance with the operating agreement and this Chapter or (ii) liquidation of the LLC is necessary to protect the rights and interests of the member.

N.C.G.S. § 57D-6-02(2) (2019). The rights available to the members of a judicially dissolved LLC vary depending upon the basis upon which the trial court decides that judicial dissolution should be required. In

the event that a trial court determines that an LLC should be judicially dissolved pursuant to clause (ii), "the court will not order dissolution if after the court's decision the LLC or one or more other members elect to purchase the ownership interest of the complaining member at its fair value in accordance with any procedures the court may provide." N.C.G.S. § 57D-6-03(d) (2019). Similarly, trial courts have the authority to appoint a receiver for an LLC on the condition that "the court shall hold a hearing on the subject after delivering notice, or causing the party who brought the dissolution to deliver notice, of the hearing to all parties and any other interested persons designated by the court." N.C.G.S. § 57D-6-04(a) (2019).

¶ 63 In his amended complaint, Mr. Chisum alleged, in pertinent part, that:

> 160. Defendants [Rocco] Campagna and [Richard] Campagna unilaterally determined that Dennis Chisum was no longer an owner or member of the Chisum/Campagna LLCs and began operating the companies in their own best interests, to the detriment of Dennis Chisum's interests.
>
> 161. Upon information and belief, [Rocco] Campagna and [Richard] Campagna have directed distributions to themselves without notifying Dennis Chisum or distributing money to him in accordance with his ownership interest.
>
> 162. Based on the Campagnas' conduct as set forth herein, liquidation of each of the Chisum/Campagna LLCs is necessary to protect the rights and interests of Dennis Chisum.
>
> 163. In accordance with N.C.G.S. §§ 57D-6-02 and 57D-6-02, [Mr. Chisum] requests that this Court dissolve and liquidate each of the Chisum/Campagna LLCs and distribute the proceeds in accordance with their respective ownership interests.

A careful examination of these allegations compels the conclusion that Mr. Chisum sought the judicial dissolution of Judges Road and Parkway pursuant to both clauses of N.C.G.S. § 57D-6-02(2) by virtue of the fact that these factual allegations would support a determination that it was no longer practicable to operate the LLCs in accordance with the existing operating agreements and that judicial dissolution was necessary

to protect Mr. Chisum's interests, so that defendants had ample notice that the trial court was entitled to dissolve the two LLCs on the basis of either prong of the relevant statutory provision.

¶ 64 In deciding that Judges Road and Parkway should be judicially dissolved, the trial court found as fact that:

> a. The Campagnas and [Mr. Chisum] had no direct contact or communications with one another from approximately October of 2010, when [Mr. Chisum] walked out of the [Carolina Coast] members meeting, and the filing of this lawsuit in July 2016.
>
> b. The Campagnas treated [Mr.] Chisum as if his membership interests in Parkway and Judges Road had been extinguished beginning in July 2012, but never communicated to [Mr. Chisum] that they considered his memberships terminated. Richard Campagna admitted [Mr. Chisum] did not fail to meet a capital call or take any specific action which would have terminated [Mr. Chisum's] membership in Parkway.
>
> c. The Campagnas filed documents with the Secretary of State of North Carolina representing that Parkway was dissolved without notifying [Mr. Chisum], seeking his consent, or making any distribution to [Mr. Chisum].
>
> d. The Campagnas ceased providing [Mr. Chisum] with required report and financial information regarding Parkway and Judges Road.
>
> e. [Mr. Chisum]'s wife, Blanche, testified that she attempted to visit the Campagnas' offices sometime in 2012–2013 to get information regarding the LLCs, but that Richard ordered her to leave the premises in a threatening manner.

In addition, in denying defendants' post-trial motions relating to the judicial dissolution of Judges Road and Parkway, the trial court stated that:

> [i]n addition to this evidence, the Court also has had opportunity to observe the parties during the course of this litigation and at trial. The level of acrimony and

> distrust between the Campagnas and [Mr. Chisum] is extraordinary. Following this lengthy and highly contentious lawsuit, the Court is convinced that these parties could not ever again be associated with one another in a jointly owned business, let alone conduct the business of Parkway and Judges Road.

As a result, the trial court's factual findings and the evidence received at trial provide ample support for a determination that "it is not practicable to conduct the LLC[s'] business in conformance with the operating agreement and this Chapter." N.C.G.S. § 57D-6-02(2). As a result, we hold that the trial court properly ordered the judicial dissolution of Judges Road and Parkway pursuant to clause (i) of N.C.G.S. § 57D-6-02(2) without giving the Campagnas the opportunity to purchase Mr. Chisum's interests given that they were not entitled to do so. *See* N.C.G.S. § 57D-6-03(d).

¶ 65 In addition, we hold that defendants had an ample opportunity to be heard with respect to the issue of whether Judges Road and Parkway should be judicially dissolved. In view of the allegations of the amended complaint, the interrelationship of the other issues that were before the trial court in this case, and the extent to which evidence relevant to the judicial dissolution was received during the course of the trial, we have no hesitation in concluding that the extent to which Judges Road and Parkway should be judicially dissolved and whether a receiver should be appointed to oversee the operation and dissolution of those companies were issues before the court at trial. At trial, the trial court heard extensive evidence concerning the level of animosity between the parties and the likelihood that they would ever be able to work together as required by the operating agreements. In addition, the trial court informed the parties while the jury was deliberating that "it's likely I will order dissolution here. I mean, highly likely, given the circumstances of the existing Judges Road" and that it typically "appoint[s] a receiver" in such circumstances. As a result, for all of these reasons, we hold that the trial court did not err when it ordered that Judges Road and Parkway be judicially dissolved and that a receiver be appointed to oversee the operation and dissolution of those LLCs.

C. Mr. Chisum's Appeal

1. Timeliness of Carolina Coast-Related Claims

¶ 66 **[7]** In seeking relief from the trial court's judgments and orders before this Court, Mr. Chisum begins by arguing that the trial court erred by determining that his claims relating to Carolina Coast were barred

by the applicable statute of limitations. More specifically, Mr. Chisum contends that statutes of limitation do not apply to actions for a declaratory judgment given that nothing is required to support the maintenance of such actions except the existence of an actual controversy between the parties, with the only time-related bar applicable to declaratory judgment actions being the equitable doctrine of laches. In addition, Mr. Chisum asserts that, in the event that this Court concludes that declaratory judgment claims are subject to any statute of limitation, such actions should be governed by the ten-year limitations period for actions sounding in constructive fraud rather than the three-year limitations period for actions sounding in breach of contract given that his declaratory judgment claims rest upon the constructive fraud claim asserted in his amended complaint.

¶ 67 In addition, Mr. Chisum asserts that his claims involving Carolina Coast should be deemed to have been timely filed even if the applicable statute of limitations is the three-year period governing breach of contract actions, with this result being the appropriate one given that the Campagnas never amended Carolina Coast's Schedule 1. At an absolute minimum, Mr. Chisum argues that the record reveals the existence of triable issues of fact relating to whether the operating agreement had been breached and whether or upon what date Mr. Chisum learned of any such breach that were sufficient to preclude the trial court from directing a verdict in defendants' favor with respect to his Carolina Coast-related claims. Finally, Mr. Chisum requests that, in the event that his claims relating to Carolina Coast are remanded to the Superior Court, New Hanover County, for a new trial, the trial court be directed to instruct the jury concerning the doctrine of equitable estoppel given the existence of evidence tending to show that the Campagnas acted in such a manner as to induce him to refrain from taking action to protect his interests prior to the filing of the initial complaint.

¶ 68 In response, defendants assert that the applicable statute of limitations is the three-year period applicable to a breach of contract claim, with the relevant limitations period having begun to run at the time of breach regardless of the extent, if any, to which Mr. Chisum had notice that a breach had actually occurred. In addition, defendants argue that the Campagnas did not act in a secretive manner in taking control of Carolina Coast and that Mr. Chisum had ample notice of their alleged breaches of contract more than three years prior to the filing of the original complaint.

¶ 69 This Court has "long recognized that a party must initiate an action within a certain statutorily prescribed period after discovering its injury

to avoid dismissal of a claim," *Christenbury Eye Ctr., P.A.*, 370 N.C. at 5, and that statutes of limitation exist to "afford security against stale demands, not to deprive anyone of his just rights by lapse of time," *id.* at 5–6 (quoting *Shearin v. Lloyd*, 246 N.C. 363, 371 (1957), *superseded by statute*, N.C.G.S. § 1-15(b) (1971), *on other grounds as recognized in Black v. Littlejohn*, 312 N.C. 626, 630–31 (1985)). Although the General Assembly has not enacted a specific statute of limitations applicable to declaratory judgment claims, this Court has applied statutes of limitation to declaratory judgment claims in a number of earlier cases.

¶ 70 In *Penley v. Penley*, 314 N.C. 1 (1985), for example, a husband filed an action against his wife for the purpose of seeking a declaration that he was entitled to a 48% ownership interest in a fast-food business. *Id.* at 4. The plaintiff alleged that, in exchange for his full-time assistance in operating the business during a time when the defendant was ill, she had agreed to organize the business as a joint enterprise with equally divided returns. *Id.* at 5. The plaintiff further alleged that, in 1977, the parties orally formed a corporation in which each party would own a 48% interest while their son owned the remaining 4%. *Id.* Both parties served as officers and directors of the corporation from late 1977 through 9 April 1979, at which point the defendant abandoned the plaintiff. *Id.* After a brief reconciliation, the defendant abandoned the plaintiff for a second time on 31 December 1979 and, from that point on, denied that the plaintiff possessed any rights in the business and wrongfully converted the proceeds of the business to her own use. *Id.* On 11 August 1981, the plaintiff filed a complaint seeking a declaration that he was entitled to a 48% interest in the corporation, a claim that the jury upheld at trial. *Id.* at 4. On appeal, this Court concluded that "the three-year contract limitations period provided in [N.C.G.S. §] 1-52(1) is the applicable statute of limitations," *id.* at 19, and determined that "the breach occurred and the right to institute an action commenced, at the earliest, when [the] defendant broke her promise or took action inconsistent with the promise she made to [the plaintiff]," *id.* at 20. As a result, we held that, since the breach of contract occurred when the defendant initially failed to perform in accordance with the contract by abandoning the plaintiff in April 1979, the plaintiff's declaratory judgment claim was not barred by the applicable three-year limitations period. *Id.* at 19–21.

¶ 71 In *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170 (2003), we considered issues arising from the General Assembly's decision to enact legislation authorizing Orange County to enact a civil rights ordinance. *Id.* at 174–75. Acting in reliance upon this legislation, as amended, the Orange County Board of Commissioners adopted an

anti-discrimination ordinance that was to be enforced by the Orange County Human Relations Commission. *Id.* at 176. In response to a civil action filed by the plaintiff alleging that the defendant had discriminated against her on the basis of her age and sex, forced her to resign, and retaliated against her for filing a complaint, the defendant asserted a counterclaim in which it sought a declaration that the enabling legislation and the underlying ordinance violated the North Carolina Constitution. *Id.* at 176–77. On appeal from a trial court decision that the defendant's claim was not time-barred and that the enabling legislation violated the North Carolina Constitution, this Court concluded that the defendant's declaratory judgment action was not barred by the statute of limitations given that the defendant had not been harmed by the enactment of the enabling legislation or the adoption of the underlying ordinance until enforcement action had been taken against it, a set of circumstances that had occurred "well within any limitations period triggered by the suits and proceedings brought against it." *Id.* at 179–81.

¶ 72 In *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15 (2016), the plaintiffs brought a declaratory judgment action for the purpose of obtaining a determination concerning whether the Town had the authority to enact and enforce an ordinance regulating the collection of water and sewer impact fees that were intended to facilitate the provision of service to future customers. *Id.* at 16. On appeal from a trial court order granting summary judgment in favor of the Town, this Court held that the Town lacked the statutory authority to impose and collect fees relating to service to be provided in the future and remanded the case to the Court of Appeals for a determination concerning whether the plaintiffs' claims were barred by the applicable statute of limitations. *Id.* at 20. In the course of deciding a subsequent appeal, we identified the applicable limitations period by focusing upon the nature of the underlying substantive claim to which the request for a declaratory judgment related and concluded that certain of the plaintiffs' claims were time-barred by the three-year statute of limitations applicable to claims arising under state or federal statutes. *Quality Built Homes Inc. v. Town of Carthage*, 371 N.C. 60, 73 (2018) (*Quality Built Homes II*).

¶ 73 Finally, in *North Carolina Farm Bureau Mutual Insurance Company v. Hull*, 370 N.C. 486 (2018), we reversed a decision of the Court of Appeals for the reasons stated in a dissenting opinion which would have held that a declaratory judgment action in a subrogation-related action had been timely filed within the three-year limitation period applicable to breach of contract actions. *See N.C. Farm Bureau Mut. Ins. Co. v. Hull*, 251 N.C. App. 429, 435 (2016) (Tyson, J., concur-

ring in part and dissenting in part). In *Hull*, as in *Penley*, *Williams*, and *Quality Built Homes*, we affirmed the applicability of statutes of limitations to declaratory judgment actions, with the appliable statute of limitations being the one associated with the substantive claim that most closely approximates the basis for the relevant request for a declaration. *See Penley*, 314 N.C. at 20–21 (applying the three-year statute of limitations applicable to actions for breach of contract given that the case in question revolved around an alleged breach of contract); *Quality Built Homes II*, 371 N.C. at 72–73 (applying the three-year statute of limitations applicable to claims based upon a "liability created by statute" given that the plaintiffs sought a declaration concerning the extent to which the Town's decision to assess certain fees relating to future service rested upon sufficient statutory authority); *Hull*, 370 N.C. at 486 (endorsing the conclusion set out in the dissenting opinion at the Court of Appeals that the three-year statute of limitations applicable to breach of contract actions governed an action seeking a declaration concerning the extent of a parties' subrogation rights under a policy of insurance). In the event that we believed that statutes of limitation did not apply to declaratory judgment actions, we would not have made any of these decisions. Moreover, we do not believe that the General Assembly intended to exempt declaratory judgment actions from the reach of any statute of limitations whatsoever given that such a decision might have the effect of thwarting the enforcement of the limitation of actions provisions that pervade the General Statutes of North Carolina by allowing plaintiffs to recast otherwise time-barred claims as declaratory judgment actions. As a result, we hold that declaratory judgment actions are subject to the applicable statute of limitations, which is the one that governs the substantive right that is most closely associated with the declaration that is being sought.

¶ 74 Although Mr. Chisum has, in fact, asserted a constructive fraud claim in connection with defendants' actions in interfering with his interest in Carolina Coast, he lacks the ability to assert that claim unless he is able to establish his status as a member of that LLC. The extent to which Mr. Chisum is a member of Carolina Coast hinges, in turn, upon the contents of the operating agreement associated with that entity, which is, of course, a contract. As a result, given that the validity of Mr. Chisum's claims relating to Carolina Coast ultimately hinges upon the validity of his claim that defendants breached the operating agreement by diluting his membership interest in the LLC and assuming total control of its operations, we hold that the three-year statute of limitations applicable to contract claims governs the declaratory judgment claims at issue in this case.

¶ 75 Finally, consistent with our earlier decision that a claim for breach of contract accrues when the plaintiff knew or should have known that the contract had been breached, we hold that the trial court erred by directing a verdict in favor of defendants with respect to Mr. Chisum's Carolina Coast-related claims. Although the record does, to be sure, contain ample evidence tending to show that Mr. Chisum knew or should have known of the Campagnas' breach of the operating agreement more than three years prior to the filing of the initial complaint, including the fact that Mr. Chisum's 2010 K-1 had been marked "[f]inal," we believe that the record also contains evidence that would have permitted a reasonable jury to return a verdict in Mr. Chisum's favor with respect to this issue, including, but not limited to, the fact that the record contains evidence tending to show that an individual's membership status relating to Coastal Carolina is reflected in the contents of the Schedule 1 applicable to that LLC, and the fact that the Schedule 1 relating to Carolina Coast was never amended to show that Mr. Chisum's membership status had been fully diluted and the fact that Mr. Chisum was allowed to use his complimentary storage unit at Judges Road until February 2016. Thus, the trial court erred by directing a verdict in defendants' favor with respect to Mr. Chisum's Carolina Coast-related claims.

¶ 76 As a result, given our determination that the record reveals the existence of a triable issue of fact relating to the extent to which Mr. Chisum knew or reasonably should have known that defendants had breached the Carolina Coast operating agreement more than three years prior to the filing of the initial complaint, we reverse the trial court's decision to direct a verdict in defendants' favor with respect to this issue and remand this case to the Superior Court, New Hanover County, for a new trial with respect to the issue of whether Mr. Chisum's Carolina Coast-related claims are barred by the applicable statute of limitations. On remand, Mr. Chisum is free to attempt to persuade the trial court to deliver an equitable estoppel instruction to the jury if he wishes to do so. In the event that the jury determines on remand that Mr. Chisum's initial complaint had been filed within three years after he knew or reasonably should have known that defendants had breached the Carolina Coast operating agreement and in the event that Mr. Chisum establishes on remand that he remains a member of Carolina Coast, he is also entitled to assert his breach of fiduciary duty and constructive fraud claims against defendants, subject to his ability to show that those claims are not otherwise time-barred and have substantive merit.

2. Punitive Damages Awards

¶ 77 **[8]** Secondly, Mr. Chisum argues that, since the Campagnas own a majority of the interests in Judges Road and Parkway, they are otherwise entitled to receive pro rata distributions that include monies associated with punitive damages awards that they are required to pay to Judges Road and Parkway at the time that the LLCs are judicially dissolved. In Mr. Chisum's view, this Court should not countenance what he believes to be an inequitable result, particularly given that such a result would thwart North Carolina's policy of "punish[ing] a defendant for egregiously wrongful acts and . . . deter[ring] the defendant and others from committing similar wrongful acts," quoting N.C.G.S. § 1D-1 (2019). In addition, Mr. Chisum asserts that the principles underlying North Carolina's policy precluding tortfeasors from being enriched as a result of their own wrongs in the wrongful death context should provide guidance to the Court in resolving this issue as well and directs our attention to four decisions from other jurisdictions that, in his opinion, hold that punitive damages awarded in corporate derivative actions should not be included in disbursements that are ultimately made for the benefit of wrongdoers. Finally, Mr. Chisum contends that, since he is not requesting that the jury's verdict be altered, the necessary relief can be afforded by simply amending the existing judgment to reflect that any distribution that is eventually made to the Campagnas following the judicial dissolution of Judges Road and Parkway should be calculated by excluding the effect of the punitive damages awards that they are otherwise required to pay to the LLCs.

¶ 78 In seeking to persuade us to refrain from adopting this proposal, defendants note that Mr. Chisum has failed to cite any binding or persuasive authority that fully supports his argument. In defendants' view, the jury was adequately informed that any punitive damages awards that it elected to order would be paid to the LLCs and that the Campagnas owned interests in Judges Road and Parkway at the time that the jury rendered its verdict with respect to the punitive damages issue. Finally, defendants assert that Mr. Chisum's analogy to the wrongful death claims is a faulty one given that in such cases, unlike the situation at issue in this case, the actual wrongdoer is a real party in interest in the underlying litigation.

¶ 79 According to well-established North Carolina law, a party is not entitled to advance an argument for the first time on appeal. *See Higgins v. Simmons*, 324 N.C. 100, 103 (1989). Instead, a party seeking to advance a legal claim on appeal "must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the

ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). In addition, "[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." N.C. R. App. P. 10(a)(2).

¶ 80 A careful examination of the record demonstrates that Mr. Chisum has failed to properly preserve this issue for purposes of appellate review. Although Mr. Chisum asserted at the jury instruction conference that, pursuant to the trial court's instructions, "[w]e're punishing [defendants]," only "for 80% of the dollars to go right back [to them]," he failed to propose any instructions that would preclude what he now claims to be an inequitable outcome and asked the trial court to instruct the jury to simply decide how much in punitive damages should be awarded to each LLC without requesting that the jury attempt to specify the way in which any punitive damages award made in favor of Judges Road and Parkway should ultimately be distributed to the LLCs' owners. After defendants' trial counsel argued that

> if [the jury] were to award punitive damages, it is specifically damages that have to be reasonably related—they have to be exactly related to the injury that was—for which the jury compensated them. That injury would be to the LLC. So to divorce the punitive damages from the injury to the LLC that they're required to base the punitive damages on wouldn't make much sense[,]

the trial court determined that "the issue of who gets to participate in [the] punitive damage award can be sorted out with the final judgment." Following the jury instruction conference, the trial court instructed the jury to decide the amount, if any, of punitive damages that Richard Campagna and Rocco Campagna should be required to pay to Judges Road and Parkway in punitive damages, with any punitive damages award being limited to an amount which "bear[s] a rational relationship to the sum reasonably needed to punish" the two Campagnas.

¶ 81 After having allowed the jury to deliberate and reach its verdict with respect to the punitive damages issue on the basis of instructions to which he did not object, Mr. Chisum waived the right to seek to have the allocation of the jury's punitive damages award recalibrated at a later time. In essence, Mr. Chisum acquiesced in a jury instruction

that provided that any punitive damages award that the jury elected to make would be paid to Judges Road and Parkway. Having done so, Mr. Chisum has no right to complain in the event that the trial court elected to enter judgment based upon the jury's verdict as it was returned. As a result, we decline to disturb the trial court's refusal to alter or amend the judgment so as to ensure that the Campagnas did not benefit from the jury's decision to award punitive damages in favor of Judges Road and Parkway.

3. Individual Claims for Fiduciary Duty and Constructive Fraud

¶ 82 **[9]** Finally, Mr. Chisum argues that the trial court erred by dismissing his individual claims for breach of fiduciary duty and constructive fraud on the grounds that the assertion of these claims was authorized by this Court's decision in *Barger v. McCoy Hillard & Parks*, 346 N.C. 650 (1997), given that he suffered an injury that was separate and distinct from that suffered by Judges Road or Parkway. As a result, Mr. Chisum contends that he should have been permitted to pursue his individual claims in addition to the derivative claims that he asserted on behalf of the LLCs.

¶ 83 In response, defendants contend that members of an LLC do not owe a fiduciary duty to other members and that Mr. Chisum failed to allege and prove that he had suffered an injury as the result of defendants' conduct that was separate and distinct from any injury sustained by the LLCs. Thus, defendants urge the Court to determine that Mr. Chisum's attempt to assert individual claims for breach of fiduciary duty and constructive fraud in this case must necessarily fail.

¶ 84 The long-standing rule in this jurisdiction is that "shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." *Barger*, 346 N.C. at 658. On the other hand, however, this Court has recognized exceptions to the general rule "(1) where there is a special duty, such as a contractual duty, between the wrongdoer and the shareholder, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders." *Id.* For that reason:

> a shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong, if the shareholder can show that the wrongdoer owed him a special duty or that the injury suffered by the shareholder is separate and distinct from the injury

> sustained by the other shareholders or the corporation itself.

Id. at 658–59; *see also*, *e.g.*, *Corwin v. British Am. Tobacco PLLC*, 371 N.C. 605, 613 (2018) (stating that "the second *Barger* exception[ ] focuses on whether the stockholder suffered a harm that is distinct from the harm suffered *by the corporation*"); *Green v. Freeman*, 367 N.C. 136, 142 (2013) (applying the *Barger* exceptions).

¶ 85 Prior to addressing the issue of whether Mr. Chisum satisfied the requirements for the assertion of an individual claim delineated in *Barger*, however, we must first determine whether he satisfied the requirements for the assertion of an individual breach of fiduciary duty or constructive fraud claim at all. As we have already noted, in order to successfully assert a claim for breach of fiduciary duty, "a plaintiff must show that: (1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that fiduciary duty; and (3) the breach of fiduciary duty was a proximate cause of injury to the plaintiff." *Sykes*, 372 N.C. at 339. Similarly, the assertion of a successful constructive fraud claim requires a plaintiff to show that he or she suffered an injury proximately caused by a defendant's decision to take advantage of a position of trust. *See Terry*, 302 N.C. at 83.

¶ 86 A careful review of the record developed before the trial court satisfies us that Mr. Chisum's breach of fiduciary duty and constructive fraud claims fail because of his failure to demonstrate that he sustained a legally cognizable injury. In attempting to demonstrate the existence of the requisite injury, Mr. Chisum claims that the Campagnas attempted to "freeze [him] out of the LLCs," conducted "sham capital calls," acted as if he was no longer a member of the LLCs, and treated him in a manner that was inconsistent with his status as a member of Judges Road and Parkway. Instead of showing the existence of a legally cognizable injury, the facts upon which Mr. Chisum relies simply describe the specific steps that the Campagnas took to deprive Mr. Chisum of his ownership interests in Judges Road and Parkway and do not show the sort of injury that is necessary to support claims for breach of fiduciary duty and constructive fraud. As a result, since Mr. Chisum has failed to establish that he suffered a legally cognizable injury as the result of the Campagnas' conduct, we need not determine whether any injury that Mr. Chisum might have suffered was separate and apart from any injury suffered by Judges Road and Parkway. For that reason, we affirm the trial court's decision to dismiss Mr. Chisum's individual claims for breach of fiduciary duty and constructive fraud.

III. Conclusion

¶ 87 Thus, for the reasons set forth above, we hold that none of defendants' challenges to the trial court's judgment and related orders have merit and that, with the exception of his challenge to the trial court's decision to direct a verdict in favor of defendants with respect to his Carolina Coast-related claims, the same is true of Mr. Chisum's challenges to the trial court's judgment and related orders. As a result, the trial court's judgments and related orders are affirmed, in part, and reversed, in part, and this case is remanded to the Superior Court, New Hanover County, for further proceedings not inconsistent with this opinion, including the holding of a new trial with respect to the claims relating to Carolina Coast that were asserted in Mr. Chisum's amended complaint.

AFFIRMED, IN PART, AND REVERSED AND REMANDED, IN PART.

Justices BERGER and BARRINGER did not participate in the consideration or decision of this case.

GAY v. SABER HEALTHCARE GRP., L.L.C

[376 N.C. 726, 2021-NCSC-8]

PAMELA GAY, EXECUTRIX OF THE ESTATE OF JOAN R. FRANKLIN
v.
SABER HEALTHCARE GROUP, L.L.C., AND AUTUMN CORPORATION,
D/B/A AUTUMN CARE OF RAEFORD

No. 190A20

Filed 12 March 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 842 S.E.2d 635 (N.C. Ct. App. 2020), affirming an order denying defendants' motion to compel arbitration and stay proceedings entered on 11 June 2019 by Judge Mary Ann Tally in Superior Court, Hoke County. Heard in the Supreme Court on 17 February 2021.

Rachel A. Fuerst and Rebecca J. Britton for plaintiff-appellee.

Bradley K. Overcash and Daniel E. Peterson for defendant-appellants.

Narendra K. Ghosh for North Carolina Advocates for Justice, amicus curiae.

PER CURIAM.

AFFIRMED.

GRIFFIN v. ABSOLUTE FIRE CONTROL, INC.

[376 N.C. 727, 2021-NCSC-9]

STACY GRIFFIN, EMPLOYEE
v.
ABSOLUTE FIRE CONTROL, INC., EMPLOYER, AND EVEREST NATIONAL INS. CO. & GALLAGHER BASSETT SERVS., CARRIER

No. 29A20

Filed 12 March 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 269 N.C. App. 193 (2020), affirming in part and reversing and remanding in part an opinion and award filed on 25 January 2019 by the North Carolina Industrial Commission. On 29 April 2020, the Supreme Court allowed plaintiff's petition for discretionary review and defendants' conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 16 February 2021.

Sellers, Ayers, Dortch & Lyons, PA, by Christian R. Ayers and John F. Ayers III, for plaintiff-appellee.

Brotherton Ford Berry & Weaver, PLLC, by Demetrius Worley, for defendant-appellants.

Poisson, Poisson & Bower, PLLC, by E. Stewart Poisson; and Erwin Byrd for North Carolina Advocates for Justice, amicus curiae.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Linda Stephens; and Teague Campbell Dennis & Gorham, LLP, by Bruce Hamilton, for North Carolina Association of Defense Attorneys, North Carolina Association of Self-Insurers, North Carolina Chamber Legal Institute, North Carolina Retail Merchants Association, North Carolina Home Builders Association, North Carolina Automobile Dealers Association, North Carolina Restaurant and Lodging Association, National Federation of Independent Business, Employers Coalition of North Carolina, North Carolina Farm Bureau Federation, American Property Casualty Insurance Association Insurance Federation of North Carolina, and National Association of Mutual Insurance Companies, amici curiae.

IN RE ELDRIDGE

[376 N.C. 728, 2021-NCSC-10]

PER CURIAM.

AFFIRMED.

¶ 1 Plaintiff's petition for discretionary review is dismissed as improvidently allowed. Defendants' conditional petition for discretionary review is dismissed as improvidently allowed. Defendants' petition for writ of certiorari is dismissed as moot.

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

IN THE MATTER OF DAVIN ELDRIDGE

No. 478A19

Filed 12 March 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 268 N.C. App. 491, 836 S.E.2d 859 (2019), affirming an order finding defendant guilty of criminal contempt entered on 11 January 2019 by Judge William H. Coward in Superior Court, Macon County. Heard in the Supreme Court on 16 February 2021.

Joshua H. Stein, Attorney General, by Teresa L. Townsend, Special Deputy Attorney General, for the State-appellee.

McKinney Law Firm, P.A., by Zeyland G. McKinney, Jr., for defendant-appellant.

PER CURIAM.

AFFIRMED.

IN RE N.P.

[376 N.C. 729, 2021-NCSC-11]

IN THE MATTER OF N.P.

No. 280A19

Filed 12 March 2021

Termination of Parental Rights—subject matter jurisdiction—non-resident parents—residence of the child

The trial court had subject matter jurisdiction in a termination of parental rights case because—even though the parents were not and had not been residents of North Carolina—jurisdiction depends on the residence of the child, not the parents. Since the child was born in North Carolina and had lived her entire life in this state, she was a resident of North Carolina.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 30 April 2019 by Judge J.H. Corpening, II in District Court, New Hanover County. Heard in the Supreme Court on 13 January 2021.

Karen F. Richards for petitioner-appellee New Hanover County Department of Social Services.

Michelle FormyDuval Lynch for appellee Guardian ad Litem.

Peter Wood for respondent-appellant.

MORGAN, Justice.

¶ 1 In this appeal from a termination of parental rights order, this Court is asked to determine whether the trial court had subject matter jurisdiction in the proceeding. Respondent-mother bases her argument contesting the trial court's authority on her assertions that (1) neither she, her daughter "Nancy," nor Nancy's father were residents of North Carolina and (2) any temporary emergency jurisdiction which the trial court may have obtained in the matter had expired prior to the filing of the termination of parental rights petition.[1] After careful review of the unusual circumstances presented by this case, we conclude that the trial court here properly exercised subject matter jurisdiction concerning Nancy under the plain language of our state's Juvenile Code. Accordingly, we affirm

1. We employ a pseudonym for the child for ease of reading and to protect the identity of the juvenile.

the trial court's order terminating respondent-mother's parental rights to Nancy.

I. Factual Background and Procedural History

¶ 2 In July 2017, respondent-mother, then seventeen years of age, was pregnant and living with her boyfriend and his family in Norfolk, Virginia. During the early portion of the month, while visiting Onslow County, North Carolina, respondent-mother went to see a doctor for prenatal care and was determined to be at risk for an immediate miscarriage. Respondent-mother was in labor as she was transported by helicopter to New Hanover Regional Medical Center in Wilmington, North Carolina. On 4 July 2017, Nancy was born twenty-three weeks prematurely, weighing one pound and four ounces, suffering from a hole in her heart, and needing a feeding tube to eat. As a result, Nancy required care from a variety of medical professionals, including a neurologist, an ophthalmologist, a cardiologist, and a pulmonologist. Respondent-mother remained at the hospital with Nancy after the child's birth. Respondent-mother's boyfriend, who was Nancy's father, returned home to Virginia after Nancy's birth, but joined respondent-mother and Nancy at the hospital for a temporary period beginning on 22 September 2017.[2] When Nancy's father and respondent-mother did not follow the proper feeding schedule for Nancy and had trouble providing proper care for the infant even with the help of hospital staff, the Onslow County Department of Social Services was contacted. Since the hospital where Nancy was receiving care was located in New Hanover County, the juvenile matter was transferred to the New Hanover County Department of Social Services (DSS) on 29 September 2017. As a result of the interrelated issues regarding Nancy's health and care, DSS took Nancy into its custody on 3 October 2017. On 3 October 2017, DSS filed a petition, which alleged that Nancy was neglected and dependent. Following an adjudication hearing in December 2017, the trial court adjudicated Nancy to be both neglected and dependent.

¶ 3 At a nonsecure custody hearing held on 11 October 2017, the trial court concluded that it "ha[d] emergency jurisdiction over the subject matter and the parties to this action and authority to enter this Order." When Nancy was discharged from the hospital on 12 October 2017, DSS placed her in foster care in New Hanover County. On 9 November 2017, Nancy's father and respondent-mother entered into a case plan with

2. Initially, Nancy's father was not listed on her birth certificate, but he added his name to the birth certificate after the filing of the petition to terminate his and respondent-mother's parental rights. The parental rights of Nancy's father to the juvenile were also terminated, but he is not a party to this appeal.

DSS, agreeing to complete parenting classes, to complete psychological evaluations and follow any recommendations, and to maintain stable housing and employment. After the agreement was reached, both parents moved back to Norfolk, Virginia, where they continued to reside at the time of the filing of the termination of parental rights petition with the family of Nancy's father.

¶ 4 On 22 October 2018, DSS filed a petition to terminate the parental rights to Nancy of both respondent-mother and Nancy's father. After a hearing on 1 April 2019, the trial court found that grounds existed to terminate the parental rights of both parents on the bases of neglect, failure to make "reasonable progress . . . in correcting those conditions which led to the removal of the juvenile," and willful abandonment. N.C.G.S. § 7B-1111(1), (2), (7) (2019). To support these grounds, among other findings of fact which are not challenged by respondent-mother on appeal, the trial court found that respondent-mother (1) did not engage in parenting classes, (2) delayed her psychological evaluation, (3) did not complete recommended therapy, (4) did not verify her housing or income during the course of the proceeding, (5) missed or rescheduled numerous visits with Nancy, and (6) did not provide emotional or financial support for Nancy. The trial court additionally determined that it was in the best interests of Nancy to terminate the parental rights of both parents. The trial court entered the order of termination on 30 April 2019. Respondent-mother gave written notice of appeal to this Court on 2 May 2019.

II. Analysis

1. Standard of Review

¶ 5 "The existence of subject matter jurisdiction is a matter of law and cannot be conferred upon a court by consent." *In re K.J.L.*, 363 N.C. 343, 345–46 (2009) (extraneity omitted). "[A] court's lack of subject matter jurisdiction is not waivable and can be raised at any time," *id.* at 346, including for the first time upon appeal, *In re H.L.A.D.*, 184 N.C. App. 381, 385 (2007), *aff'd per curiam*, 362 N.C. 170 (2008). We review questions of law de novo. *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 556 (2018).

2. Pertinent Law

¶ 6 Absent subject matter jurisdiction a court has no power to act and any resulting judgment is void. *In re T.R.P.*, 360 N.C. 588, 590 (2006). "When the record shows a lack of [subject matter] jurisdiction in the lower court, the appropriate action on the part of the appellate court is

to . . . vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176 (1981).

¶ 7 "In matters arising under the Juvenile Code, the court's subject matter jurisdiction is established by statute." *In re K.J.L.*, 363 N.C. at 345. The Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA) is an overarching jurisdictional scheme intended to "[a]void jurisdictional competition and conflict with courts of other States in matters of child custody." N.C.G.S. § 50A-101 cmt. (2019); *see also In re L.T.*, 374 N.C. 567, 569 (2020) ("The trial court must comply with the UCCJEA in order to have subject matter jurisdiction over juvenile abuse, neglect, and dependency cases and termination of parental rights cases.").

> The UCCJEA applies to proceedings in which child custody is at issue, including those involving juvenile abuse, neglect, dependency and termination of parental rights; and a trial court must comply with its provisions to obtain jurisdiction in such cases. *See* N.C.G.S. §§ 50A-102(4), -201(a)–(b) (2017). Generally, North Carolina courts have jurisdiction to make a child custody determination if North Carolina is the home state of the child. N.C.G.S. § 50A-201(a)(1). " 'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." N.C.G.S. § 50A-102(7) (2017).

In re S.E., 373 N.C. 360, 364 (2020).

¶ 8 More specifically, in termination of parental rights matters, the North Carolina General Statutes provide:

> *The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion.* The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. *Provided, that before exercising jurisdiction under this Article, the court shall find that it has jurisdiction to make a child-custody*

> *determination under the provisions of G.S. 50A-201*, 50A-203, or 50A-204. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the state of residence of the parent. *Provided, that before exercising jurisdiction under this Article regarding the parental rights of a nonresident parent, the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201* or G.S. 50A-203, without regard to G.S. 50A-204 *and that process was served on the nonresident parent pursuant to G.S. 7B-1106.*

N.C.G.S. § 7B-1101 (2019) (emphasis added). Section 50A-201 of the General Statutes of North Carolina sets forth in four subparagraphs when "a court of this State has jurisdiction to make an initial child-custody determination." N.C.G.S. § 50A-201(a)(1) (2019). Section 50A-204 addresses when a court of this State has temporary emergency jurisdiction. N.C.G.S. § 50A-204 (2019). As pertinent to this appeal, subparagraph (a)(1) of N.C.G.S. § 50A-201 states:

> (1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State[.]

N.C.G.S. § 50A-201(a)(1). Once a court has made a child-custody determination under the provisions of section 50A-201, that court has exclusive, continuing jurisdiction over the determination until:

> (1) A court of this State determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training, and personal relationships; or
>
> (2) A court of this State or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State.

N.C.G.S. § 50A-202 (2019).[3]

3. Respondent-mother does not make a specific argument under section 50A-202.

3. Application

¶ 9 Respondent-mother's sole argument on appeal is that the trial court lacked subject matter jurisdiction in this matter, although this position is premised on a series of related and overlapping contentions. First, while she acknowledges the appropriate exercise of the trial court's temporary emergency jurisdiction in the days just after Nancy's birth, respondent-mother asserts that "at some point after DSS took custody, that jurisdiction expired." Respondent-mother also contends that she and Nancy's father were residents of Norfolk, Virginia when Nancy was born and at least until some point after the date of the filing of the petition to terminate their parental rights to Nancy. Respondent-mother submits that the exercise of subject matter jurisdiction by the trial court here was improper under the terms of the UCCJEA. Respondent-mother also notes her own youth at the time of Nancy's birth.

¶ 10 Further, respondent-mother represents that the exercise of jurisdiction by the trial court in New Hanover County created

> an uphill battle complying with the case plan. She had no transportation and could not easily make it back and forth between her home state and the state with custody of Nancy for visits. She had trouble lining up services in Virginia when that state did not administer the case plan. Keeping her child in a state where she did not reside presented logistical and legal barriers that would not have existed if the parents and Nancy lived in the same state.

Respondent-mother goes on to contend that "[t]here are compelling public policy issues for not allowing a state that acquires temporary emergency jurisdiction to keep custody of a child indefinitely. At some point the child should be allowed to return to the state where the parents live." Finally, respondent-mother maintains that Nancy's case should have been transferred to Virginia, citing N.C.G.S. § 7B-903(a)(6) for the proposition that the trial court could have ordered DSS to "return the juvenile to the responsible authorities in the juvenile's home state." N.C.G.S. § 7B-903(a)(6) (2019).

¶ 11 Assuming, *arguendo*, that the existence of a temporary emergency regarding Nancy's welfare had expired at some point after the juvenile's birth and before the filing of the petition to terminate parental rights to Nancy, such a circumstance is of no consequence in light of the facts and procedures in the present case. We are not required to determine with exactness the juncture at which the temporary emergency regarding

the child's well-being may have ended because the record reveals that, regardless of any temporary emergency jurisdiction exercised during the initial period of Nancy's life or during the time leading up to her adjudication as a dependent and neglected juvenile, the trial court had exclusive, original jurisdiction over all petitions and motions concerning termination of parental rights to Nancy pursuant to N.C.G.S. § 7B-1101 and in conformance with the UCCJEA. Section 7B-1101 properly focuses the question of subject matter jurisdiction on the custody, location, or residence of the subject *child* in a termination of parental rights proceeding rather than on the residential state of the *parents*. *See*, *e.g.*, *In re T.H.T.*, 362 N.C. 446, 450 (2008) (affirming that the *child's* best interests constitute "the 'polar star' of the North Carolina Juvenile Code"); *see also In re Montgomery*, 311 N.C. 101, 109 (1984). Respondent-mother incorrectly construes the applicable law regarding jurisdiction to be dictated by the residential location of the child's *parents*, instead of the residential location of the *child* along with other factors consistent with the child's residential location which impact the child's best interests.

¶ 12 Likewise, section 7B-1101 states, inter alia, that a trial

> court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights *to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services* . . . in the district at the time of filing of the petition or motion. . . . Provided, that before exercising jurisdiction . . . , *the court shall find that it has jurisdiction to make a child-custody determination under the provisions of G.S. 50A-201* . . . .

N.C.G.S. § 7B-1101 (emphasis added). Similarly, section 50A-201 provides that "a court of this State has jurisdiction to make an initial child-custody determination only if . . . [t]his State is the *home state of the child* on the date of the commencement of the proceeding," N.C.G.S. § 50A-201(a)(1) (emphasis added), and " '[h]ome state' means the state *in which a child lived with* a parent or a *person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding*," N.C.G.S. § 50A-102(7) (2019) (emphasis added).

¶ 13 In the case at bar, the trial court made a finding of fact that Nancy "has lived in this state for her entire life. The Courts of the State of North Carolina have home state jurisdiction over the child and at least one par-

ent is a resident of this State."[4] Nancy was born in North Carolina and lived with foster parents in the state for the six months immediately before the filing of the termination of parental rights petition on 22 October 2018. For the entirety of her life, which was nearly sixteen months at that time, Nancy lived in North Carolina. These facts indicate that the trial court's determination that North Carolina was the home state for Nancy was supported by, and fully consistent with, both the UCCJEA and N.C.G.S. § 50A-201(a)(1).

¶ 14 With further regard to the operation of N.C.G.S. § 7B-1101, as noted above, Nancy was born in New Hanover County, North Carolina, had resided for her entire life in New Hanover County at the time of the filing of the petition to terminate respondent-mother's parental rights and was in the legal custody of DSS in New Hanover County at the time of the filing of the petition to terminate respondent-mother's parental rights. Thus, every requirement for exclusive, original jurisdiction under N.C.G.S. § 7B-1101 was satisfied: (1) Nancy "reside[d] in, [was] found in, or [was] in the legal or actual custody of a county department of social services . . . at the time of filing of the petition or motion;" (2) North Carolina was the home state for Nancy pursuant to N.C.G.S. § 50A-201(a)(1); and (3) "process was served on [respondent-mother] pursuant to G.S. 7B-1106."[5] N.C.G.S. § 7B-1101. This proper exercise of jurisdiction by the trial court is buttressed by the lack of any motion made by any party to the proceedings concerning Nancy to end the tribunal's authority based upon the expiration or termination of the temporary emergency, or to transfer the tribunal's authority to an appropriate legal forum in the parents' residential state of Virginia. As a result, North Carolina's ongoing jurisdiction was exclusive and appropriate. Accordingly, Nancy was a juvenile over whom our state's courts could properly exercise subject matter jurisdiction in connection with a petition of termination of parental rights under our state's Juvenile Code.

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4. Although a trial court making specific findings of fact related to its jurisdiction under N.C.G.S. § 50A-201(a)(1) "would be the better practice," this Court has affirmed that the statute "states only that certain circumstances must exist, not that the court specifically make findings to that effect." *In re T.J.D.W.*, 182 N.C. App. 394, 397, *aff'd per curiam*, 362 N.C. 84 (2007). Although respondent-mother was a resident of Virginia when the termination of parental rights petition was filed on 22 October 2018, the record on appeal indicates that she relocated to North Carolina between that date and 3 December 2018 when the notice of hearing in the termination proceeding was filed, at which point her address was in Rocky Point, N.C. Likewise, both of the amended notices of hearing on the termination of parental rights petition, filed on 18 February 2019 and 25 March 2019, designate respondent-mother's address as being located in Rocky Point, N.C.

5. Respondent-mother has never disputed the fact "that process was served on [her] pursuant to G.S. 7B-1106." N.C.G.S. § 7B-1101.

¶ 15 In response to respondent-mother's representation that the transfer of her case plan to Virginia pursuant to N.C.G.S. § 7B-903(a)(6) would have improved her opportunity to successfully complete it, we note that the statute is inapposite here and hence the transfer option was unavailable. The statute provides, in abuse, neglect, and dependency proceedings, that

> [t]he following alternatives for disposition shall be available to any court exercising jurisdiction, and the court may combine any of the applicable alternatives when the court finds the disposition to be in the best interests of the juvenile:
>
> . . .
>
> (6) Place the juvenile in the custody of the department of social services *in the county of the juvenile's residence*. In the case of a juvenile who has legal residence outside the State, the court *may place the juvenile in the physical custody of the department of social services in the county where the juvenile is found so that agency may return the juvenile to the responsible authorities in the juvenile's home state.*

N.C.G.S. § 7B-903(a)(6) (emphasis added). As already discussed, at all times during this matter, Nancy was found in New Hanover County, North Carolina and North Carolina was her home state. Therefore, N.C.G.S. § 7B-903(a)(6) was not available to be invoked in the instant case by the trial court.

¶ 16 As to respondent-mother's reference to her own youth at the time of Nancy's birth, N.C.G.S. § 7B-1101 specifically states that "[t]he court shall have jurisdiction to terminate the parental rights of any parent *irrespective of the age of the parent*." N.C.G.S. § 7B-1101 (emphasis added). Respondent-mother cites no legal authority to the contrary and makes no actual argument on this point. Also, we must decline respondent-mother's invitation to engage in public policy considerations here in light of the unambiguous and specific language chosen by the General Assembly in drafting and enacting the Juvenile Code of this state. Given the clarity of the statutes which pertain to subject matter jurisdiction as they apply to the present case, any such public policy concerns raised here should be directed to the state's legislative branch for contemplation. *See*, *e.g.*, *State v. Whittle Commc'ns*, 328 N.C. 456, 470 (1991) ("[T]he general rule in North Carolina is that absent 'constitutional re-

straint, questions as to public policy are for legislative determination.' " (quoting *Gardner v. N.C. State Bar*, 316 N.C. 285, 293 (1986))).

III. Conclusion

¶ 17 In this juvenile matter, the trial court had exclusive, original jurisdiction over the termination of parental rights case regarding Nancy pursuant to the UCCJEA and N.C.G.S. § 7B-1101. Therefore, we affirm the trial court's order terminating respondent-mother's parental rights to Nancy.

AFFIRMED.

IN THE MATTER OF Q.P.W.

No. 475A19

Filed 12 March 2021

Termination of Parental Rights—grounds for termination—willful failure to make reasonable progress—lack of participation in case plan

The trial court properly terminated respondent-mother's parental rights on the basis of willful failure to make reasonable progress where the findings established that respondent, whose pregnancy at thirteen resulted from a crime perpetrated against her and who was placed in foster care with her baby until aging out when she reached the age of majority, discontinued participation in and failed to comply with multiple aspects of her case plan despite having the ability to comply. The case plan had a sufficient nexus to the reason the child was removed from respondent's care because it included activities designed to foster stability and the acquisition of sufficient parenting skills.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 16 September 2019 by Judge Tonia A. Cutchin in District Court, Guilford County. Heard in the Supreme Court on 13 January 2021.

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

IN RE Q.P.W.

[376 N.C. 738, 2021-NCSC-12]

Christopher S. Edwards, *for appellee Guardian ad Litem.*

Wendy C. Sotolongo, *Parent Defender*, *by Annick I. Lenoir-Peek*, *Deputy Parent Defender*, *for respondent-appellant mother.*

HUDSON, Justice.

¶ 1 Respondent-mother appeals from the trial court's orders terminating her parental rights to Q.P.W. (Quentin).[1] After careful review, we affirm.

I. Factual and Procedural History

¶ 2 Respondent-mother was the victim of a crime that left her pregnant at the age of thirteen. Respondent-mother was later placed in the custody of Guilford County Department of Social Services (DSS) pursuant to a juvenile dependency petition. Quentin was born to respondent-mother on 8 March 2014. Shortly after he was born, respondent-mother left Quentin in the hospital for two days without informing hospital staff that she was leaving.

¶ 3 On 20 May 2014, Quentin was adjudicated to be a dependent juvenile after the trial court found that respondent-mother was too young to provide proper care for herself and Quentin, that respondent-mother had left Quentin in the hospital, and that respondent-mother was in DSS custody herself. Respondent-mother and Quentin were placed in the same foster home and remained in a joint placement, with only brief interruptions, from May 2014 to November 2017.

¶ 4 Respondent-mother entered into a case plan with DSS on 5 June 2014. Pursuant to her case plan at that time, respondent-mother was required to attend school, complete parenting education and training, attend Quentin's medical appointments, abide by the rules of her placement to avoid disruption, and participate in individual therapy. Quentin's primary permanent plan at that time was reunification. Initially, respondent-mother engaged in her case plan by attending school, participating in therapy, participating in parent education programs, and attending medical appointments with her son.

¶ 5 However, respondent-mother also disobeyed the rules of her placements and ran away from her placements causing several disruptions to her joint placement with Quentin from 2014 to 2016. Eventually,

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

respondent-mother refused to participate in additional parenting classes, stopped attending school, stopped participating in therapy, and continued to disrupt her placement.

¶ 6 On 2 June 2017, the trial court entered an order warning respondent-mother that her failure to comply with her case plan could result in a change to Quentin's primary permanent plan. By then, Quentin had been in over twelve placements.

¶ 7 Respondent-mother turned eighteen in November 2017 and was no longer eligible to continue placement with DSS because she was neither working nor attending school. As a result, her joint placement with Quentin was disrupted. From November 2017 through August 2018, respondent-mother had some contact with Quentin. On 10 August 2018, respondent-mother had her last visit with Quentin, and she failed to confirm a single subsequent visit as required by her case plan.

¶ 8 On 30 August 2018, DSS updated respondent-mother's case plan and identified areas for improvement including obtaining employment, improving her parenting skills, and obtaining stable housing. In October 2018, DSS identified respondent-mother's failure to address her mental health issues, her lack of stable housing, her failure to consistently visit with Quentin, her failure to comply with the recommendations from her parenting evaluation, and her failure to address her parenting deficits by completing parenting classes as barriers to achieving reunification.

¶ 9 On 16 November 2018, the trial court noted that respondent-mother had failed to comply with requests for drug screenings, was not in appropriate housing, had failed to show up to work the previous week, had not attended any of Quentin's medical appointments since the last court date, had failed to attend therapy since 1 August 2018, and she had missed 21 visits with Quentin. The trial court found that respondent-mother was not actively participating in or cooperating with her case plan and found that she was not making adequate progress.

¶ 10 On 23 January 2019, the trial court terminated respondent-mother's visits with Quentin and named several barriers to reunification including respondent-mother's failure to participate in parenting classes, complete a psychological assessment and address her mental health needs, find safe and appropriate housing, and visit Quentin consistently. The primary plan for Quentin was changed to adoption. On 24 May 2019, the trial court found that respondent-mother was still not in compliance with the housing, parenting, and substance abuse portions of her case plan, and was not making adequate progress within a reasonable period of time.

¶ 11 In April 2019 DSS petitioned the trial court to terminate respondent-mother's parental rights (TPR petition) alleging that termination was appropriate under N.C.G.S. § 7B-1111(a)(1), (2), (3), (6), and (7). A hearing on the TPR petition was held on 13 and 14 August 2019. On 16 September 2019 the trial court entered an order terminating respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (2), (3), (6), and (7) (TPR order). Respondent-mother filed a notice of appeal on 18 September 2019.

II. Standard of Review

¶ 12 We have previously explained the standard of review for termination of parental rights appeals as follows:

> Proceedings to terminate parental rights consist of an adjudicatory stage and a dispositional stage. At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence that one or more grounds for termination exist under section 7B-1111(a) of the North Carolina General Statutes. We review a trial court's adjudication under N.C.G.S. § 7B-1109 to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. The trial court's conclusions of law are reviewable de novo on appeal.

In re K.H., 375 N.C. 610, 612 (2020) (cleaned up).

III. Analysis

¶ 13 In this case, the trial court determined that grounds existed to terminate respondent-mother's parental rights based on neglect, willful failure to make reasonable progress, willful failure to pay a reasonable portion of her child's cost of care, dependency, and willful abandonment. N.C.G.S. § 7B-1111(a)(1)–(3), (6)–(7) (2019). Respondent mother has not contested any findings of fact,[2] and thus, they are binding on appeal. *In re T.N.H.*, 372 N.C. 403, 407 (2019) ("Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal.").

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2. Respondent-mother discusses findings 19 and 26 in her brief, but her only argument is that these findings include irrelevant information. She makes no argument that these findings are not supported by clear, cogent, and convincing evidence. Furthermore, we do not rely on either of these findings in reaching our disposition.

¶ 14 We begin our review of the TPR order to determine whether the trial court's findings of fact support its conclusion that there were grounds to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2), which provides as follows:

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

N.C.G.S. § 7B-1111(a)(2).

¶ 15 We have previously explained that:

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

In re Z.A.M., 374 N.C. 88, 95–96 (2020).

¶ 16 First, we review whether the findings support the conclusion that Quentin had been willfully left in foster care or placement outside the home for more than twelve months. "[T]he twelve-month period begins when a child is left in foster care or placement outside the home pursuant to a court order, and ends when the motion or petition for termination of parental rights is filed." *In re K.H.*, 375 N.C. at 613 (quoting *In re J.G.B.*, 177 N.C. App. 375, 383 (2006)). Here, DSS filed its TPR petition in April 2019. Therefore, the relevant twelve-month period is from April 2018 to April 2019.

¶ 17 The trial court made the following relevant findings of fact:

> 14. . . . [Respondent-mother] reached the age of majority on November 30, 2017. . . .

> . . .
>
> c. . . . [Respondent-mother] left her placement . . . after reaching the age of majority. . . .
>
> . . .
>
> 25. . . .
>
> a. The juvenile has been placed in foster care continuously since March 19, 2014.

These findings demonstrate that Quentin was in foster care and was not sharing a placement with his mother beginning in December 2017—more than twelve months before DSS filed the TPR petition.

¶ 18 Respondent-mother's willfulness can be established by evidence that she possessed the ability to make reasonable progress but was unwilling to make an effort. *In re Baker*, 158 N.C. App. 491, 494 (2003). The following portions of finding of fact 14 are relevant to respondent-mother's willfulness:

> b. . . . [Respondent-mother] was asked to continue parenting education, to address her decision making. Parenting education was offered to [respondent-mother], but she chose not to attend any parenting classes. [Respondent-mother] was referred to PATE on March 31, 2017[.] . . . To date, [respondent-mother] has only completed one PATE class and has not made any contact with the facilitator to reengage in the program.
>
> . . .
>
> [Respondent-mother] refused to participate in a psychological evaluation and has indicated that she is tired of completing tasks for [DSS].
>
> . . .
>
> . . . Since reaching the age of majority on November 30, 2017, [respondent-mother] has not attended any medical appointments for the juvenile. . . . [Respondent-mother] has missed all her visits with the juvenile since August 10, 2018, and has not contacted [DSS] to inquire about reinstating visitation.

> c. . . . [Respondent-mother] was advised that Section 8 had openings . . . by [DSS] and [respondent-mother] was urged to go apply for the opening immediately. Despite being given this resource, [respondent-mother] moved out of her grandmother's home and is currently renting a room [in Greensboro]. . . . To-date [sic], [respondent-mother] has failed to demonstrate any stability with regard to her living situation, and she is not in compliance with this component of her case plan.
>
> d. . . . To date, [respondent-mother] has not completed a substance abuse assessment.

¶ 19 We determine that these findings support a conclusion of willfulness. Therefore, the findings of fact in the TPR order support the conclusion that respondent-mother willfully left Quentin in foster care or placement outside the home for over twelve months prior to April 2019.

¶ 20 Next, we review whether the trial court's findings of fact support its conclusion that respondent-mother has not made reasonable progress to correct the conditions which led to the removal of Quentin. Regarding the conditions that led to the removal of the juvenile, the trial court made the following finding of fact:

> The conditions that led to the juvenile coming into custody include [respondent-mother's] inability to provide basic needs for herself and the juvenile due to [respondent-mother's] status as a minor child in the custody of [DSS]; [respondent-mother's] inability to provide the required medical care for the juvenile; lack of an appropriate adult caregiver for the juvenile; [respondent-mother] leaving the juvenile at the hospital for two days without anyone to make decisions for the juvenile and paternity had not been established.

Respondent-mother argues that the conditions that led to Quentin's removal were all attributable to her own minor status. She argues that the requirements of her case plan did not have a sufficient nexus to that condition. We disagree.

¶ 21 Our Court has previously explained that our appellate case law

> reflects a consistent judicial recognition that parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination

> exist pursuant to N.C.G.S. § 7B–1111(a)(2) even when there is no direct and immediate relationship between the conditions addressed in the case plan and the circumstances that led to the initial governmental intervention into the family's life, as long as the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home. The adoption of a contrary approach would amount to turning a blind eye to the practical reality that a child's removal from the parental home is rarely the result of a single, specific incident and is, instead, typically caused by the confluence of multiple factors, some of which are immediately apparent and some of which only become apparent in light of further investigation.

In re B.O.A., 372 N.C. 372, 384–85 (2019).

¶ 22 Here, DSS modified respondent-mother's case plan and reviewed it several times to adjust for her changing circumstances as more information came to light about the barriers to reunification. The case plan requirements were tied to respondent-mother's need to demonstrate maturity and stability. For example, in order to care for Quentin, respondent-mother needed to learn parenting skills, demonstrate a commitment to Quentin on a sustained basis, and find stable housing and employment. We conclude that the case plan requirements were properly tied to alleviating the conditions which directly or indirectly contributed to the problematic circumstances that led to Quentin's removal—namely, respondent-mother's immaturity and instability.

¶ 23 Regarding respondent-mother's failure to make reasonable progress, the trial court made the following relevant findings of fact:

> 13. [Respondent-mother] has had the opportunity to correct the conditions that led to the juvenile's removal from the home, including but not limited to being offered and entering into, a service agreement with [DSS]. [DSS] identified needs arising out of the conditions that led to the removal of the juvenile and developed a service agreement to assist [respondent-mother] in addressing those needs.

14. [Respondent-mother] . . . entered into the case plan on June 5, 2014. On March 26, 2018, . . . [respondent-mother's] case plan was updated. . . .The service agreement was reviewed on August 30, 2018, November 13, 2018, and February 11, 2019. . . .

. . . .

b. Parenting Skills/Mental Health—[Respondent-mother] has made minimal progress on the parenting component of her case plan. . . . [Respondent-mother] completed the parenting program at [her placement] in September 2014. Because [respondent-mother] continued to take the juvenile on unauthorized overnight stays with adults who were not authorized by [DSS], [respondent-mother] was asked to continue parenting education, to address her decision making. Parenting education was offered to [respondent-mother], but she chose not to attend any parenting classes. [Respondent-mother] was referred to PATE on March 31, 2017[.] . . . To date, [respondent-mother] has only completed one PATE class and has not made any contact with the facilitator to reengage in the program.

[Respondent-mother] completed a parenting assessment with Dr. McColloch on June 15, 2017. Dr. McColloch recommended that [respondent-mother] participate in a psychological evaluation, trauma focused therapy, individual counseling, and parenting classes. . . . [Respondent-mother] last attended therapy on August 1, 2018. . . . [Respondent-mother] refused to participate in a psychological evaluation and has indicated that she is tired of completing tasks for [DSS].

. . . .

. . . Since reaching the age of majority on November 30, 2017, [respondent-mother] has not attended any medical appointments for the juvenile. When [respondent-mother] and the juvenile were no longer placed together, . . .

[respondent-mother] was . . . allowed to have supervised visits with the juvenile at the foster home with the permission of the juvenile's foster parent. On October 17, 2018, due to [respondent-mother] missing twenty-one (21) visits with the juvenile, visitation between [respondent-mother] and the juvenile was reduced to one day per week for one hour. [Respondent-mother] subsequently failed to attend any of her scheduled visits with the juvenile, and her visits were suspended on January 9, 2019. [Respondent-mother] has missed all her visits with the juvenile since August 10, 2018, and has not contacted [DSS] to inquire about reinstating visitation. [Respondent-mother] is not in compliance with the parenting component of her case plan.

c. Placement/Housing—At the commencement of the underlying case, [respondent-mother's] only requirement under this component of her case plan was to comply with the rules and policies of her placement. . . . When [respondent-mother] has [sic] aged out of foster care the placement component of her case plan has [sic] changed to a requirement that [respondent-mother] obtain and maintain stable housing suitable for her and the juvenile. [Respondent-mother] has not made any progress on this component of her case plan. . . . On March 8, 2018, [respondent-mother] reported that she had her own apartment, however, the lease she provided on April 5, 2018 stated that the lease term ended on April 1, 2018. On July 26, 2018, [respondent-mother] again reported that she had her own two-bedroom apartment paying $375.00 per month in rent. [Respondent-mother] went on to state that she was sharing the apartment with her sister but since her sister moved out, the rent was taking up her entire check. On August 10, 2018, [respondent-mother] reported that she was living with her mother because her apartment complex made her move out due to safety concerns. [Respondent-mother] explained that

a domestic violence incident occurred between her and her ex-boyfriend, and the ex-boyfriend trashed her apartment. . . . On September 18, 2018, [respondent-mother] reported that she was living with her grandmother. [Respondent-mother] was advised that Section 8 had openings . . . by [DSS] and [respondent-mother] was urged to go apply for the opening immediately. Despite being given this resource, [respondent-mother] moved out of her grandmother's home and is currently renting a room [in Greensboro]. . . . To-date [sic], [respondent-mother] has failed to demonstrate any stability with regard to her living situation, and she is not in compliance with this component of her case plan. [Respondent-mother] entered into a Voluntary Placement Agreement on August 9, 2018. . . .

When [respondent-mother] entered into the Voluntary Placement Agreement she was residing . . . in her own apartment, but she moved out due to safety concerns with her ex-boyfriend. On August 30, 2018 [respondent-mother] reported that she was living with a friend [in Greensboro]. On September 18, 2018 [respondent-mother] reported that she was staying with her grandmother and great grandmother. . . . She advised Social Worker Young and Social Worker Stewart that she could not stay with her friend anymore. [Respondent-mother] was advised that all moves need to be reported in order to get approval. On November 16, 2018 Social Worker Stewart met with [respondent-mother] who stated that things weren't going well and that she needed to be out of her grandmother's home by the end of the month. Ms. Stewart provided [respondent-mother] with housing resources. [Respondent-mother] moved [to another house]. She was renting a room in this house with several others. She was paying $250 per month for rent and was responsible for the light bill. On January 11, 2019 SW Stewart spoke with [respondent-mother] who stated

that she had to leave her previous placement and was now living with her father because she has no place else to go. She was advised that her VPA will be terminated because she was living with her father and that they would meet the next week to get VPA termination papers signed. On January 22, 2019 SW Stewart spoke with [respondent-mother] who stated that she was now living with a friend [in Greensboro]. As of March 18, 2019, [respondent-mother] continue [sic] to reside at [that] address. She stated that she had put in an application for housing [elsewhere], however she still has an outstanding balance of $1000.00 on her housing record. [Respondent-mother] did advise [DSS] that she is currently living at another address but failed to provide the actual address.

d. Substance Abuse—[Respondent-mother] has not made any progress in addressing her substance abuse needs. . . . On October 10, 2018, Social Worker Young referred [respondent-mother] for a substance abuse assessment. . . . To date, [respondent-mother] has not completed a substance abuse assessment. On August 31, 2018, [respondent-mother] was asked to comply with a drug screen by no later than September 4, 2018. [Respondent-mother] did not comply. [Respondent-mother] was also asked to submit to a drug screen on September 18, 2018, and she did not comply. On October 17, 2018, [respondent-mother] was ordered by the court to submit to a drug screen by the end of the day. [Respondent-mother] submitted to a drug screen on October 18, 2018 and tested positive for marijuana. On November 13, 2018, the assigned social worker requested that [respondent-mother] submit to a random drug screen, and [respondent-mother] did not comply. As of the filing of the petition, [respondent-mother] has only submitted to one drug screen which was positive for marijuana. [Respondent-mother] is not in compliance with the substance abuse component of her case plan.

. . . .

25. . . .

. . . .

> b. The lack of reasonable progress under the circumstances is not due solely to the poverty of [respondent-mother] . . . but is the direct result of [her] failure to address the conditions that led to the removal of the juvenile, including [respondent-mother's] failure to maintain stable housing, failure to attend parenting classes, failure to cooperate with drug screens, [and] failure to attend visits . . . .

We conclude that these findings support the trial court's conclusion that respondent-mother failed to make reasonable progress under the circumstances to correct the conditions which led to Quentin's removal.[3]

IV. Conclusion

¶ 24 We conclude that the trial court properly found that grounds existed to terminate respondent-mother's parental rights under N.C.G.S. § 7B-1111(a)(2). The trial court's conclusion that one statutory ground for termination existed is sufficient in and of itself to support termination of respondent-mother's parental rights. *In re E.H.P.*, 372 N.C. 388, 395 (2019). Therefore, we need not address respondent-mother's arguments regarding N.C.G.S. § 7B-1111(a)(1), (3), (6), and (7). Furthermore, respondent-mother does not challenge the trial court's conclusion that termination of her parental rights was in Quentin's best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

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3. Respondent-mother argues that she has made reasonable progress, pointing to her participation in a DSS program for people transitioning out of foster care. However, her participation in that program alone is not sufficient to prevent or negate the conclusion that she has failed to make reasonable progress.

Justice EARLS dissenting.

¶ 25 The result of the majority's decision today is that a nineteen-year-old mother who became pregnant when she was sexually assaulted as a thirteen-year-old girl will permanently and unnecessarily lose her right to maintain any relationship with her child. The trial court's findings of fact do not support the conclusion that petitioner has met its burden of "proving by clear, cogent, and convincing evidence the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re K.D.C.*, 375 N.C. 784, 788 (2020) (cleaned up). This decision is not compelled by North Carolina law and illustrates this Court's continued refusal to accord sufficient respect to a parent's fundamental constitutional-liberty interest in raising their child. Accordingly, I respectfully dissent.

I. Factual Background

¶ 26 The circumstances underlying the present case are highly distressing. Respondent's own mother was convicted of aiding and abetting in the sexual assault perpetrated by a twenty-year-old man which led to respondent's pregnancy. After the assault, respondent was first placed with her grandmother, who quickly realized that she was unable to provide respondent with adequate care. On 5 March 2014, respondent was adjudicated to be a dependent juvenile and placed into the custody of the Guilford County Department of Social Services (DSS). Three days later, respondent gave birth to her son, Quentin. Twelve days after Quentin was born, he was also adjudicated to be a dependent juvenile due to respondent's "inability to care for herself, much less an infant child."

¶ 27 Initially, respondent and Quentin were placed together in a foster home. Respondent entered into a case plan on 5 June 2014. Although respondent occasionally exhibited disruptive or inappropriate behaviors while in foster care, she substantially complied with her case plan and made continuous progress towards reunification over the next four years, despite experiencing frequent instability as she was moved between numerous foster care placements. There is no evidence in the record that respondent ever abused Quentin, nor is there evidence that her behaviors ever exposed Quentin to a significant risk of harm. Respondent aged out of the foster care system when she turned eighteen on 30 November 2017. Less than two years later, the trial court terminated her parental rights to Quentin.

II. Willful Failure to Make Reasonable Progress Under the Circumstances: N.C.G.S. § 7B-1111(a)(2)

¶ 28 In affirming the trial court's order terminating respondent's parental rights on the grounds that she has willfully failed to make reasonable progress towards correcting the conditions that led to Quentin's removal, the majority ignores the myriad constraints on respondent's ability to comply with her case plan imposed by respondent's circumstances. This unwillingness to examine the realities of respondent's situation—particularly her age and her recent experience attempting to transition out of the foster care system—is inconsistent with the "ongoing examination of the circumstances" we have previously deemed appropriate in assessing a respondent-parent's reasonable progress under N.C.G.S. § 7B-1111(a)(2). *In re B.O.A.*, 372 N.C. 372, 382 (2019). Accordingly, I disagree with the majority's approach and would instead hold that the trial court was required to consider respondent's holistic circumstances in assessing both the willfulness of her conduct and the reasonableness of the progress she made towards correcting the conditions that led to Quentin's removal.

¶ 29 Pursuant to N.C.G.S. § 7B-1111(a)(2), a court may terminate a respondent-parent's parental rights when the parent has "willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2) (2019). We have previously explained that "[w]illfulness is established when the respondent had the ability to show reasonable progress, but was unwilling to make the effort." *In re S.M.*, 375 N.C. 673, 685 (2020) (quoting *In re McMillon*, 143 N.C. App. 402, 410, *disc. review denied*, 354 N.C. 218 (2001)); *see also In re Matherly*, 149 N.C. App. 452, 455 (2002) ("Evidence showing a parents' ability, or capacity to acquire the ability, to overcome factors which resulted in their children being placed in foster care must be apparent for willfulness to attach."). A trial court cannot fulfill its obligation to assess willfulness when it blinds itself to important context. The trial court must consider that context even if some of the relevant events occurred before the respondent-parent reached the age of majority. In this case, respondent's experiences both within and immediately upon leaving the foster care system are relevant in assessing the willfulness of the conduct which forms the basis of DSS's termination petition. *See In re Pierce*, 356 N.C. 68, 75 n.1 (2002) ("[T]here is no specified time frame that limits the admission of relevant evidence pertaining to a parent's 'reasonable progress' or lack thereof.").

¶ 30 For four years after giving birth to Quentin at the age of fourteen, respondent continued making progress towards reunification with her son to the repeated satisfaction of the trial court. She continued making progress even while she was moved across multiple placements and while dealing with all of the ordinary challenges of adolescence, compounded by the fact that she was a minor parent who was herself in DSS custody. Throughout this difficult period, respondent remained committed to learning to parent Quentin. She undeniably developed a meaningful bond with her child. Her persistence in the face of tremendous adversity suggests that her conduct which forms the basis of the underlying termination petition—conduct which occurred during a short period of time immediately after the respondent reached the age of majority and while she was attempting to make the difficult transition from foster care to independent living—reflected difficulties inherent in her unique circumstances which would be resolved in time, rather than a willful failure to make reasonable progress within the meaning of N.C.G.S. § 7B-1111(a)(2).[1] *Cf. Lecky v. Reed*, 20 Va. App. 306, 312 (1995) (holding that termination of minor parent's parental rights was warranted because "[n]othing in this record attributes mother's parental deficiencies to her age or suggests that the mere passage of time would resolve her difficulties").

¶ 31 The trial court's and the majority's steadfast refusal to fully consider respondent's circumstances is also inconsistent with the realities of adolescent development. Although our legal system often draws a sharp distinction between "minors" and "adults," this binary does not account for the fact that "psychological, social, and economic forces have shifted the way that people experience their late teens and early twenties." Clare Ryan, *The Law of Emerging Adults*, 97 Wash. U. L. Rev. 1131, 1147 (2020). Scientific research has demonstrated that "the years from the late teens to the early twenties constitute a transitional period that bridges adolescence and mature adulthood" where "[d]evelopment is gradual, and the psychological boundaries between adolescence and adulthood are fuzzy." Elizabeth S. Scott et al., *Young Adulthood As a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 645 (2016). The Court of Appeals has held that if a respondent-parent has not yet turned eighteen when DSS

1. It is notable that in regard to respondent's final foster care placement before reaching the age of majority, the trial court found that respondent "did very well in her placement with [the foster parent] as [the foster parent] provided strong support and guidance for respondent to learn parenting skills." Respondent only left this placement when she aged out of the foster care system upon turning eighteen.

files its termination petition, the trial court is required to "make specific findings of fact showing that a minor parent's age-related limitations as to willfulness have been adequately considered." *In re Matherly*, 149 N.C. App. at 455. I agree with the Court of Appeals and would hold trial courts to the same requirement when the respondent-parent is a young adult, especially when, as here, many of the pertinent events occurred prior to the parent reaching the age of majority.[2]

¶ 32 We need not and should not adopt the fictitious presumption that everything respondent did after she turned eighteen was willful. Instead, we should examine her circumstances and capacities holistically, acknowledging "[r]ecent research in neuroscience and developmental psychology [which] indicates that individuals between the ages of 18 and 21 share many of the[ ] same characteristics" as minors. *Pike v. Gross*, 936 F.3d 372, 385 (6th Cir. 2019) (Stranch, J., concurring), *cert. denied*, 207 L. Ed. 2d 171 (U.S. 2020). This research has particular implications for children in foster care who must immediately attempt to live independently at age eighteen. "It is now well established among social scientists that young adults who emancipate from foster care, when compared to their peers, are far more likely to suffer from homelessness, unemployment, unplanned pregnancy, lack of health care, and incarceration, among other problems." Bruce A. Boyer, *Foster Care Reentry Laws: Mending the Safety Net for Emerging Adults in the Transition to Independence*, 88 Temp. L. Rev. 837, 837 (2016). As Boyer explains:

> Both social scientists and neurologists now recognize that true "adult" functioning, measured in terms of cognitive, behavioral, and social maturity, is not achieved for the majority of emerging adults until well into the third decade of life. During this transitional phase, while most young people begin the process of separating from their families, few do so precipitously or without setbacks. Studies generally place the median age at which adolescents first leave home in the early twenties, and many of those adolescents

2. Regardless, the trial court made numerous factual findings regarding incidents which occurred prior to respondent reaching the age of majority, including factual findings regarding her purported disruption of foster care placements. The trial court relied on these factual findings in arriving at its ultimate conclusion that respondent had willfully failed to make reasonable progress to correct the conditions that led to Quentin's removal. However, a legitimate question arises in this case of whether respondent's conduct relating to correcting those conditions was willful during the period that she was in foster care. The trial court's factual findings do not address that question.

> who leave home for the first time between the ages of eighteen and twenty-four return to live in their parental households at some time thereafter, even if only for a short time. One recent study found that approximately 55% of young men and 46% of young women between eighteen and twenty-four years old were living at home with one or both of their parents. Other studies have concluded that the average age at which children in the general population finally depart the home is twenty-eight. The staging of the transition to independence is particularly indispensable for youth from less well-off families seeking to balance work, school, and the achievement of the credentials needed to sustain independence.

Id. at 840–41 (footnotes omitted). The failure to examine respondent's progress in light of this context is a legal error because it reflects a failure to properly apply the statutory mandate to consider respondent's reasonable progress "under the circumstances." N.C.G.S. § 7B-1111(a)(2).

¶ 33 Therefore, in this case, the trial court's findings do not support the conclusion that respondent "had the ability to show reasonable progress, but was unwilling to make the effort." *In re S.M.*, 375 N.C. at 685 (quoting *In re McMillon*, 143 N.C. App. at 410). The evidence instead only indicates that respondent failed to make more progress than she did due to her limited capacities as a very young parent who was attempting to live independently for the first time, without the benefit of adequate financial resources or a support network. Although the state maintains a substantial interest in the welfare of all children in North Carolina, including those born to minor parents, consideration of a young parent's circumstances is consistent with the Juvenile Code's goals of protecting juveniles "by means that respect both the right to family autonomy and the juveniles' needs" while "preventing the unnecessary or inappropriate separation of juveniles from their parents." N.C.G.S. § 7B-100(3)–(4) (2019).

¶ 34 Additionally, the majority misses the mark in summarily disregarding respondent's "participation in a DSS program for people transitioning out of foster care." Although respondent acknowledges that she did not fully comply with her case plan after reaching the age of majority, she argues that her engagement with the NC LINKS program—which provides services to young adults exiting the foster care system to help them attain education, employment, health, and housing stability—is relevant in assessing whether she made reasonable progress towards

correcting the conditions which led to Quentin's removal. In this case, as the majority notes, the requirements of respondent's case plan "were tied to [her] need to demonstrate maturity and stability." Certainly, respondent's participation in a program designed to assist young adults in achieving positive life outcomes is a possible indicator of her increased maturity. Because participation in the NC LINKS program is entirely optional, respondent's choice to seek out additional support could reflect an awareness of her own limitations and a recognition that she needed help in order to adequately care for herself and her son. Further, if respondent's participation in the NC LINKS program helped her advance her education, obtain employment and housing, and improve her mental and physical health, then she would have made substantial progress towards addressing the material conditions which rendered her unable to parent Quentin.

¶ 35 We have never held that a respondent-parent's compliance, or lack thereof, with a DSS case plan is dispositive in determining whether the requirements of N.C.G.S. § 7B-1111(a)(2) have been met. This statutory ground does not permit termination of parental rights merely on the basis that a respondent-parent has failed to comply with his or her case plan. *In re E.C.*, 375 N.C. 581, 585 (2020) ("A trial court should refrain from finding that a parent has failed to make reasonable progress in correcting the conditions that led to the children's removal 'simply because of his or her failure to fully satisfy all elements of the case plan goals.' " (quoting *In re B.O.A.*, 372 N.C. at 385)). Rather, it permits termination only when a parent has failed to make "reasonable progress under the circumstances" towards "correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B-1111(a)(2). A parent's compliance with a case plan is often evidence that he or she has made reasonable progress under the circumstances because case plans are typically developed to address the specific conditions which led to a child's removal. *See In re J.S.*, 374 N.C. 811, 815–16 (2020) ("[I]n order for a respondent's noncompliance with her case plan to support the termination of her parental rights, there must be a nexus between the components of the court-approved case plan with which the respondent failed to comply and the conditions which led to the child's removal from the parental home." (cleaned up)). However, it is possible for a parent to make reasonable progress towards addressing the substantive conditions which led to a child's removal from the parental home in a manner other than the one specified in a DSS-approved case plan. *See*, *e.g.*, *In re K.D.C.*, 375 N.C. at 792 (holding that petitioner had failed to prove grounds existed under N.C.G.S. § 7B-1111(a)(2) where "respondent-mother failed to complete a parenting class as required by her case plan,

. . . [but] completed a 'Mothering' class, which appears to be at least a plausible attempt by respondent-mother to complete her case plan and to improve her parenting skills"). Accordingly, the trial court erred in failing to consider respondent's participation in the NC LINKS program as probative evidence of her progress towards addressing the conditions that led to Quentin's removal. If respondent was able to address the substantive barriers preventing her from caring for Quentin through her participation in the NC LINKS program, then N.C.G.S. § 7B-1111(a)(2) does not supply a ground for terminating her parental rights.

¶ 36 Finally, the trial court erred in failing to assess whether respondent's inability to meet the requirements of her case plan stemmed from her poverty, rather than her willful conduct. *See In re M.A.*, 374 N.C. 865, 881 (2020) ("[P]arental rights are not subject to termination in the event that [a parent's] inability to care for her children rested solely upon poverty-related considerations . . . ."). The trial court's bare assertion that "[t]he lack of reasonable progress under the circumstances is not due solely to the poverty of [respondent], but is the direct result of [her] failure to address the conditions that led to the removal of the juvenile," is puzzling given the evidence that respondent's lack of financial resources caused her to be unable to meet the conditions of her case plan. For example, the trial court notes that respondent "had put in an application for housing" but that "she still ha[d] an outstanding balance of $1000.00 on her housing record." The record discloses that respondent made numerous efforts to obtain housing after reaching the age of majority. Thus, there is evidence in the record indicating that respondent's poverty, rather than a lack of effort, directly caused her continued inability to maintain stable housing. The trial court's conclusory finding that respondent's lack of progress was not due to poverty is insufficient to support the legal conclusion that respondent had the actual ability to comply with the conditions imposed by her case plan. *Cf. In re McMillon*, 143 N.C. App. at 412 (affirming order terminating parental rights despite respondent's claim that he was impoverished because "[t]he components of the DSS plan did not require material resources"); *In re A.W.*, 237 N.C. App. 209, 217 (2014) (affirming order terminating parental rights when "there was a sufficient basis in the record for terminating the Father's parental rights that had nothing to do with poverty").

III. Other Grounds

¶ 37 Having wrongfully affirmed the portion of the trial court's order concluding that respondent willfully failed to make reasonable progress within the meaning of N.C.G.S. § 7B-1111(a)(2), the majority does not address any of the other grounds for terminating respondent's parental

rights adjudicated by the trial court. With regard to these other grounds, I would also hold that the trial court's conclusions are not supported by clear, cogent, and convincing evidence.

¶ 38 First, there is insufficient evidence in the record to support the conclusion that grounds exist to terminate respondent's parental rights on the basis of neglect. The trial court's sole conclusion of law supporting termination pursuant to N.C.G.S. § 7B-1111(a)(1) is that respondent was presently neglecting Quentin based on her failure to comply with her case plan. However, respondent's failure to comply with her case plan cannot establish ongoing neglect in this case because respondent has not had custody of her son for many years. Because there is insufficient evidence that Quentin was a neglected child within the meaning of N.C.G.S. § 7B-101(15), petitioner must prove that respondent previously neglected Quentin and that she is likely to do so again in the future. *In re R.L.D.*, 375 N.C. 838, 841 n.3 (2020). The only evidence of prior neglect that petitioner can point to is respondent's conduct in the immediate aftermath of giving birth to Quentin as a fourteen-year-old, when she left Quentin in the hospital for two days. There is no evidence that Quentin was in any way harmed by respondent's brief absence. Accordingly, I would hold that the record does not support the conclusion that respondent's parental rights may be terminated under N.C.G.S. § 7B-1111(a)(1).

¶ 39 Second, the evidence presented at trial does not support the conclusion that respondent willfully failed to pay a reasonable portion of the cost of caring for Quentin pursuant to N.C.G.S. § 7B-1111(a)(3). The evidence indicates that respondent made three child support payments during the six months preceding the filing of the termination petition. The evidence also indicates that the total amount paid by respondent was less than the total amount she owed during this period. This Court has not addressed whether the ground provided for in N.C.G.S. § 7B-1111(a)(3) is automatically triggered whenever a parent fails to pay the full amount of a valid child support obligation. Regardless, the evidence establishes that respondent did not fail to pay a reasonable portion of the cost of care "for a *continuous period of six months* immediately preceding the filling of the petition" because she paid the full amount of child support owed for a monthly period on at least one occasion during these six months. N.C.G.S. § 7B-1111(a)(3) (emphasis added). Accordingly, I would hold that N.C.G.S. § 7B-1111(a)(3) does not support the termination of respondent's parental rights.

¶ 40 Third, the record evidence plainly does not support the conclusion that respondent is incapable of caring for Quentin within the meaning of N.C.G.S. § 7B-1111(a)(6). According to the trial court, this ground for

termination has been met because respondent once tested positive for marijuana. However, as Quentin's guardian *ad litem* rightly conceded in its brief, evidence that a parent uses drugs is insufficient to prove that the parent is incapable of caring for his or her child absent a finding that the parent's drug use will "prevent the parent from providing [the child with] proper care and supervision." *In re D.T.N.A.*, 250 N.C. App. 582, 585 (2016). The record is bereft of any evidence suggesting that respondent's purported substance abuse problem caused her to be "incapable of providing for the proper care and supervision of" Quentin. N.C.G.S. § 7B-1111(a)(6). Thus, the trial court erred in concluding that the requirements of N.C.G.S. § 7B-1111(a)(6) had been met.

¶ 41 Finally, the record does not support the conclusion that respondent willfully abandoned Quentin within the meaning of N.C.G.S. § 7B-1111(a)(7). In order to establish willful abandonment, there must be evidence establishing that respondent evinced 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)). Here, respondent made multiple child support payments in the six months immediately preceding the filing of the termination petition. In addition, she enrolled in the NC LINKS program, purportedly in an effort to address the deficiencies which prevented her from providing for Quentin as his parent. These actions are inconsistent with the conclusion that respondent "deliberately eschewed . . . her parental responsibilities in their entirety." *In re E.B.*, 375 N.C. 310, 318 (2020). Accordingly, I would hold that petitioner has not met its burden of proving that respondent willfully abandoned Quentin pursuant to N.C.G.S. § 7B-1111(a)(7).

IV. Conclusion

¶ 42 Simply put, neither the termination statutes nor our precedents endorse the blinkered approach the majority adopts in reviewing the trial court's order terminating respondent's parental rights. The majority's analysis entirely ignores the likelihood that respondent's behavior in the year subsequent to reaching the age of majority was substantially influenced by the conditions she lived in during the preceding years when she was in DSS custody. To the extent that respondent may have lacked the resources or capacity to parent Quentin immediately upon turning eighteen, then DSS itself bears a substantial share of the responsibility as her caregiver. The outcome of the majority's decision unfairly punishes a young mother who has exhibited remarkable fortitude in striving

to raise her child under difficult circumstances. Accordingly, I would vacate the trial court's order terminating respondent's parental rights and remand for further factfinding which considers all of the relevant evidence, including her circumstances, financial resources, and participation in the NC LINKS program, in determining whether she willfully failed to make reasonable progress in correcting the conditions which led to Quentin's removal.

IN THE MATTER OF Z.J.W.

No. 178A20

Filed 12 March 2021

1. Termination of Parental Rights—adjudicatory findings of fact—sufficiency of evidence—improperly based on dispositional evidence

Where several of the trial court's findings of fact, made in the adjudication phase of a termination of parental rights hearing, lacked evidentiary support or were improperly based on testimony from the dispositional phase, the Supreme Court disregarded those portions of the findings made in error when evaluating the trial court's determination that respondent-father's parental rights to his daughter should be terminated on the basis of neglect and willful abandonment.

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

In a termination of parental rights proceeding, the trial court's conclusion that respondent-father willfully abandoned his daughter was reversed where the unchallenged findings established that respondent made child support payments, sent emails to the relative caring for his daughter, and completed certain aspects of his case plan during the determinative six-month period prior to the filing of the termination petition. Respondent's failure to visit with his daughter was not voluntary where a prior order precluded visitation absent a recommendation from the child's therapist, which had not been given.

3. Termination of Parental Rights—grounds for termination—neglect—insufficient findings—evidence from which determination could be made

IN RE Z.J.W.

[376 N.C. 760, 2021-NCSC-13]

The trial court's determination that respondent-father's parental rights to his daughter were subject to termination on the basis of neglect was vacated. The court's conclusion that respondent neglected his child by abandonment was not supported by its findings, which established that respondent paid child support, attended hearings, emailed his daughter's caregiver, and complied with his case plan requirements. Although the court also concluded that grounds for neglect existed based on a prior adjudication of neglect and a likelihood of future neglect, the court's findings did not address the possibility of a repetition of neglect, despite record evidence from which sufficient findings could be made. The matter was remanded for entry of a new order addressing future neglect and best interests.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 23 September 2019 by Judge Elizabeth Freshwater-Smith in District Court, Nash County. Heard in the Supreme Court on 17 February 2021.

Jayne B. Norwood for petitioner-appellee Nash County Department of Social Services.

Poyner Spruill LLP, by Caroline P. Mackie, for appellee Guardian ad Litem.

Garron T. Michael for respondent-appellant father.

ERVIN, Justice.

¶ 1 Respondent-father Scott A. appeals from a trial court order terminating his parental rights in his minor child Z.J.W.[1] After careful consideration of respondent-father's challenges to the trial court's termination order in light of the record and the applicable law, we reverse the trial court's order, in part; vacate the trial court's order, in part; and remand this case to the District Court, Nash County, for further proceedings not inconsistent with this opinion.

¶ 2 Jill was born in August 2008 to respondent-father and the mother, Amy T.[2] The parents, who were never married and whose relationship

1. Z.J.W. will be referred to throughout the remainder of this opinion as "Jill," which is a pseudonym used for ease of reading and to protect the identity of the juvenile.

2. Although the trial court terminated the mother's parental rights in Jill in the order that is before us in this case, she did not seek appellate review of the trial court's decision and is not a party to the proceedings on appeal.

was marred by incidents of domestic violence, also had a son,[3] who was born in October 2006. As a result of the level of conflict between the parents, the mother would routinely retreat to Nash County, where a number of the members of her family lived, during difficult times. Eventually, the mother left respondent-father and Steven in Buncombe County and moved to Nash County with Jill. Respondent-father had no further contact with Jill for many years after her departure for Nash County.

¶ 3 The mother married another man after relocating to Nash County. On 29 January 2015, allegations of neglect relating to Jill were made to the Nash County Department of Social Services. During the ensuing investigation, the mother's husband admitted that he had had sexual fantasies involving Jill. After DSS provided assistance to respondent-mother and her husband, the investigation into the neglect allegations relating to Jill was closed on 11 August 2015.

¶ 4 On 25 June 2017, the Nash County DSS received a child protective services report relating to an incident of domestic violence involving the mother and her husband. In the course of the resulting investigation, the mother reported that her husband had raped her earlier in the evening, that he had previously committed acts of sexual abuse against Jill, and that she had allowed the husband to continue to live in the family home with Jill despite her knowledge of his conduct. In addition, the husband admitted that he had sexually abused Jill on several occasions. As a result, the mother and the husband were arrested and charged with the commission of several criminal offenses while Jill was placed with her maternal aunt.

¶ 5 On 14 July 2017, a social worker employed by the Nash County DSS contacted respondent-father and informed him about Jill's situation. At that time, respondent-father stated that he could not remember the last time that he had seen Jill. Although he claimed that he had spoken with Jill over the phone since the last time that he had seen her, respondent-father could not provide the date upon which this conversation had occurred. Respondent-father did not, at any point during this conversation, question the social worker about Jill's well-being or where she was living. In spite of the fact that the social worker provided respondent-father with her own contact information, he did not make any further effort to communicate with the social worker.

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3. The parents' son will be referred to throughout the remainder of this opinion as "Steven," which is a pseudonym used for ease of reading and to protect the juvenile's privacy.

¶ 6 In October 2017, the Buncombe County Department of Social Services filed a petition alleging that Steven was an abused, neglected, and dependent juvenile and obtained the entry of an order placing him in nonsecure custody. In its petition, the Buncombe County DSS alleged that it had received a child protective services report on 9 December 2016 asserting that respondent-father had been involved in a physical altercation with his own mother in Steven's presence. On 29 March 2018, Judge Susan M. Dotson-Smith entered an order finding Steven to be a neglected and dependent juvenile. On 12 June 2018, Judge Ward D. Scott entered a dispositional order placing Steven in the custody of the Buncombe County DSS and ordering respondent-father to submit to random drug screens, obtain a psychosexual evaluation, and complete a parenting class.

¶ 7 On 10 January 2018, the Nash DSS filed a petition alleging that Jill was an abused and neglected juvenile. In its petition, the Nash County DSS alleged, among other things, that the husband had admitted to having sexually abused Jill and that the mother had, despite her knowledge of the husband's fantasies about having sexual contact with Jill, enabled the husband's abuse of Jill by burning Jill's diary, in which Jill described the mistreatment that she had experienced, and continuing to live with the husband despite her knowledge of his conduct.

¶ 8 After a hearing held on 7 June 2018, Judge Wayne S. Boyette entered an order on 27 July 2018 finding Jill to be an abused and neglected juvenile. In his order, Judge Boyette found that, while respondent-father did not have a relationship with Jill and had not seen her in over six years, he had expressed a desire to have custody of her. Judge Boyette placed Jill in the custody of the Nash County DSS, sanctioned a permanent plan of reunification with a concurrent plan of adoption, and prohibited visitation between respondent-father and Jill "until [such visitation was] recommended by [Jill's] therapist." Finally, Judge Boyette ordered respondent-father "to work with [the Buncombe County DSS] and complete their court ordered recommendations and service plan." As of October 2018, Judge Dotson-Smith had determined that respondent-father had "completed all recommendations" imposed by the District Court and the Buncombe County DSS.

¶ 9 On 20 February 2019, the Nash County DSS filed a motion to terminate respondent-father's parental rights in Jill. In its termination petition, the Nash County DSS alleged that Jill was an abused and neglected juvenile and that there was a reasonable probability that she would experience abuse and neglect in the future in the event that she was to be returned to respondent-father's care, *see* N.C.G.S. § 7B-1111(a)(1)

(2019), and that respondent-father had willfully abandoned Jill, *see* N.C.G.S. § 7B-1111(a)(7) (2019).

¶ 10 On 5 March 2019, Judge Pell C. Cooper entered a permanency planning order that changed the primary permanent plan for Jill to adoption with a secondary plan of reunification. Following a hearing held on 7 March 2019, at which respondent-father was, for the first time, physically present, Judge Anthony W. Brown entered a permanency planning order on 15 April 2019. In his order, Judge Brown found that respondent-father had sent a few e-mails to the maternal aunt, with whom Jill continued to be placed, and that respondent-father was financially able to parent Jill. In addition, Judge Brown ordered the Nash County DSS to "inform the therapist to contemplate the issue of visitation by [respondent-father] with [Jill]."

¶ 11 As the result of a hearing held on 4 April 2019, Judge Cooper entered a permanency planning order on 15 May 2019 in which he permitted respondent-father to initiate contact with Jill by writing her a letter to be screened by the Nash County DSS and the guardian ad litem before it could be presented to Jill. In addition, Judge Cooper ordered respondent-father to actively participate in all Child and Family Team meetings and to appear at all hearings that were held for the purpose of considering his situation with respect to Jill.

¶ 12 After a hearing held on 13 June 2019 which respondent-father attended telephonically, the trial court entered a permanency planning order on 23 July 2019. In its order, the trial court found that Jill had been receiving therapy from Annie Shaw since March 2018 for the purpose of addressing concerns arising from the sexual abuse that she had experienced at the hands of the mother's husband. However, Ms. Shaw did not believe that it was her role to make a recommendation concerning the issue of whether respondent-father should visit with Jill and stated that she "had never intended to do so." Instead, Ms. Shaw had only intended to assist Jill in preparing for such a visit in the event that one was to occur and declined to express an opinion concerning whether it would be "harmful or helpful" for Jill to visit with respondent-father. The trial court found, on the other hand, that the Nash County DSS and counsel for the parties had believed that Ms. Shaw would make a recommendation concerning the issue of visitation and had acted in accordance with that belief.

¶ 13 The issues raised by the termination motion came on for hearing before the trial court on 25 June 2019 and 25 July 2019. On 23 September 2019, the trial court entered an order concluding that both grounds for

termination alleged in the termination motion existed and that it would be in Jill's best interests for respondent-father's parental rights to be terminated. As a result, the trial court terminated respondent-father's parental rights in Jill. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent-father noted an appeal to this Court from the trial court's termination order.

¶ 14 In seeking relief from the trial court's termination order before this Court, respondent-father argues that the trial court erred by determining that his parental rights in Jill were subject to termination on the basis of neglect, N.C.G.S. § 7B-1111(a)(1), and willful abandonment, N.C.G.S. § 7B-1111(a)(7). According to well-established North Carolina law, trial courts utilize a two-step process in determining whether a parent's parental rights in a child should be terminated that consists of an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more of the grounds for termination delineated in N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(e)–(f) (2019). This Court reviews a trial court's adjudication decision in order "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111 (1984) (citing *In re Moore*, 306 N.C. 394, 404 (1982)). "If [the trial court] determines that one or more grounds [for termination] listed in section 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) (citing *In re Young*, 346 N.C. 244, 247 (1997); N.C.G.S. § 7B-1110).

¶ 15 In support of its adjudication decision, the trial court found as a fact that:

> 7. The Court takes judicial notice of the court order in the underlying action adjudicating [Jill] as an abused and neglected juvenile[.]
>
> . . . .
>
> 9. The relationship between [the parents] was problematic and [the mother] frequently left the home and came to Nash County to be with her family. . . . [The parents] moved to Buncombe County where [Jill] was born. While living in Buncombe County, they each sought and obtained Domestic Violence Protection orders [(DVPO)] on each other.

10. After [the mother] left [respondent-father] for the final time in 2010, she returned to live with family in Nash County. [The mother] left with [Jill] and [Steven] remained with [respondent-father]. In Nash County[, the mother] obtained a DVPO against [respondent-father]. As a part of the DVPO order [respondent-father] was allowed to have supervised visitation at the Nashville Police Department. [Respondent-father] did not attend the DVPO hearing, nor did he ever exercise his visitation with [Jill]. [Respondent-father] has not seen [Jill] since she and her mother left Buncombe County in 2010. Although he believed they were in Nash County, [respondent-father] made no known efforts to find [Jill] or her mother. [The mother] changed her phone number and [respondent-father] stated he had no way to contact her as her family reportedly told him they did not know where [the mother] and [Jill] were located. [The maternal aunt] says she was never contacted by [respondent-father] until he was provided with the email address of [Jill's] placement by the Department in 2018. [Respondent-father] knew where [the mother's] mother resided in Nash County having visited [the mother] there previously. [The mother's] mother and family continue to reside in the same homes they lived in at the time of the visits by [respondent-father].

. . . .

12. In 2017, [respondent-father] was made aware that there was a child protective services investigation in Nash County involving [Jill]. Due to confidentiality he was not given specific details. However, [respondent-father] admits that although knowing what he did know, he still made no effort to contact [the mother's] relatives in Nash County to check on his daughter nor did he inquire about her well-being with the Nash County social worker.

13. Nash County social worker, Roxanne Hill, contacted [respondent-father] by phone on July 14, 2017 informing him of the child protective services investigation involving [Jill]. During that conversation [respondent-father] was unable to recall when he had last seen [Jill] but [h]e had spoken with her but could not remember when that had transpired. He stated he was focused on [Steven] and had no time for anything else, stating [Steven] is a "hand full". He did not ask about [Jill's] well-being or where she was living, although that information was available to him at the time.

14. At the time of the Nash County investigation with [Jill], [Buncombe DSS] had an open investigation with [respondent-father] concerning [Steven]. . . . [Steven] was adjudicated neglected and dependent in Buncombe County on February 22, 2018 and placed in the custody of Buncombe County.

15. Prior to being removed from his father, [Steven] did not attend school. [Respondent-father] attempted to home school [Steven] but never completed the required documents regarding attendance for [Steven] to receive credit. When [Steven] entered foster care and was enrolled in public schools, he was found to be behind academically. His grades and academic progress improved while he was in foster care.

. . . .

18. [Respondent-father] stated he began attending therapy at Family Preservation a week after [Steven] was removed from his care. Jane Jones, Social Worker with Family Preservation Services worked with [respondent-father] from November 9, 2017 until October 2018 when he was no longer eligible for their services due to a change in their mandate for services. On June 6, 2019, [h]e returned to Family Preservation and continues to be seen. Ms. Jones had no knowledge of the issues regarding his involvement with

Buncombe County and did not inquire. She did attend two [CFT] meetings at Buncombe [DSS] and believes he completed the goals set for him.
. . .

. . . .

20. [Respondent-father] has never been employed for more than a few weeks at a time. He was diagnosed with Crohn's Disease at age 13 and was approved for disability in 2002. [Respondent-father] receives $770.00 monthly in disability of which $50.00 is deducted for child support for [Jill] and $350.00 in Food and Nutrition benefits. [Respondent-father] never voluntarily paid child support and payments did not begin until January 4, 2019 from his social security benefits. He struggles to provide for himself and [Steven] and according to [respondent-father] his sister assists him financially when he needs help. At times, he cannot pay his rent. He does not have a driver's license and he has not had a motor vehicle in over ten years.

21. [Respondent-father] did not attend any hearings regarding [Jill] until after [DSS] filed the [m]otion to terminate his parental rights on February 20, 2019. He participated by phone for two hearings and only attended five. Two of which were hearings on the [m]otion to terminate his parental rights.

22. [Respondent-father] attended court hearings regarding [Steven] in Buncombe County but did not initially comply with their case plan. The Court ordered that he submit to a Psychosexual Evaluation which he did not do in a timely manner. The therapist attended a hearing in Buncombe County to request additional information that she did not receive from [respondent-father] so that the evaluation could be completed.

23. The plan in Buncombe County was completed by [respondent-father] and as his plan in Nash

County was to complete the Buncombe County plan, the Nash County plan was also completed.

23.[4] There were Domestic Violence orders involving [respondent-father] and his mother . . . in Buncombe County. Due to the volatile relationship and verbal altercations in the presence of [Steven,] [respondent-father's] mother was not to be present in the home[.] In October of 2018, [respondent-father] was hospitalized and had surgery. Upon his discharge from the hospital, [his mother] moved into [his] home to care for him in violation of the Buncombe [DSS] plan. . . .

24. [Respondent-father] states he had no one else who could or would assist him and his condition was such that he was unable to care for himself. He states he has no friends or any support system that could have helped him during his recovery.

25. [Respondent-father] was contacted by Foster Care Supervisor, Stephanie Grischow on a regular basis to keep him informed about [Jill]. Ms. Grischow initiated the contacts between [respondent-father] and herself. She often left messages for him to return her call. It would require multiple messages from Ms. Grischow before her calls would be returned. [Respondent-father] missed three consecutive meetings. Ms. Grischow contacted him encouraging him to attend and participate in the meetings. He participated in some Child and Family Team Meetings by phone.

26. On July 26, 2018 [respondent-father] was provided the email address of [the maternal aunt] so that he could contact her and inquire about [Jill] and her wellbeing. Again on August 27, 2018 and September 18, 2018 he was given the email address because he said he had lost the address. The first email to [the maternal aunt] was sent September 18, 2018. There was a total of twelve emails in fourteen months: November

4. The trial court's order had two findings of fact numbered 23.

9, 2018, December 19, 2018, December 27, 2018, February 22, 2019, February 26, 2019, March 3, 2019, March 21, 2019, April 20, 2019, May 7, 2019, and May 22, 2019. [The maternal aunt] responded to all the emails received. [Respondent-father] at times sent pictures of clothing to [the maternal aunt] asking for [Jill's] size and whether [Jill] would like them. He never sent anything. He has not sent her cards or gifts for her birthdays or holidays since she moved to Nash County in 2010. [The mother] denies blocking [respondent-father] from Facebook.

27. . . . [Respondent-father] made no effort to locate his daughter or inquire of her maternal family about her well-being or whereabouts since [respondent-mother] and [Jill] left his home in 2010. By his own statements, [respondent-father] did not make efforts as he had his hands full with [Steven]. He was provided [the maternal aunt's] e-mail address and did not even utilize the email to contact [the maternal aunt] for two months after having the address as he lost it twice. And even then, [respondent-father] only sent twelve emails in over a year's time. [Jill] was 9 years old, before [respondent-father's] paternity was established and it was only done . . . at the request and effort of [Nash DSS]. [Respondent-father] stated he was not a legal expert and did not know how to go about establishing he was her father. Yet paternity of [Steven] was established by Buncombe County over six months prior to the testing for [Jill] and he did not inquire about testing for [Jill] even after becoming aware of the process. . . .

. . . .

30. [Jill] is in therapy to address the trauma of her sexual abuse. Due to scheduling conflicts with the previous therapist, Annie Shaw, and travel issues, it was in [Jill's] best interest to change therapist[s].

31. While under Ms. Shaw's care, [respondent-father] was allowed to write [Jill] a letter. The letter was reviewed by [Nash DSS]. Ms. Shaw read the letter to [Jill] in a therapy session. Ms. Shaw assisted [Jill] in processing her feelings after hearing the letter. Previously, [Jill] had expressed interest in the possibility of seeing her father and asking him why he had not been in her life for seven years. After hearing the letter, she no longer wanted to see him stating the letter made her feel "icky" and that it made her think of the "other one", referring to [her stepfather]. [Respondent-father] has written a second letter which has been given to [Jill's] current therapist, but [Jill] has not yet seen the letter.

32. All parties thought [Ms.] Shaw would be providing a recommendation to the Court regarding visitation by [respondent-father]. When Ms. Shaw testified in court on June 13, 2019, she stated "it was not, nor was it ever her role to make a recommendation regarding the father's visitation[.]" Ms. Shaw only intended to prepare [Jill] for a visit if it were to be ordered by the Court.

33. [Respondent-father] through his inaction for most of [Jill's] life prior to and including the six months immediately preceding the filing of the Motion to terminate parental rights, has displayed a willful neglect and refusal to perform the natural and legal obligations of parental care and support. He has withheld his presence, his love, his care. Further, he has failed to afford himself of the opportunities to display filial affection in such a manner that demonstrates he has relinquished all parental claims. Therefore, he has neglected and abandoned [Jill].

34. In light of [respondent-father's] nearly complete absence from [Jill's] life prior to the filing of the Motion to terminate parental rights, it is probable that neglect would continue if she were returned to his care.

> 35. [Respondent-father] had the ability to achieve contact with [Jill] irrespective of his financial and social resources.

¶ 16 **[1]** As an initial matter, respondent-father challenges the sufficiency of the evidentiary support for several of the trial court's findings of fact. First, respondent-father contends that the portions of Finding of Fact No. 10 stating that the mother had left him "for the final time in 2010" and that he had not exercised the right to participate in supervised visitation with Jill as permitted by the Nash County DVPO order lack sufficient record support. A careful review of the record persuades us respondent-father's contention has merit given that nothing in the record provides support for the specific factual statements that respondent-father has contested. As a result, we will disregard the relevant portions of Finding of Fact No. 10 and those portions of Finding of Fact Nos. 26 and 27 that state that the mother left respondent-father in 2010, rather than 2011, in determining the extent to which the trial court's findings of fact provide sufficient support for its determination that respondent-father's parental rights in Jill were subject to termination on the basis of neglect and willful abandonment. *See In re N.G.*, 374 N.C. 891, 901 (2020) (disregarding findings of fact that were not supported by sufficient record evidence).

¶ 17 Secondly, respondent-father challenges the sufficiency of the evidentiary support for those portions of Finding of Fact Nos. 10 and 27 that state that he made no known efforts to locate the mother or Jill or to inquire of members of the mother's family concerning Jill's location or well-being since the mother left Buncombe County with Jill. At the termination hearing, respondent-father testified that he had contacted the mother's family following her departure from Buncombe County with Jill and had been told that they did not know where the mother was and that respondent-mother had changed her phone number and blocked his ability to send Facebook messages to her. Although the trial court was not required to deem respondent-father's testimony to be credible, *see In re D.L.W.*, 368 N.C. 835, 843 (2016), it appears that the trial court predicated the challenged portions of its findings of fact upon testimony presented by the maternal aunt at the dispositional phase of the proceeding to the effect that respondent-father had not made any contact with the mother's family until he had been provided with her e-mail address by the Nash County DSS in 2018. In the event that the trial court relied upon this dispositional evidence as support for its adjudicatory finding that respondent-father had not made any efforts to locate the mother or Jill since their departure from Buncombe County, we agree with longstanding Court of Appeals precedent that it was error

to do so. *See In re Mashburn*, 162 N.C. App. 386, 396 (2004) (noting that a trial court should not consider testimony received at the dispositional phase of a termination proceeding in making adjudicatory findings of fact). As a result, we hold that the relevant portions of Finding of Fact Nos. 10 and 27 should not be considered in evaluating the validity of respondent-father's challenges to the trial court's adjudicatory decisions.

¶ 18 Similarly, respondent-father contends that the portion of Finding of Fact No. 15 stating that Steven had been "behind academically" at the time that he entered foster care and enrolled in public school was not supported by the record evidence. However, a 12 June 2018 dispositional order entered in the Buncombe County proceeding regarding Steven that was admitted into evidence at the termination hearing reflects that, while Steven had been "doing well integrating into the 4th grade," he was "on a first grade level in math" and had "advanced approximately two years in his math skills since being placed in his foster home five months ago." As a result, we hold that the challenged portion of Finding of Fact No. 15 has sufficient evidentiary support.

¶ 19 Moreover, respondent-father argues that the portion of Finding of Fact No. 18 indicating that "Ms. Jones[, a social worker with Family Preservation Services,] had no knowledge of the issues regarding his involvement with Buncombe County and did not inquire[ ]" into that subject mischaracterizes her testimony and contradicts the remainder of that finding, which states that Ms. Jones had attended two Child Family Team meetings at Buncombe DSS and "believes he completed the goals set for him." A careful review of the record satisfies us that Finding of Fact No. 18 does contain the internal inconsistency described in respondent-father's brief and conflicts with Ms. Jones' testimony at the termination hearing, which reflects an adequate understanding of the nature and extent of respondent-father's involvement with the Buncombe County DSS. More specifically, Ms. Jones' testimony reflects that she was familiar with the goals set out in respondent-father's Buncombe County case plan and indicates that respondent-father had addressed domestic violence and substance abuse issues in the course of complying with the relevant plan requirements. For that reason, we will disregard the trial court's statement in Finding of Fact No. 18 that Ms. Jones lacked knowledge of the issues that were addressed during respondent-father's period of involvement with the Buncombe County DSS in determining the validity of the trial court's adjudicatory decision. *See In re N.G.*, 374 N.C. at 901.

¶ 20 Respondent-father also challenges the portion of Finding of Fact No. 21 which provides that he "did not attend any hearings regarding

[Jill] until after the Nash County [DSS] filed the [m]otion to terminate his parental rights on February 20, 2019[ ]" as not supported by the evidence. A careful review of the record clearly indicates respondent-father participated in the hearing concerning the underlying juvenile petition that was on held on 7 June 2018 by telephone. As a result, we will disregard the challenged portion of Finding of Fact No. 21 in evaluating the correctness of the trial court's adjudicatory determinations. *See id.*

¶ 21 Next, respondent-father contends the trial court's statement in Finding of Fact No. 22 that he "did not initially comply" with his Buncombe County case plan conflicts with the record evidence. As the initial dispositional order entered in the Buncombe County proceeding on 12 June 2018 reflects, respondent-father was ordered to submit to random drug screens, participate in a psychosexual evaluation, and complete a parenting class in order to be reunited with Steven. However, the trial court determined in Finding of Fact No. 22, which has not been challenged as lacking in sufficient record support, that respondent-father did not complete the required psychosexual evaluation in a timely manner. *In re Z.L.W.*, 372 N.C. 432, 437 (2019) (stating that unchallenged findings are deemed to have sufficient record support and are binding for purposes of appellate review). In addition, while respondent-father testified at the termination hearing that he began participating in his psychosexual evaluation as soon as he was ordered to do so, the therapist who conducted the evaluation had expressed concern about the extent to which respondent-father was "being forthright with regard to her evaluation," a development that resulted in the holding of additional hearings "to decide how best to handle" the situation and a request on the part of the therapist to be allowed to review additional records. As a result, we hold that the trial court was entitled to infer from this evidence that respondent-father had initially failed to comply with his Buncombe County case plan. *See In re D.L.W.*, 368 N.C. at 843 (stating that the trial judge has the responsibility for considering the evidence, evaluating the credibility of the witnesses, and making any reasonable inferences that can be drawn from the record evidence).

¶ 22 In addition, respondent-father argues that the trial court erred by stating in Finding of Fact No. 24 that he "ha[d] no friends or any support system that could have helped him during his recovery" from surgery. According to respondent-father, his original plan following his discharge from the hospital in 2018 was to go to Virginia and stay with his sister. In support of this assertion, respondent-father relies upon testimony that his sister provided at the dispositional phase of the proceeding; however, as we have previously stated, such testimony is insufficient to

support an adjudicatory finding. *See In re Mashburn*, 162 N.C. App. 396. On the other hand, respondent-father testified at the adjudicatory hearing that he had allowed his mother to enter his home following the surgical procedure that was performed upon him because "I didn't know anybody else that would look after me and help me with my recovery[.]" In light of this testimony, we hold that the record contains sufficient evidentiary support for the trial court's finding that respondent-father had stated he had no one else other than his mother to assist him during his convalescence following surgery.

¶ 23 In his penultimate challenge to the trial court's findings of fact, respondent-father argues that the portion of Finding of Fact No. 25 stating that he had "missed three consecutive [Child Family Team] meetings" lacked sufficient evidentiary support. As the record reflects, a foster care supervisor employed by the Nash County DSS testified that respondent-father had participated by telephone in two of the four Child Family Team meetings held in connection with the underlying juvenile proceeding by phone. More specifically, the foster care supervisor testified that respondent-father had participated in a Child Family Team meeting by phone on 26 July 2018, was absent from a Child Family Team meeting that was held on 23 October 2018, participated in a Child Family Team meeting by phone on 24 January 2019, and was absent from a Child Family Team meeting that was held on 23 April 2019. As a result, given that the record provides no support for the trial court's finding that respondent-father had missed three consecutive Child Family Team meetings, we will disregard this portion of Finding of Fact No. 25 in determining whether the trial court properly determined that respondent-father's parental rights in Jill were subject to termination on the basis of neglect and willful abandonment. *In re N.G.*, 374 N.C. at 901.

¶ 24 Finally, respondent-father contends that Finding of Fact Nos. 33 through 38 constitute "ultimate facts bordering on conclusions of law." Although the trial court labeled the relevant portions of its termination order as findings of fact rather than conclusions of law, its determinations that respondent-father had "displayed a willful neglect," "relinquished all parental claims," "neglected and abandoned [Jill]," and "neglect would [probably] continue if [Jill] were returned to [respondent-father's] care" involve the application of legal principles to the facts rather than factual findings. Given that "findings of fact which are essentially conclusions of law will be treated as such on appeal," *State v. Sparks*, 362 N.C. 181, 185 (2008) (cleaned up), we will treat the challenged portions of Finding of Fact Nos. 33 through 38 in that manner in evaluating the validity of respondent-father's remaining challenges to the trial court's adjudicatory decision.

¶ 25 **[2]** In challenging the trial court's determination that grounds for terminating his parental rights in Jill existed, respondent-father begins by arguing that the trial court's findings of fact did not support its conclusion that his parental rights in Jill were subject to termination on the grounds of willful abandonment. The termination of a parent's parental rights in a child on the basis of abandonment pursuant to 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[.]" N.C.G.S. § 7B-1111(a)(7) (2019). "Abandonment 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)); *see also Pratt v. Bisho*p, 257 N.C. 486, 502 (1962) (stating that "[a]bandonment requires a willful intent to escape parental responsibility and conduct in effectuation of such intent"). In light of that fact, this Court has stated that, "if 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*, 257 N.C. at 501. "Although 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. 71, 77 (2019) (quoting *In re D.E.M.*, 257 N.C. App. 618, 619 (2018)).

¶ 26 In view of the fact that the motion to terminate respondent-father's parental rights in Jill was filed on 20 February 2019, the determinative six-month period ran from 20 August 2018 through 20 February 2019. In arguing that the trial court erred by determining that his parental rights in Jill were subject to termination on the basis of willful abandonment, respondent-father notes that he was precluded from having any contact with Jill during the relevant period of time, that he fully complied with the case plan that was established in Buncombe County and adopted in Nash County, and that he never demonstrated that he willfully intended to forego all of his parental duties or to relinquish his parental claims to Jill.

¶ 27 The trial court's unchallenged findings of fact indicate that respondent-father made child support payments during the relevant six-month period beginning on 4 January 2019. In addition, the trial court found that respondent-father sent e-mails to the maternal aunt with whom Jill had been placed for the purpose of inquiring about Jill's well-

being on 18 September 2018, 9 November 2018, 19 December 2018, and 27 December 2018. Finally, the trial court found that respondent-father had attended a Child Family Team meeting and completed the requirements of his case plan during the relevant six-month period. As a result, rather than reflecting a willful withholding of his parental love and affection from Jill, the trial court's findings establish that respondent-father took a number of affirmative actions, including sending e-mails to the maternal aunt, attending a Child Family Team meeting, and satisfying the requirements of his case plan during the relevant six-month period in an attempt to show his love, concern, and affection for Jill.

¶ 28 Admittedly, respondent-father did not visit with Jill at any time during the relevant six-month period. However, the order adjudicating Jill to be an abused and neglected juvenile entered by Judge Boyette precluded visitation between respondent-father and Jill until the occurrence of such visits was recommended by Ms. Shaw. Subsequently, unchallenged testimony from a foster care supervisor employed by the Nash County DSS indicates that respondent-father wished to be allowed to visit with Jill and contacted Ms. Shaw for that purpose on at least two occasions. Although the trial court's unchallenged findings of fact indicate that all parties believed that Ms. Shaw would make a recommendation regarding the extent to which visitation between respondent-father and Jill would be appropriate, Ms. Shaw testified on 13 June 2019 that "it was not, nor was it ever her role to make a recommendation regarding the father's visitation" and that she never intended to do anything other than prepare Jill for a visit with respondent-father in the event that such visits were allowed to take place. Since all of the parties, including respondent-father, were expecting a recommendation from Ms. Shaw concerning the extent, if any, to which respondent-father should be permitted to visit with Jill before such visits would be allowed, his failure to have personal contact with Jill during the relevant six-month period was neither voluntary nor attributable to any failure on his part to seek to visit with Jill. As a result, the trial court erred to the extent that it determined that respondent-father's parental rights in Jill were subject to termination on the basis of willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7) due to the absence of visits between respondent-father and Jill. *Cf. In re T.C.B.*, 166 N.C. App. 482, 486–87 (2004) (holding that the trial court's conclusion that the parent's parental rights were subject to termination on the basis of abandonment was not supported by the trial court's visitation-related findings given the fact that the respondent's attorney had instructed him to avoid contact with the child and the fact that a subsequent protection plan prohibited visitation between the respondent and the child).

¶ 29 Although respondent-father could, of course, have done more than he did in order to exhibit his concern for Jill, the steps that he did take as reflected in the trial court's findings of fact suffice to preclude a finding that his parental rights were subject to termination on the basis of willful abandonment. Simply put, the trial court's findings of fact do not "support a conclusion that respondent-father completely withheld his love, affection, and parental concern for the" child, thereby "rendering his parental rights in [the child]" subject to termination" for abandonment. *In re A.G.D.*, 374 N.C. 317, 325 (2020). As a result, we hold that the trial court's determination that respondent-father's parental rights in Jill were subject to termination on the basis of abandonment must be reversed.

¶ 30 **[3]** Finally, respondent-father argues that the trial court erred by concluding that his parental rights in Jill were subject to termination based upon neglect. A trial court may terminate a parent's parental rights in the event that the parent has neglected the juvenile. N.C.G.S. § 7B-1111(a)(1) (2019). A "neglected juvenile" is defined as "[a]ny juvenile . . . whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; or who has been abandoned; . . . or who lives in an environment injurious to the juvenile's welfare[.]" N.C.G.S. § 7B-101(15) (2019). "In deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.' " *In re N.D.A.*, 373 N.C. at 80.

> When it cannot be shown that the parent is neglecting his or her child at the time of the termination hearing because "the child has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent."

In re Z.A.M., 374 N.C. 88, 95 (2020) (quoting *In re D.L.W.*, 368 N.C. at 843 (2016))[5] *see also In re N.D.A.*, 373 N.C. at 80.

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5. As this Court noted in *In re R.L.D.*, 375 N.C. 838, 841 n.3 (2020), "a showing of past neglect is [not] necessary in order to terminate parental right [on the basis of neglect] in every case." On the contrary, we pointed out in that decision that N.C.G.S. § 7B-101(15) "does not require a showing of past neglect if the petitioner can show current neglect." *Id.* However, given that the record before the Court in this case does contain a finding of past neglect, the analysis set out in the text is appropriate for use in evaluating the validity of respondent-father's challenge to the trial court's determination that his parental rights in Jill were subject to termination on the basis of neglect.

¶ 31 As an initial matter, we note that this Court has held that

> [a] trial court is entitled to terminate a parent's parental rights in a child for neglect based upon abandonment pursuant to N.C.G.S. § 7B-1111(a)(1) in the event that the trial court finds that the parent's conduct demonstrates a "wil[l]ful neglect and refusal to perform the natural and legal obligations of parental care and support."

In re N.D.A., 373 N.C. at 81 (quoting *Pratt*, 257 N.C. at 501). In order to conclude that "neglect by abandonment" is present, the trial court's findings must reflect "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," *id.* at 81, with the trial court being required to consider the parent's conduct over an extended period of time continuing up to and including the time at which the termination hearing is being held. *Id.* at 81–82.

¶ 32 The trial court appears to have incorporated a "neglect by abandonment" theory in Finding of Fact No. 33, which states that respondent-father had, for "most of [Jill's] life prior to and including the six months immediately preceding the filing of the [m]otion to terminate parental rights," "displayed a willful neglect and refusal to perform the natural and legal obligations of parental care and support" by "with[o]ld[ing] his presence, his love, [and] his care" and by "fail[ing] to afford himself of the opportunities to display filial affection" so as to neglect Jill. However, the trial court's findings of fact reflect that respondent-father began paying child support on 4 January 2019, that he attended some of the hearings that were held in the underlying juvenile proceeding, that he satisfied the requirements set out in the case plan that was adopted by the Buncombe County DSS and the Nash County DSS, that he participated in some Child Family Team meetings, that he sent twelve e-mails to the maternal aunt with whom Jill was residing for the purpose of keeping informed about Jill's situation, and that he wrote two letters to Jill. Although respondent-father did not ever visit with Jill, his failure to do so cannot be directly attributed to any failure on his part to seek the right to participate in such visits for the reasons set out in greater detail earlier in this opinion. As a result, given that the trial court's findings of fact fail to establish that respondent-father "manifest[ed] a willful determination to forego all parental duties" with respect to Jill, *In re N.D.A.*, 373 N.C. at 81, and, in fact, supported the opposite conclusion, the trial court erred to the extent that it determined that respondent-

father's parental rights in Jill were subject to termination on the basis of a "neglect by abandonment" theory.

¶ 33 A determination that respondent-father did not neglect Jill on the basis of abandonment does not, however, end our inquiry concerning the viability of the trial court's conclusion that respondent-father's parental rights in Jill were subject to termination on the basis of neglect. Instead, we note that the trial court also appears to have found the existence of the neglect ground for termination on the basis of a prior finding of neglect and the likelihood of future neglect as well given its decision to "take[ ] judicial notice of the court order in the underlying action adjudicating the child as an abused and neglected juvenile" and given its finding that, "[i]n light of [respondent-father's] nearly complete absence from [Jill's] life prior to the filing of the [m]otion to terminate parental rights, it is probable that neglect would continue if she were returned to his care." As a result, we must evaluate the extent, if any, to which the trial court's findings of fact support its determination that respondent-father's parental rights in Jill were subject to termination on the basis of the "prior neglect and likelihood of a repetition of neglect."

¶ 34 As we have already noted, in the event that there has been a previous finding of neglect and the juvenile has not resided in the parental residence for an extended period of time, the principal issue that the trial court is required to consider in determining whether the parent's parental rights in the child are subject to termination on the grounds of neglect is the likelihood that the juvenile would experience a repetition of the neglect to which he or she had previously been subjected in the event that he or she was returned to the parent's care based upon an analysis of the record evidence concerning the situation leading up to and existing at the time of the termination hearing. *In re N.D.A.*, 370 N.C. at 80. Although the trial court appears to have attempted to utilize this analytical rubric in the termination order, its finding that a repetition of neglect was likely in the event that Jill was returned to respondent-father's care rests solely upon respondent-father's "nearly complete absence from [Jill's] life prior to the filing of the [m]otion to terminate parental rights." In view of the fact that the trial court clearly failed to consider any of the evidence concerning events that had occurred prior to the filing of the termination motion other than respondent-father's lengthy absence from Jill's life or any of the evidence concerning events that occurred subsequent to the filing of the termination motion in determining the likelihood that the neglect to which Jill had been subjected would be repeated in the event that she was placed in respondent-father's care, the trial court's findings of fact do not suffice to support a determination that respondent-father's parental rights in Jill were sub-

ject to termination on the basis of "prior neglect and likelihood of a repetition of neglect" theory.

¶ 35 On the other hand, however, the record contains evidence from which a proper repetition of neglect finding could be made in the event that the trial court deemed that evidence to be credible. Among other things, the trial court's other findings of fact reflect that respondent-father "made no effort to locate his daughter or inquire of her maternal family about her well-being" for a substantial period of time after the mother and Jill left Buncombe County, that respondent-father failed to make any effort to locate Jill because "he had his hands full with Steven, that Steven had been adjudicated to be a neglected and dependent juvenile in Buncombe County based upon events that occurred while he was in respondent-father's custody, that respondent-father had failed to complete the psychosexual evaluation that he was ordered to receive in Buncombe County in a timely manner, that respondent-father did not initially comply with his Buncombe County case plan, that respondent-father made no attempt to establish his paternity of Jill until the Nash County DSS arranged for the performance of the necessary test, that it was difficult for employees of the Nash County DSS to reach respondent-father, and that respondent-father was slow in making contact with the maternal aunt after being provided with her e-mail address. In addition, the record contains evidence that, while not fully reflected in the trial court's findings of fact, tends to show that respondent-father exhibited boundary-related limitations in attempting to care for Steven and that Steven exposed himself to Jill during a sibling visit Thus, since we believe that the record contains evidence from which the trial court could, if it elected to do so, find that a repetition of neglect would be probable in the event that Jill was returned to respondent-father's care, we conclude that the portion of the trial court's order determining that respondent-father's parental rights in Jill were subject to termination on the basis of neglect lack sufficient support in the trial court's findings of fact; that the relevant portion of the trial court's order should be vacated; and that this case should be remanded to the District Court, Nash County, for the entry of a new order concerning the extent, if any, to which respondent-father's parental rights in Jill are subject to termination on the basis of neglect and, if so, whether it would be in Jill's best interests for respondent-father's parental rights to be terminated.[6]

6. In view of our determination that the trial court's findings fail to support its conclusion that respondent-father's parental rights in Jill were subject to termination on the basis of any of the grounds for termination set forth in N.C.G.S. § 7B-1111(a), we need not address respondent-father's challenge to the trial court's determination that the termination of his parental rights would be in Jill's best interests.

¶ 36 Thus, for the reasons set forth above, we conclude that the trial court's determination that respondent-father's parental rights in Jill were subject to termination on the basis of abandonment and neglect by abandonment lacked sufficient support in the trial court's findings of fact and that the trial court's determination that respondent-father's parental rights in Jill were subject to termination on the basis of prior neglect and the likelihood of a repetition of neglect rested upon a misapplication of the applicable law. As a result, the trial court's termination order is reversed, in part, and vacated, in part, and this case is remanded to the District Court, Nash County, for further proceedings not inconsistent with this opinion, including the entry of a new termination order containing proper findings of fact and conclusions of law concerning the extent to which respondent-father's parental rights in Jill were subject to termination on the basis of prior neglect coupled with the likelihood of a repetition of neglect and whether the termination of respondent-father's parental rights would be in Jill's best interests.

REVERSED, IN PART; VACATED AND REMANDED, IN PART.

JVC ENTERPRISES, LLC, AS SUCCESSOR BY MERGER TO GEOSAM CAPITAL US, LLC; CONCORD APARTMENTS, LLC; AND THE VILLAS OF WINECOFF, LLC F/K/A THE VILLAS AT WINECOFF, LLC

v.

CITY OF CONCORD

No. 31PA20

Filed 12 March 2021

Cities and Towns—city's authority to levy fees—session law amending city's charter—plain language analysis

In a case involving a challenge by residential subdivision developers (plaintiffs) to defendant-city's authority to levy water and wastewater connection fees for services to be furnished, the plain language of a session law amending the city's charter—which superseded prior session laws that had given a city board the authority to assess fees and charges for services and facilities to be furnished—stated that all powers of the board "shall become powers and duties of the City." This language was unambiguous and transferred the powers held by the board (including the authority to levy water and sewer fees for services to be furnished) to the city, and the

simultaneous dissolution of the board by the same session law did not affect the transfer of the board's powers. Therefore, the trial court properly granted summary judgment to the city where there was no genuine issue of material fact regarding the city's authority to charge the challenged fees.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 269 N.C. App. 13 (2019), reversing and remanding an order entered on 10 October 2018 by Judge Joseph N. Crosswhite in Superior Court, Cabarrus County, granting summary judgment in favor of the City and dismissing all of plaintiffs' claims. Heard in the Supreme Court on 12 January 2021.

Scarborough, Scarborough, & Trilling PLLC, by James E. Scarborough, John Scarborough and Madeline J. Trilling; and Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, for plaintiff-appellees.

Hamilton Stephens Steele & Martin, PLLC, by Keith J. Merritt and Rebecca K. Cheney, for defendant-appellant.

HUDSON, Justice.

¶ 1 Here we must decide whether a series of local acts gives the City of Concord the authority to levy water and wastewater connection fees against plaintiff developers for services to be furnished. We hold that the language of these acts is clear and unambiguous in granting this authority to the City of Concord. Accordingly, we reverse the decision of the Court of Appeals and affirm the trial court's order granting summary judgment to the City and dismissing plaintiffs' claims with prejudice.

I. Factual and Procedural History

¶ 2 In 2004, the City of Concord adopted an ordinance requiring developers of residential subdivisions to pay fees for water and wastewater service before a subdivision plat would be accepted for recordation. The ordinance was updated in 2016 such that fees are now due "at the time" of acquiring a permit.

¶ 3 Plaintiffs are developers who constructed subdivisions within the City of Concord prior to 2016 and paid water and wastewater connection fees to the City prior to development as required by the pre-2016 ordinance. Plaintiffs sued the City on 11 September 2017 seeking a declaratory judgment that these fees were ultra vires and seeking damages

in the amount of fees paid to the City in connection with their developments. Plaintiffs contend that the fees are illegal because the City lacks authority to collect fees prior to furnishing water and sewer services to plaintiffs' subdivisions.

¶ 4 On 17 September 2018 the City moved for partial summary judgment, arguing that its authority to charge water and sewer fees for services "to be furnished" is specifically set forth in the City's Charter. In support of its motion, the City relied on a series of local acts amending, revising, or consolidating the City's Charter between 1959 and 1986. An Act Amending the Charter of the Board of Light and Water Commissioners of the City of Concord, ch. 66, 1959 N.C. Sess. Laws 43 (1959 Act); An Act to Revise and Consolidate the Charter of the City of Concord and to Repeal Prior Local Acts, ch. 744, 1977 N.C. Sess. Laws 970 (1977 Act); An Act to Revise and Consolidate the Charter of the City of Concord and to Repeal Prior Local Acts, ch. 861, § 1, 1985 N.C. Sess. Laws 112 (1986) (1986 Act).[1]

¶ 5 The 1959 Act authorized the Board of Light and Water Commissioners of the City of Concord (the Board) "[t]o fix and collect rates, fees and charges for the use of and for the services and facilities furnished or to be furnished in the form of electrical and water service." 1959 N.C. Sess. Laws at 43, § 1.[2] The 1977 Act revised and consolidated the City's Charter and continued the existence of the Board and its powers. 1977 N.C. Sess. Laws at 971, 973–75, 979–82, §§ 1, 5–6. Finally, the 1986 Act consolidated the City's Charter, dissolved the Board, provided that "[a]ll powers and duties of said Board shall become powers and duties of the City of Concord[,]" and repealed all but two sections of the 1977 Act. 1985 N.C. Sess. Laws at 118–119, §§ 2, 6.

¶ 6 The trial court granted summary judgment for the City on 10 October 2018 dismissing plaintiffs' claims with prejudice. Plaintiffs appealed to the Court of Appeals.[3]

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1. 1985 N.C. Sess. Laws 112 will be referred to as the 1986 Act, since it was enacted and became effective in 1986.

2. An earlier law allowed the Board to levy prospective fees for sewer. An Act to Amend the Charter of the Board of Light and Water Commissioners of the City of Concord, ch. 1180, 1955 N.C. Sess. Laws 1176, 1176 (1955).

3. In resolving this case, the trial court ruled both that the ordinance at issue was consistent with session law and that a particular session law was constitutional. The City also cross-appealed, arguing that the constitutionality of the session law was not properly alleged in plaintiffs' complaint. Beyond reversing the Court of Appeals decision regarding

¶ 7 The Court of Appeals concluded that there were two reasonable interpretations of the City's Charter as amended by the 1986 Act. *JVC Enterprises, LLC v. City of Concord*, 269 N.C. App. 13, 19 (2019). The court went on to conclude that it was compelled by the canon of constitutional avoidance to adopt plaintiff's interpretation that "the 1986 Act eliminated the Board, revoked the power to levy prospective fees" and "vested the City with the ability to levy water and sewer fees consistent with the General Enterprise Statutes." *Id.* at 22. The Court of Appeals ultimately reversed the trial court's grant of summary judgment. *Id.* at 23. The City filed a petition for discretionary review, which we allowed on 1 April 2020.

II. Standard of Review

¶ 8 We review de novo an appeal of a summary judgment order. *In re Will of Jones*, 362 N.C. 569, 573 (2008). "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." *Morrell v. Hardin Creek, Inc.*, 371 N.C. 672, 680 (2018). "[W]hen 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," we will affirm an order granting summary judgment to that party. *In re Will of Jones*, 362 N.C. at 573. Likewise, "[w]e review matters of statutory interpretation de novo[.]" *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15, 18 (2016) (citing *In re Ernst & Young, LLP*, 363 N.C. 612, 616 (2009)).

III. Analysis

¶ 9 Here, we review the 1986 Act which amended the Charter for the City of Concord to determine whether the City has the authority to collect water and sewer fees for services "to be furnished." If the City has this authority, then the trial court's grant of summary judgment should be affirmed; if not, we must affirm the Court of Appeals.

¶ 10 "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). "[H]owever, where the statute is ambiguous or unclear as to its meaning, the courts must interpret the statute to give effect to the legislative in-

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the meaning of the statute, we decline to address the statute's constitutionality under Article II Section 24 because it was not properly raised by the plaintiffs in their complaint.

tent." *In re Ernst & Young, LLP*, 363 N.C. 612, 616 (2009). Canons of statutory interpretation are only employed "[i]f the language of the statute is ambiguous or lacks precision, or is fairly susceptible of two or more meanings[.]" *Abernethy v. Bd. of Comm'rs*, 169 N.C. 631, 636 (1915).

¶ 11 Section 2 of the 1986 Act provides:

> The Board of Light and Water Commissioners for the City of Concord shall be dissolved. All powers and duties of said Board shall become powers and duties of the City of Concord. All real and personal property and all assets owned by the Board of Light and Water Commissioners shall be held under the name and ownership of the City of Concord.

1985 N.C. Sess. Laws at 118, § 2.

¶ 12 Section 6 provides:

> The following act is repealed: Chapter 744, Session Laws of 1977, except for Sections 5 and 6 of that act.

1985 N.C. Sess. Laws at 119, § 6.

¶ 13 We find no ambiguity or contradiction in this language. By its plain language Section 2 dissolves the Board of Light and Water and transfers all the powers and duties of the Board to the City. We determine that the language is plain and unambiguous and that "shall become" effectively transferred the powers and duties of the Board to the City. As the trial court stated, "[t]he General Assembly was not required to use the word 'transfer' in order to transfer the powers of the Board."

¶ 14 Section 6 then repeals the bulk of the prior City Charter ensuring that there is only one active Charter for the City at a time. Nothing in Section 6 contradicts the language of Section 2 or renders Section 2 ambiguous. Because this language is clear and unambiguous, we "eschew statutory construction in favor of giving the words their plain and definite meaning." *Beck*, 359 N.C. at 614.[4]

¶ 15 The Court of Appeals concluded in its opinion below that the language of the 1986 Act is ambiguous because it "ostensibly both eliminates *and* transfers the powers of the Board afforded by the 1977 Charter." *JVC Enters.*, 269 N.C. App. at 18 (emphasis in original). Plaintiffs have

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4. The parties also discuss 1985 N.C. Sess. Laws. at 118–19, § 4 at length, each party arguing that it bolsters their interpretation of the 1986 Act. Section 4 does not affect our disposition of the issues and therefore we need not address it.

argued that powers and duties cannot be repealed by Section 6 and transferred by Section 2 at the same time. Therefore, plaintiffs urge us to interpret the relevant sections to mean that the powers and duties of the Board are not transferred to the City, but instead that upon the dissolution of the Board, the City retained only the powers granted to it under the Public Enterprise Statutes. We conclude this is not a reasonable reading of the statutory language.

¶ 16 The first sentence of Section 2 dissolves the Board of Light and Water. Had the General Assembly stopped there, the City would only have its general powers under the Public Enterprise Statutes in operating the water and sewer systems formerly belonging to the Board. But the General Assembly elected to do more than just dissolve the Board. It went on to specify that all the powers and duties of the Board "shall become" powers and duties of the City. It would be unreasonable to read this second sentence of Section 2 as meaning that the Board's powers and duties vanish into the powers and duties already held by the City. Such a reading is flawed because it would render the second sentence a meaningless reiteration of the first sentence. *See Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556 (1981) ("It is well established that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.").[5]

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5. Plaintiffs also argue that under *Clayton v. Liggett & Myers Tobacco Co.*, 225 N.C. 563 (1945), for defendant's view to be correct we must determine that the 1986 Act contains an express grant of authority to the City to charge fees for services to be furnished. We disagree. The Court in *Clayton* stated:

> [I]t is a general principle of law that municipal corporations are creatures of the legislature of the State, and that they possess and can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers expressly conferred, or those essential to the accomplishment of the declared objects and purposes of the corporation.

225 N.C. at 566. Here, the legislature specifically stated that the powers and duties of the Board shall become those of the City, and thus if the City acts under any of those powers and duties, then it has not acted beyond the scope of authority granted to it by the legislature. The power to charge fees for services to be furnished is "necessarily or fairly implied in or incident to the powers expressly conferred" by the transfer of the Board's powers to the City. *Id.*

Furthermore, the General Assembly has more recently enacted N.C.G.S. § 160A-4 which provides:

¶ 17 Because we conclude that the language is plain and unambiguous, we need not address the arguments regarding constitutional avoidance, which, as a canon of interpretation, is only employed when there are two or more reasonable meanings of the statutory language at issue. *See Abernethy*, 169 N.C. at 636.

IV. Conclusion

¶ 18 We conclude the 1986 Act transfers the Board's authority to collect water and sewer fees for services "to be furnished" to the City, and thus, there is no genuine issue as to any material fact with respect to the City's legislative authority to charge these fees to plaintiffs for their developments. Therefore, the City is entitled to partial summary judgment as a matter of law. Accordingly, we reverse the decision of the Court of Appeals.

REVERSED.

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

> [P]rovisions . . . of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.

N.C.G.S. § 160A-4 (2019). Thus, the legislature did not have to specifically name each power and duty of the Board in order to transfer those powers and duties to the City.

LAUZIERE v. STANLEY MARTIN CMTYS., LLC

[376 N.C. 789, 2021-NCSC-15]

PAMELA LAUZIERE, EMPLOYEE
v.
STANLEY MARTIN COMMUNITIES, LLC, EMPLOYER, AND AMERICAN ZURICH INSURANCE COMPANY, CARRIER

No. 259A20

Filed 12 March 2021

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 844 S.E.2d 9 (N.C. Ct. App. 2020), reversing and remanding an opinion and award filed on 22 May 2018 by the North Carolina Industrial Commission. Heard in the Supreme Court on 16 February 2021.

Lennon, Camak & Bertics, PLLC, by S. Neal Camak and Michael W. Bertics, for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by Bryan L. Cantley and Mallory E. Lidaka, for defendant-appellants.

PER CURIAM.

¶ 1 The Court of Appeals shall remand to the full Commission for further consideration in accordance with 11 N.C. Admin. Code 23A.0704 (2020). The full Commission shall review the award and as it deems necessary, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award.

AFFIRMED.

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

RALEIGH HOUSING AUTHORITY
v.
PATRICIA WINSTON

No. 385PA19

Filed 12 March 2021

Landlord and Tenant—public housing—notice of lease termination—federal requirement to state specific grounds

In a summary ejectment case, plaintiff public housing authority's notice of lease termination to defendant tenant failed to "state specific grounds for termination," pursuant to 24 C.F.R. § 966.4 (l)(3)(ii), where the notice quoted the lease provision defendant allegedly violated but neither identified specific conduct by defendant that violated the provision nor clearly identified the factors forming the basis for terminating the lease. Consequently, the Supreme Court reversed the Court of Appeals' decision holding that the notice complied with federal regulations.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 267 N.C. App. 419 (2019), affirming an order entered on 26 June 2018 by Judge Michael Denning in District Court, Wake County. Heard in the Supreme Court on 12 January 2021.

The Francis Law Firm, PLLC, by Ruth Sheehan and Charles T. Francis and Alan D. Woodlief, Jr., for plaintiff-appellee.

Robinson, Bradshaw & Hinson, P.A., by Erik R. Zimmerman and Ethan R. White; and Legal Aid of North Carolina, Inc., by Andrew Cogdell, Celia Pistolis, Darren Chester, Daniel J. Dore, and Thomas Holderness, for defendant-appellant.

Jack Holtzman, Emily Turner, Elizabeth Myerholtz, Lisa Grafstein, and Lisa Nesbitt for Disability Rights North Carolina, North Carolina Justice Center, North Carolina Housing Coalition, North Carolina Coalition to End Homelessness, North Carolina Coalition Against Domestic Violence, amici curiae.

BARRINGER, Justice.

¶ 1 This case presents us with the question of whether a notice of lease termination provided to a tenant of public housing "state[d] specific

grounds for termination." 24 C.F.R. § 966.4(*l*)(3)(ii) (2019).[1] Plaintiff Raleigh Housing Authority (RHA) provided a notice of lease termination to defendant Patricia Winston (Winston) that notified her of RHA's intent to terminate her lease due to "Inappropriate Conduct – Multiple Complaints" and quoted provision 9(F) of the lease agreement. Because the notice of lease termination failed to provide Winston with the factors necessary for her to be on notice of RHA's justification for the termination of her lease on this record, we reverse the decision of the Court of Appeals.

I. Background

¶ 2 RHA filed a complaint in summary ejectment against Winston on 13 April 2018 in District Court, Wake County. RHA's complaint alleged that the lease period had ended, and Winston was holding over after the end of the lease. In her answer, Winston denied these allegations and raised as a defense that the notice of lease termination "d[id] not state with specificity defendant's alleged 'Inappropriate Conduct' " and "violates federal lease notice requirements" citing 24 C.F.R. § 966.4(*l*)(3)(ii). The lease agreement between Winston and RHA stated that "[t]he notice of termination to the Resident shall state reason(s) for the termination." Following a summary ejectment trial in April 2018 and a hearing on RHA's motion for eviction on 25 June 2018,[2] the trial court entered an order allowing immediate possession of the apartment to RHA. In the order allowing immediate possession, the trial court made the following findings of fact:[3]

> 3. On April 17, 2017 [t]he Defendant entered into a renewable twelve-month lease ("Lease") with the Plaintiff for a one-bedroom apartment (Apartment #206) at 150 Gas Light Creek Court, Raleigh, N.C. 27601.

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1. While Winston cites court decisions from other jurisdictions addressing other regulations under Title 24, "Housing and Urban Development," Winston has not argued that any regulation addressing written notice applies other than 24 C.F.R.§ 966.4(*l*)(3)(ii) (2019).

2. The trial court's order allowing immediate possession indicates that the trial court is addressing RHA's motion for eviction. However, the trial court stated at the hearing that the trial court was hearing an appeal of a summary ejectment.

3. Winston has not challenged any of the trial court's findings of fact on appeal to this Court. The trial court's findings of fact are therefore binding on appeal. *See, e.g.*, *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191 (2012).

4. Between October 2017 and November 2017, Plaintiff received three (3) written complaints from other tenants in the apartment complex about noise disturbances coming from Defendant's apartment[.]

5. After the first written complaint[,] Plaintiff issued the Defendant a written warning indicating to the Defendant that a complaint had been filed against her for noise disturbance.

6. On or about December 1, 2017, after receiving a third written complaint from a tenant in the apartment complex, Plaintiff sent a letter to Defendant indicating that her lease would be terminated on December 31, 2017 as a result of violating Paragraph 9(f) of the Lease.

7. Violating Paragraph 9(f) is a material breach of the Lease.

8. After issuing the lease termination notice, Plaintiff had an informal meeting with the Defendant to discuss why her lease was being terminated.

9. Plaintiff rescinded the lease termination letter after the informal meeting, as the Defendant made the Plaintiff aware that Defendant had been a victim of domestic violence.

10. The [c]ourt takes judicial notice of the North Carolina Court Information System Electronic-Filing for Domestic violence complaints and notes that on December 5th, 2017, *after* RHA had hand delivered and sent via Certified mail return receipt requested the first notice of Lease Termination to the Defendant, Defendant file[d] for an Ex Parte Domestic Violence Protective Order (DVPO) against [another individual].

11. Defendant's request for an Ex-Parte DVPO was DENIED on December 5th, 2017, and, notable her reasons for requesting the order were:

> He deserve [sic] my neighbor my landlord was going to put me out because she didn't want here and I didn't want he there but if he keep coming I we have to leave.

> 12. Defendant did not obtain a DVPO against [the other individual] until the return hearing on December 18th, at that hearing [the other individual] was not present and the Defendant's allegations had changed substantially:
>
> > defendant repeatedly screams profanity at plaintiff and threatens to assault her; repeatedly verbal abuse for 17 years has caused her substantial emotional distress[.]
>
> 13. At the time of the first warning Defendant indicated to Plaintiff that she intended to get a no trespass order against [the other individual].
>
> 14. On or about February 5, 2018, the Plaintiff received another noise complaint against the Defendant.
>
> 15. On or about February 13, 2018, the Plaintiff issued a second notice of lease termination to the [Defendant].
>
> 16. On or about February 17, 2018, the Defendant wrote a memo to the Plaintiff acknowledging the noise disturbances and alleging that the disturbances were a result of [the other individual's] three friends.
>
> 17. Just after receiving the 2nd notice to terminate her lease, Defendant sent a letter to the RHA indicating she intended to get a no trespass order for the other three friends of [the other individual]. Defendant has neither received a no trespass order for any of the individuals nor has she made any affirmative efforts to do so.
>
> 18. Per the Defendant's rights, she had a grievance hearing on or about March 6, 2018 with an independent third party. The grievance hearing affirmed the Plaintiff's decision to terminate the Defendant's lease.

¶ 3 From these facts, the trial court concluded that "[d]efendant has . . . been given adequate notice of her violations of Paragraph 9(f) of the Lease."

¶ 4 The Court of Appeals concluded that the trial court did not err by reaching this conclusion. *Raleigh Hous. Auth. v. Winston*, 267 N.C. App.

419, 424 (2019). The Court of Appeals held that "the Notice of Lease Termination to Defendant was in compliance with the governing federal regulation" because it "identified—and quoted—the specific provision serving as the basis for Defendant's lease termination." *Id.*

¶ 5 Winston sought discretionary review in this Court, asking this Court to consider "[w]hether a reference to a provision of a lease alone satisfies a public housing authority's obligation under federal law to 'state specific grounds' for terminating the lease." Winston also sought discretionary review concerning the business records exception to hearsay. This Court allowed the petition for discretionary review on both issues presented. We reverse the decision of the Court of Appeals on the first issue presented and remand to the trial court for dismissal. Accordingly, we decline to address the evidentiary issue concerning the business records exception and express no opinion concerning the manner in which the Court of Appeals resolved that issue.

II. Standard of Review

¶ 6 "In federally subsidized housing cases, the court decides whether applicable rules and regulations have been followed, and whether termination of the lease is permissible." *E. Carolina Reg'l Hous. Auth. v. Lofton*, 238 N.C. App. 42, 46 (2014) (quoting *Charlotte Hous. Auth. v. Patterson*, 120 N.C. App. 552, 555 (1995)), *aff'd as modified*, 369 N.C. 8 (2016). The construction of an administrative regulation is a question of law. *United States v. Moriello*, 980 F.3d 924, 930 (4th Cir. 2020). "On appeal, '[c]onclusions of law drawn by the trial court from its findings of fact are reviewable *de novo*.' " *In re Estate of Skinner*, 370 N.C. 126, 140 (2017) (alteration in original) (quoting *In re Foreclosure of Bass*, 366 N.C. 464, 467 (2013)); *see also Moriello*, 980 F.3d at 930.

III. Analysis

¶ 7 At issue in this case is the construction of the term "specific grounds" in 24 C.F.R. § 966.4(*l*)(3)(ii). Section 966.4 of Title 24 of the Code of Federal Regulations states:

> § 966.4 Lease requirements.
>
> A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereinafter.
>
> . . . .
>
> (l) *Termination of tenancy and eviction—*

. . . .

(3) *Lease termination notice.*

. . . .

(ii) The notice of lease termination to the tenant shall state specific grounds for termination, and shall inform the tenant of the tenant's right to make such reply as the tenant may wish. The notice shall also inform the tenant of the right (pursuant to § 966.4(m)) to examine PHA documents directly relevant to the termination or eviction. When the PHA is required to afford the tenant the opportunity for a grievance hearing, the notice shall also inform the tenant of the tenant's right to request a hearing in accordance with the PHA's grievance procedure.

24 C.F.R. § 966.4.

¶ 8 "In resolving issues of statutory construction, we look first to the language of the statute itself." *Walker v. Bd. of Trs. of the N.C. Loc. Gov'tal Emps.' Ret. Sys.*, 348 N.C. 63, 65 (1998) (quoting *Hieb v. Lowery*, 344 N.C. 403, 409 (1996)); *see also Radford*, 734 F.3d at 293 (citing *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 204 (2011)). When the term in the statute is unambiguous, the term "should be understood in accordance with its plain meaning." *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 20 (2017); *see also Moriello*, 980 F.3d at 934 ("If the language of the regulation 'has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written.' " (quoting *Gilbert v. Residential Funding LLC*, 678 F.3d 271, 276 (4th Cir. 2012)). To determine the plain meaning, this Court has looked to dictionaries as a guide. *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258 (2016).

¶ 9 In 24 C.F.R. § 966.4(*l*)(3)(ii), the adjective "specific" modifies the noun "grounds." "Grounds" is defined as "factors forming a basis for action or the justification for a belief." *Grounds*, *New Oxford American Dictionary* (3rd ed. 2010); *see also Ground*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007) (defining "ground" as "a basis for belief, action, or argument"); *Ground*, *Black's Law Dictionary* (11th ed. 2019) (defining "ground" as "[t]he reason or point that something (as a legal claim or argument) relies on for validity"). Meanwhile, "specific" is defined as "clearly defined or identified." *Specific*, *New Oxford American Dictionary* (3rd ed. 2010); *see also Specific*, *Merriam-*

Webster's Collegiate Dictionary (11th ed. 2007) (defining "specific" as "free from ambiguity").

¶ 10 The plain meaning of "specific grounds" therefore requires RHA to clearly identify the factors forming the basis for termination of the lease. Applying the unambiguous plain meaning of "specific grounds" leads us to conclude that RHA failed to comply with 24 C.F.R. § 966.4(*l*)(3)(ii).

¶ 11 The relevant portion of the notice of termination states:

> You are hereby notified that the Housing Authority intends to terminate your Lease to the premises at **150-206 Gas Light Creek Court** under the provisions in your Lease Agreement and pursuant to Raleigh Housing Authority's Grievance Procedure due to the following:
>
> Inappropriate Conduct – Multiple Complaints
>
> 9. **OBLIGATIONS OF RESIDENT**
> F. To conduct himself/herself and cause other persons who are on the premises with the Resident's consent to conduct themselves in a manner which will not disturb the neighbors' peaceful enjoyment of their accommodations.

¶ 12 As evidenced above, the notice of termination identifies provision 9(F) of the lease agreement, providing the contractual basis for termination of the lease. However, the notice of termination lacks any reference to specific conduct by Winston. RHA contends the "language [in the notice of termination] put . . . Winston on notice that her alleged lease violation was based on disturbing her neighbors." Yet, a tenant's disturbance of her neighbors encompasses a broad range of conduct, may involve the tenant or other persons on the premises, and, as relevant to this case, may include conduct for which the landlord may not evict the tenant as a matter of law. Specifically, as part of the Violence Against Women Act, ch. 322, 108 Stat. 1902 (1994), Congress has prohibited covered housing programs from terminating participation in or evicting a tenant from housing "on the basis that the . . . tenant is or has been a victim of domestic violence, dating violence, sexual assault, or stalking," 34 U.S.C. § 12491(b)(1), and mandates that

> [a]n incident of actual or threatened domestic violence, dating violence, sexual assault, or stalking shall not be construed as—
>
> (A) a serious or repeated violation of a lease for housing assisted under a covered housing program by the victim or threatened victim of such incident; or

> (B) good cause for terminating the assistance, tenancy, or occupancy rights to housing assisted under a covered housing program of the victim or threatened victim of such incident.

34 U.S.C. § 12491(b)(2); *see also* N.C.G.S. § 42-42.2 (2019) (prohibiting termination of tenancy or "retaliat[ion] in the rental of a dwelling based substantially on: (i) the tenant, applicant, or a household member's status as a victim of domestic violence, sexual assault, or stalking"). The additional statement in the notice of termination—"Inappropriate Conduct – Multiple Complaints"—is similarly broad and vague and subject to the same concerns as provision 9(F) of the lease agreement.

¶ 13 As a whole, the notice of termination is indeterminate. Winston cannot determine from the notice of termination how RHA contends she breached provision 9(F) of the lease agreement, and none of the trial court's factual findings support a conclusion otherwise. In the notice of termination, RHA failed to clearly identify the factors forming the basis for termination of the lease—the specific grounds for termination. Winston lacked adequate notice of the basis for the termination of lease.

IV. Conclusion

¶ 14 We reverse the decision of the Court of Appeals. In this case, the identification and quotation of the specific provision serving as the basis for the landlord's lease termination does not comply with 24 C.F.R. § 966.4(*l*)(3)(ii) because the factors forming the basis for termination of the lease cannot be discerned. While a quotation of the violated lease provisions in certain factual circumstances may provide "specific grounds for termination," *cf. Roanoke Chowan Reg'l Hous. Auth. v. Vaughan*, 81 N.C. App. 354, 358 (1986) (holding that the notice of termination provided the specific grounds for termination even though it incorrectly cited Section 7 of the lease agreement because the statement—"by allowing individuals not named on the lease to reside in your apartment"—"put defendants on notice regarding the specific lease provision deemed to have been violated"), this issue and such a notice is not before us. We hold that on this record, the notice of termination was fatally deficient. Accordingly, we reverse the Court of Appeals' decision concerning compliance with 24 C.F.R. § 966.4(*l*)(3)(ii) and remand to the Court of Appeals for remand to the trial court for dismissal consistent with this opinion.

REVERSED AND REMANDED.

RED VALVE, INC. v. TITAN VALVE, INC.

[376 N.C. 798, 2021-NCSC-17]

RED VALVE, INC., AND HILLENBRAND, INC.
v.
TITAN VALVE, INC., BEN PAYNE, FABIAN AEDO ORTIZ, AND JOHN DOES 1–10

No. 22A20

Filed 12 March 2021

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order and opinion on plaintiffs' verified motion for order to show cause and second motion for sanctions and contempt entered on 3 September 2019 and an order and opinion on plaintiffs' petition for reasonable expenses resulting from plaintiffs' second motion for sanctions entered on 5 September 2019 by Judge Louis A. Bledsoe III, Chief Special Superior Court Judge for Complex Business Cases, in Superior Court, Mecklenburg County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(a). Heard in the Supreme Court on 16 February 2021.

Nelson Mullins Riley & Scarborough LLP, by Benjamin S. Chesson, David N. Allen, and Anna C. Majestro, for plaintiff-appellees.

Bell, Davis & Pitt, PA., by Joshua B. Durham and Edward B. Davis, for defendant-appellants.

PER CURIAM.

AFFIRMED.[1]

1. The order and opinion of the North Carolina Business Court entered on 3 September 2019, 2019 NCBC 56, is available at https://www.nccourts.gov/assets/documents/opinions/2019_NCBC_56.pdf, and the order and opinion of the North Carolina Business Court entered on 5 September 2019, 2019 NCBC 57, is available at https://www.nccourts.gov/assets/documents/opinions/2019_NCBC_57.pdf.

STATE v. CORBETT

[376 N.C. 799, 2021-NCSC-18]

STATE OF NORTH CAROLINA
v.
MOLLY MARTENS CORBETT AND THOMAS MICHAEL MARTENS

No. 73A20

Filed 12 March 2021

1. Evidence—hearsay—child witnesses—medical treatment exception—indices of reliability

In a prosecution of a father and his daughter who were accused of killing the daughter's husband during an altercation, the trial court erred by excluding statements made by the victim's two children during medical evaluations conducted a few days after the victim was killed. Objective circumstances, including that trained professionals explained to the children the importance of being truthful and that the evaluation was conducted in close proximity in time and space to a physical examination by a doctor, sufficiently demonstrated that the statements were made for the purpose of obtaining a medical diagnosis and met the reliability standards required by Evidence Rule 803(4).

2. Evidence—hearsay—child witnesses—residual hearsay exception—guarantees of trustworthiness

In a prosecution of a father and his daughter who were accused of killing the daughter's husband during an altercation, the trial court abused its discretion by excluding statements from the victim's two children made to a social worker because its findings—that the children did not have personal knowledge of their statements, that the children lacked motivation for telling the truth, and that the statements were specifically recanted—were overly broad and not fully supported by the evidence. Neither these findings, nor the record evidence, supported the court's conclusion that the children's statements were not sufficiently trustworthy to be admitted under the residual hearsay exception in Evidence Rule 803(4).

3. Appeal and Error—preservation of issues—expert testimony—adequacy of objections—by operation of law

In a prosecution of a father and his daughter who were accused of killing the daughter's husband during an altercation, a challenge to a portion of expert testimony on bloodstain patterns (spatters which were never tested to confirm they were the victim's blood) was properly preserved for appellate review. Despite defendants'

failure to object to the challenged portion, their objections to the expert's report containing the same conclusions and other portions of the expert testimony were sufficient to preserve the issue for review. Further, the issue was preserved by operation of law pursuant to N.C.G.S. § 15A-1446(d)(10) where the Court of Appeals determined that the blood spatter evidence was improperly admitted and that issue was not appealed to the Supreme Court.

4. Evidence—murder trial—one defendant's testimony—co-defendant's out-of-court statement—non-hearsay

In a prosecution of a father and his daughter who were accused of killing the daughter's husband during an altercation, the trial court erred by excluding testimony by the father that he heard his daughter say "Don't hurt my dad" during the altercation, because the statement did not constitute hearsay where it was offered not to prove the truth of the matter asserted, but to illustrate the father's state of mind, and was relevant to whether his subjective fear of the victim was reasonable for purposes of his claims of self-defense and defense of another.

5. Homicide—evidentiary errors—prejudice—new trial

In a prosecution of a father and his daughter for the unlawful killing of the daughter's husband during an altercation, where the trial court committed multiple evidentiary errors, defendants were entitled to a new trial because they were deprived of an opportunity to fully present their claims of self-defense and defense of another. Defendants were primarily prejudiced by the court's exclusion of statements made by the victim's children, which would have corroborated defendants' version of events and provided context, and there was a reasonable possibility that the admission of those statements would have resulted in a different outcome at trial.

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, 269 N.C. App. 509 (2020), reversing judgments entered on 9 August 2017 by Judge W. David Lee in Superior Court, Davidson County, and remanding for a new trial. Heard in the Supreme Court on 11 January 2021.

STATE v. CORBETT

[376 N.C. 799, 2021-NCSC-18]

Joshua H. Stein, Attorney General, by Jonathan P. Babb and L. Michael Dodd, Special Deputy Attorneys General, for the State-appellant.

Tharrington Smith, L.L.P., by Douglas E. Kingsbery, for defendant-appellee Molly Martens Corbett.

Dudley A. Witt, David B. Freedman, and Jones P. Byrd, Jr. for defendant-appellee Thomas Michael Martens.

EARLS, Justice.

¶ 1 In the early morning hours of 2 August 2015, a Davidson County 911 operator received a call regarding an incident at 160 Panther Creek Court. The caller, Thomas Martens (Tom), reported that his son-in-law, Jason Corbett (Jason), "got in a fight" with his daughter, Molly Martens Corbett (Molly), and that he had found Jason "choking my daughter. He said, 'I'm going to kill her.' " Tom told the dispatcher that he had hit Jason in the head with a baseball bat. Jason was "in bad shape. We need help. . . . He, he's bleeding all over, and I, I may have killed him." The 911 operator instructed Tom and Molly to perform CPR while emergency medical technicians (EMTs) were dispatched to the home. When they got there, the EMTs found Molly performing chest compressions on Jason in the master bedroom, but Jason did not survive. Law enforcement officers who arrived shortly thereafter found Molly "very obviously in shock." She told the officers she had been choked.

¶ 2 Subsequently, Molly and Tom were charged with and ultimately convicted of second-degree murder for the homicide of Jason. From their first call to 911 through the trial, Molly and Tom did not deny that they had killed Jason. Instead, they maintained that they had lawfully used deadly force to defend themselves while under the reasonable apprehension that they were facing an imminent threat of deadly harm during a violent altercation initiated by Jason. On appeal, a divided panel of the Court of Appeals vacated Molly's and Tom's convictions and ordered a new trial. *State v. Corbett*, 269 N.C. App. 509, 512, *writ allowed*, 373 N.C. 580, *and writ dismissed*, 375 N.C. 276 (2020).

¶ 3 The jury in this case did not have to determine who killed Jason. Instead, they had to decide to believe either Tom's testimony that Jason was threatening to kill Molly and was in the process of choking her to death, or to believe the State's theory that Tom and Molly were the aggressors in the altercation and killed Jason without justification. After

careful review, we agree with the majority below that the trial court committed prejudicial error in excluding evidence that went to the heart of defendants' self-defense claims. The trial court's errors in excluding certain evidence deprived defendants of the full opportunity to put the jury in their position at the time they used deadly force. In turn, this deprived the jury of evidence necessary to fairly determine whether Tom and Molly used deadly force at a moment when they were actually and reasonably fearful for their lives. Accordingly, we affirm the decision of the Court of Appeals and remand to the trial court for a new trial.

I. Background

¶ 4 Jason was a citizen and resident of the Republic of Ireland. He had two children, Jack and Sarah, with his first wife, Margaret. Margaret died unexpectedly in 2006, from what the Irish authorities determined to be complications of an asthma attack, just eleven weeks after giving birth to Sarah. In late 2007 or early 2008, Jason hired Molly to work as an au pair in his home in Ireland. The two later began a romantic relationship. In 2011, Jason, Molly, Jack, and Sarah moved to Davidson County, North Carolina, after Jason transferred to an office his employer had recently opened in the United States. Jason and Molly married that same year.

A. The Altercation

¶ 5 At around 8:30 p.m. on 1 August 2015, Molly's parents, Tom and Sharon Martens, who lived in Tennessee, arrived at the Corbett's home in Davidson County for a visit. Tom—a retired FBI agent and former attorney—brought an aluminum baseball bat and a tennis racket as gifts for Jack. According to Tom's testimony, Jason had been drinking beer with his neighbor but was pleasant and social during the evening. Jack, who had been at a party at a friend's house, returned home around 11:00 p.m. Because it was late, Tom decided to wait until the following morning to give Jack the bat and tennis racket. Tom and Sharon went to sleep in the guest bedroom, located on the floor below the master bedroom where Jason and Molly typically slept.

¶ 6 Tom testified that in the middle of the night, he was awakened by the sound of thumping on the floor above him, followed by "a scream and loud voices." He thought "it sounded bad . . . like a matter of urgency." He grabbed the baseball bat and ran upstairs toward the source of the noises, which he determined was the master bedroom. Inside the bedroom, Tom encountered Jason and Molly facing each other. Jason's hands were around Molly's neck. Tom testified that he told Jason to let Molly go, to which Jason replied, "I'm going to kill her." Tom again asked Jason to let Molly go, to which Jason again replied, "I'm going to kill

her." Jason then "reversed himself so that he had [Molly's] neck in the crook of his right arm" and started dragging Molly toward the bathroom.

¶ 7 According to Tom, he feared that if Jason reached the bathroom with Molly, Jason would close the door and kill her. In an effort to impede Jason, Tom swung the baseball bat at "the back of the two of them glued together." However, the initial blow apparently had no effect on Jason. From Tom's perspective, it only "further enraged" him. Tom continued striking Jason "to distract him because he now had Molly in a very tight chokehold" and "she was no longer wiggling." Tom was unable to prevent Jason from reaching the bathroom. However, after following Jason into the bathroom, Tom struck Jason in the head with the bat. In response, Jason charged out of the bathroom and back toward the master bedroom, pushing Molly in front of him. Tom continued to swing the baseball bat at Jason to try to separate him from Molly. Eventually, Molly slipped out of Jason's arms, but Jason was able to wrestle the bat out of Tom's grasp. Tom, who had lost his glasses and was pushed to the floor in the struggle, testified that he heard Molly yell "[d]on't hurt my dad," although this portion of his testimony was stricken upon the State's objection. In a written statement admitted into evidence at the trial, Molly maintained that at some point after Jason took the bat from Tom, she "tried to hit [Jason] with a brick (garden décor) I had on my nightstand."

¶ 8 When Tom regained his footing, he saw Molly trapped between Jason and the bedroom wall. He claimed that he was physically weakened and in fear for both his daughter's life and his own. Jason was twenty-six years younger than Tom and outweighed him by more than 100 pounds. Tom testified the following:

> A. . . . I'm on the other side of the room at the end of the bed. And things look pretty bleak. He's got the bat. He's in a . . . good athletic position. He has his weight down on the balls of his feet. He's kind of looking between me and Molly. And so I decided . . . to rush him and try to get ahold of the bat.
>
> . . . .
>
> A. . . . [A]s desperate as it seemed, it seemed like the only thing to do. And so I rush him and I do get both hands on the bat (demonstrating). Now there are four hands on the bat. And we are struggling over control of the bat. And this is not—this is not good for me. He's bigger and stronger and younger.

. . . .

A. . . . I try to hit him this way with the end of the bat. I try to hit him with this end of the bat. I don't know. I'm trying to hit him with anything I can (demonstrating) and I win. I get control of the bat. He loses his grip. And I hit him. And—

Q. Why did you hit him?

A. Because I don't want him to take the bat away from me and kill me. I mean—just because he lost control of the bat doesn't mean this is over. This was far from over. And so I still think that, you know, he has the advantage even though—'cause I know what I'm feeling like. I'm shaking. I'm not doing good now. And so I hit him. And I hit him until he goes down. And then I step away.

Q. Do you know how many times you hit him?

A. I don't.

Q. And why did you continue to hit him after the first hit?

A. I hit him until I thought that he could not kill me. I thought that he was—I mean, he said he was going to kill Molly. I certainly felt he would kill me. I felt both of our lives were in danger. I did the best I could.

Tom gathered his thoughts and told Molly "we need to call 911." Both Tom and Molly were themselves "in pretty bad shape," but Molly eventually brought Tom a phone, and they called 911.

B. The Investigation

¶ 9 The first EMT to arrive at the scene found Jason on the floor of the master bedroom. He noticed a baseball bat and a brick paver near Jason's body. There was "blood all over the floor and the walls." The EMT could not locate a pulse. When the EMT tried to lift Jason's chin for intubation, the fingers on the EMT's left hand "went inside [Jason's] skull," and he realized that "there was severe heavy trauma to the back of the head." Other EMTs who attempted to revive Jason testified that his body "felt cool" when they arrived and that they observed dried blood. The forensic pathologist who conducted Jason's autopsy concluded that

he had died from "multiple blunt force injuries" which included "ten different areas of impact on the head, at least two of which had features suggesting repeated blows indicating a minimum of 12 different blows to the head." According to the forensic pathologist, the "degree of skull fractures . . . are the types of injuries that we may see in falls from great heights or in car crashes under other circumstances."

¶ 10 Corporal Clayton Stewart Daggenhart of the Davidson County Sheriff's Office arrived at the scene at 3:16 a.m. At trial, he testified that he found a naked white male lying on his back in the master bedroom with "several areas of blood next to him that appeared to be puddled." There were significant amounts of blood on the bedroom wall. Corporal Daggenhart also observed a "brick stone or paving stone and a baseball bat" near the body. A photograph of the brick paver revealed hair "scattered throughout" the markings on its surface. After exiting the bedroom, Corporal Daggenhart encountered Tom and Molly. He did not notice anything "remarkable" about either defendant, other than that Molly had blood on the top of her head. He asked Tom and Molly to exit the house, and then went to Jack's and Sarah's bedrooms to wake the children and escort them outside.

¶ 11 Deputy David Dillard of the Davidson County Sheriff's Office was tasked with observing Molly while law enforcement officers were investigating inside the home. He testified that he noticed dried blood on her forehead and face but no obvious injuries. According to Deputy Dillard, Molly "was making crying noises but I didn't see any visible tears. She was also rubbing her neck." Another officer who photographed Molly in order to document her physical condition testified that she was "continually tugg[ing] and pull[ing] on her neck with her hand." At some point, EMTs who came to check on Molly found her curled up in a fetal position on the grass. They noticed that her neck was red.

¶ 12 When ruling on whether to admit the children's statements at issue in this case, Molly's interview from early that morning at the Davidson County Sheriff's Office was before the trial court. In the videotaped interview, Molly told the investigators that Jason had been experiencing anger issues which, in recent months, had gotten progressively worse. She stated that Jason had been verbally and physically abusive toward her on numerous occasions and that his outbursts were often triggered by seemingly trivial matters.[1] Molly told investigators that earlier that

1. Jason's medical records, which were unsealed and admitted as evidence at trial, revealed that a couple of weeks prior to his death, Jason had complained to his doctor about feeling "angry lately for no reason."

evening, Jason had become angry at her after being awakened by his daughter, Sarah, who had entered their bedroom after becoming frightened by the designs on her bedsheets. Molly alleged that when she tried to defend Sarah's behavior by pointing out that she was only seven years old, Jason told Molly to "shut up" and began choking her.

¶ 13 Also before the trial court was the fact that at the urgent request of the Davidson County Sheriff's Office, a social worker from the Union County Department of Social Services (DSS) had interviewed Jack, Sarah, and Molly on the day after Jason's death, 3 August 2015. The social worker's arrival was unannounced. Molly was not home when the social worker separately interviewed Jack and Sarah. The social worker's notes reflect that Jack disclosed that "[Jason] gets mad at [Molly] for no good reason" and that "[Jason] curses [Molly]." He also disclosed that "[Jason's anger] can be for anything, such as leaving a light on." Sarah disclosed that "[Jason] is angry on a regular basis," that "seemingly innocuous things . . . set him off," and that "she has seen Jason pull Molly's hair." After Molly returned home, she told the social worker that Jason frequently became angry at both her and the children and that the children would "lie [to Jason] almost daily trying to protect her for fear of what their father may do."

¶ 14 Three days later, on 6 August 2015, Davidson County DSS and the Davidson County Sheriff's Office arranged for Jack and Sarah to complete a child medical evaluation at Dragonfly House, an accredited child advocacy center in Mocksville, North Carolina. The purpose of the child medical evaluation was to determine whether Jack and Sarah had witnessed domestic violence or experienced child abuse and, if necessary, to diagnose the children as victims of child abuse and develop an appropriate treatment plan. Molly's mother, Sharon, drove Jack and Sarah to Dragonfly House immediately following Jason's funeral. At Dragonfly House, Jack and Sarah were seen by a child advocate, a forensic interviewer, and a pediatrician. Jack told the forensic interviewer that his parents "didn't get along very well. . . . My dad got mad about bills, leaving lights on, um, and it he (sic) just got very mad at simple things." He stated that Jason "physically and verbally hurt my mom," that he had witnessed Jason "punching, hitting, [and] pushing" Molly "[o]nce or twice," and that he had noticed Jason "[g]etting madder . . . he's been cussing and screaming a lot more, getting a lot angrier" over the preceding months. Jack told the interviewer that in the event of a really bad emergency, which he defined as "[h]itting or cussing that would be going on and on and on without stopping for an hour or two, maybe more," the kids knew to call their maternal grandparents and say

a "key word" which would summon the grandparents to their home and then hang up the phone. Jack's "key word" was "Galaxy." Sarah's was "Peacock." In response to a question asked at the request of law enforcement, Jack explained that the reason the décor paver was in his parents' bedroom was because "we were going to paint it so it would look pretty, and that—it was in my mom's room, because it was raining earlier, and we already—we were going to paint it. We didn't want it getting all wet. So we brought it inside, and my mom put it at her desk."

¶ 15 During her forensic interview, Sarah also stated that she knew to call her grandma in the event of an emergency and "just say Peacock and hang up the phone, and she would come over to our house." She told the interviewer that Jason "gets really angry" at Molly "for like ridiculous reasons." She described how she would "go downstairs to my parents' bedroom" if she woke up after having a nightmare, but that whenever she went to get Molly, she "tried to go [into the bedroom] as quiet as possible, because my dad—I do not want my dad to wake up, because that's not a good thing. Because he just gets very, very, angry." She further explained that "what caused my dad being really mad" the night of the altercation was that "my mom kept on coming upstairs because I—like I have fairies on my bed, and I really got scared of those things, because they look like there are spiders and lizards on my bed. So that's why my mom had to keep on coming up [to my room]. I couldn't fall asleep until my mom put another sheet on my bed, and then my dad got mad.

¶ 16 Jack and Sarah were both diagnosed as victims of child abuse and recommended to receive treatment and mental health services. By court order in a separate contested custody proceeding, Jack and Sarah were subsequently placed in the custody of Jason's sister and her husband (Mr. and Mrs. Lynch) in Ireland.

C. The Trial

¶ 17 On 18 December 2015, Tom and Molly were indicted for second-degree murder and voluntary manslaughter. Both defendants pleaded not guilty. Because Jack and Sarah were residing in Ireland and unavailable to testify at trial, Molly filed a pre-trial motion seeking to admit the children's statements to the DSS social worker and their statements at Dragonfly House into evidence. The State objected and moved to have all of the children's statements excluded. During a pre-trial hearing, the State submitted to the trial court a video and transcript of Jack being interviewed via Skype from Mr. and Mrs. Lynch's home in Ireland and various unauthenticated materials the children had purportedly written after returning to Ireland. The interview was conducted on 27 May

2016 by an assistant district attorney (ADA) from the Davidson County District Attorney's Office. During the interview, Jack told the ADA that "I didn't tell the truth at Dragonfly" or when he spoke with DSS. He claimed that Molly coerced the children into lying by telling them that Mr. and Mrs. Lynch would obtain custody and take them back to Ireland, where she would never see them again, unless they told investigators "that our dad was abusive and . . . that he was very mean to Molly." Jack also claimed that Molly had physically abused him. When the ADA asked why he was "telling the truth today" after lying previously, Jack replied "[b]ecause I just want the truth. And I found out what happened to my dad, and I want justice to be served." The trial court ruled that Jack's and Sarah's statements to the DSS social worker and at Dragonfly House were inadmissible hearsay and denied defendants' motion to admit the children's statements into evidence.

¶ 18 Tom and Molly were tried jointly in the Superior Court, Davidson County. The State's case centered on the forensic evidence—which established that Jason had been killed by repeated blows to the head from either the aluminum baseball bat or the brick paver—and testimony from the EMTs and law enforcement officers who were present at the home on the night of Jason's death. In addition, the State presented expert testimony from Stuart H. James, an expert in bloodstain pattern analysis. James testified that based on his review of the photographs and videos taken at the scene of the crime, as well as the physical evidence collected by law enforcement, the bloodstain patterns he examined were "consistent with impacts to the head of [Jason] as he was descending to the floor with his head contacting the south wall in the areas of the impact." According to James, small blood spatters on the boxer shorts Tom was wearing during the altercation were "impact spatters . . . consistent with the wearer of these boxer shorts in proximity to the victim Jason Corbett when blows were struck to his head" and that blood spatters found on the underside of Tom's boxer shorts "were consistent with the wearer of the shorts close to and above the source of the spattered blood." He also testified that blood spatters on Molly's pajama bottoms indicated that she was near Jason when his head was struck as he was descending to the floor.

¶ 19 Tom and Molly claimed self-defense. Molly did not testify or present evidence. With defendants' consent, the State introduced into evidence the written statement that Molly gave to law enforcement officers in the hours after Jason's death. Tom took the stand and called one character witness. During his testimony, Tom shared his version of the altercation leading to Jason's death, as recounted above. The trial court sustained

the State's objection to the portion of Tom's testimony in which he recalled hearing Molly yell "[d]on't hurt my dad." Tom admitted that he had previously made disparaging comments about Jason to a coworker after an incident involving a party Jason attended at Tom's home.

¶ 20 On 9 August 2017, the jury returned verdicts finding both defendants guilty of second-degree murder. The defendants were each sentenced to a term of 240 to 300 months imprisonment. They gave oral notice of appeal in open court.[2]

D. The Court of Appeals' Decision

¶ 21 Although defendants raised thirteen issues on appeal, the Court of Appeals described the ultimate question at trial as "deceptively simple, boiling down to whether Defendants lawfully used deadly force to defend themselves and each other during the tragic altercation with Jason." *Corbett*, 269 N.C. App. at 512. Relevant for the purposes of our review, defendants challenged (1) the trial court's exclusion of Jack's and Sarah's statements to DSS and at Dragonfly House, (2) the trial court's admission of a portion of James's expert testimony based upon his examination of the blood spatters found on Tom's boxer shorts and Molly's pajama bottoms; and (3) the trial court's exclusion of Tom's testimony that he heard Molly yell "[d]on't hurt my dad." *Id.* at 582. A majority of the Court of Appeals concluded that (1) Jack's and Sarah's statements were admissible hearsay under both N.C.G.S. § 8C-1, Rule 803(4) and Rule 803(24); (2) James's testimony regarding the boxer shorts and pajama bottoms was inadmissible expert testimony because it did not meet the requirements of N.C.G.S. § 8C-1, Rule 702(a); and (3) Tom's stricken testimony that he heard Molly say "[d]on't hurt my dad" was "either non-hearsay, or alternatively, admissible hearsay." *Id.* at 560. Judge Collins concurred in part and dissented in part with regard to the majority's resolution of the defendants' evidentiary challenges, arguing that the trial court did not prejudicially err.[3] Upon close examination of the record, we affirm the decision of the Court of Appeals.

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2. Defendants also filed a Motion for Appropriate Relief (MAR) on 16 August 2017 and a supplemental MAR on 25 August 2017 alleging juror misconduct and other violations of their constitutional rights. The trial court denied the MARs without conducting an evidentiary hearing, and the Court of Appeals affirmed. *State v. Corbett*, 269 N.C. App. 509, 521 (2020). Those issues are not before us because they were not a basis for the dissenting opinion below. *See* N.C. R. App. P., Rule 16(b).

3. The Court of Appeals also held that the trial court erroneously instructed the jury on the aggressor doctrine with regard to Tom. Because we agree with the Court of Appeals that the trial court's evidentiary errors were prejudicial, we do not need to reach the question of whether the trial court erred by giving the aggressor-doctrine instruction.

II. Evidentiary Errors

A. Jack's and Sarah's Statements

¶ 22 At trial, parties are generally permitted to present evidence to the jury that is relevant and admissible, subject to the limitations of N.C.G.S. § 8C-1, Rule 403. *See*, *e.g.*, *State v. McElrath*, 322 N.C. 1, 13 (1988) ("Relevant evidence, as a general matter, is considered to be admissible."). "Evidence is relevant if it has any logical tendency to prove a fact in issue." *State v. Goodson*, 313 N.C. 318, 320 (1985). Portions of Jack's and Sarah's statements to the DSS investigator and at Dragonfly House were plainly relevant to defendants' case for at least three reasons. First, Jack's and Sarah's disclosures regarding the nature of their parents' relationship presented circumstantial evidence tending to support defendants' account of the altercation which resulted in Jason's death. Second, Jack's statement to the forensic investigator providing an innocent explanation for the presence of the brick paver tended to corroborate Molly's written statement, introduced by the State and admitted into evidence, that she "tried to hit [Jason] with a brick (garden décor) I had on my nightstand." Conversely, it tended to detract from the State's argument that Molly's account was not credible because, as the prosecutor argued, "there is nothing else having to do with landscaping or gardening or building walls inside that bedroom." Third, Sarah's statement explaining her nightmare tended to support Molly's claim that Sarah's arrival in the master bedroom angered Jason and precipitated the altercation.

¶ 23 Although relevant, Jack's and Sarah's statements were out-of-court statements offered for the truth of their content, making them hearsay. N.C.G.S. § 8C-1, Rule 801(c) (2019). (" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."), "Hearsay is not admissible except as provided by statute or the Rules of Evidence." *State v. Hinnant*, 351 N.C. 277, 283 (2000). The Court of Appeals held that the trial court erred by failing to admit Jack's and Sarah's statements at Dragonfly House pursuant to Rule 803(4)—the medical diagnosis or treatment exception—and their statements at Dragonfly House and to DSS pursuant to Rule 803(24)—the residual exception. After careful consideration, we substantially agree with the reasoning and conclusions of the majority below concerning Rule 803(4) with regard to the statements given at Dragonfly House and concerning Rule 803(24) with regard to their statements to the social worker at their uncle's house. We first address the exception to the hearsay rule for statements made for the purpose of medical diagnosis or treatment.[4]

4. The trial court's written order refers only to Rule 803, but the defendants moved for admission of the statements under both Rule 803 and Rule 804.

1. The Medical Diagnosis or Treatment Exception

¶ 24 **[1]** Defendants argue that Jack's and Sarah's statements at Dragonfly House were admissible under Rule 803(4) because they were made for the purpose of diagnosing the children as victims of child abuse. Pursuant to Rule 803(4), "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof" are admissible as hearsay "insofar as [the statements are] reasonably pertinent to diagnosis or treatment. N.C.G.S. § 8C-1, Rule 803(4) (2019). We have interpreted Rule 803(4) to "require[ ] a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *Hinnant*, 351 N.C. at 284.[5] A trial court's determination that an out-of-court statement is inadmissible under Rule 803(4) is reviewed de novo. *State v. Norman*, 196 N.C. App. 779, 783 (2009) (citing *Hinnant*, 351 N.C. at 284).[6]

¶ 25 The conceptual foundation of Rule 803(4) is "the rationale that statements made for purposes of medical diagnosis or treatment are inherently trustworthy and reliable because of the patient's strong

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5. The majority below reversed the trial court's order finding that the statements were not pertinent to medical diagnosis or treatment, but the dissenting judge expressly declined to address this holding. Before this Court, the State does not argue that the statements Jack or Sarah made at Dragonfly House are inadmissible under the second prong of the *Hinnant* test. Accordingly, the State has abandoned any argument that Jack's and Sarah's statements should be excluded as not reasonably pertinent to their medical diagnosis or treatment. *See* N.C. R. App. P. 28(b)(6); *State v. Augustine*, 359 N.C. 709, 738 (2005) ("Because defendant presents no argument and cites no authority in support of these contentions, they are deemed abandoned.").

6. In disputing the appropriateness of reviewing the trial court's admissibility determination de novo, the dissent claims that because our case law regarding this issue is "non-existent, we can look to the federal rules for guidance." In fact, we do have case law on point regarding this issue that we should follow or expressly overrule for good cause, not ignore. Although this Court has not previously explicitly elaborated at length the standard of review which governs a challenge to a trial court's determination regarding the admissibility of hearsay under Rule 803(4), our numerous opinions interpreting Rule 803(4) establish that the Court has routinely reviewed these decisions de novo without affording deference to the trial court's determination. *See, e.g.*, *Hinnant*, 351 N.C. at 285; *State v. Jones*, 339 N.C. 114, 146 (1994); *State v. Stafford*, 317 N.C. 568, 571 (1986). In addition, although decisions of the Court of Appeals are not binding on this Court, the fact that the Court of Appeals has interpreted our precedents as making clear that the admissibility of hearsay under Rule 803(4) is reviewed de novo further confirms that there exists settled precedent in the State of North Carolina, notwithstanding decisions of the federal courts which may have arrived at different conclusions.

motivation to be truthful." *Hinnant*, 351 N.C. at 284. At its core, the exception is predicated on the presumptive trustworthiness of a declarant who "is motivated to describe accurately his or her symptoms and their source" in order to obtain a proper diagnosis and appropriate treatment. *Id.* at 285, (quoting *R.S. v. Knighton*, 125 N.J. 79, 85 (1991)). However, in some circumstances, the subjective motivation of a declarant may be difficult to ascertain. In *Hinnant*, we noted "the difficulty of determining whether a [child] declarant understood the purpose of his or her statements." *Id.* at 287. Even in a setting where it would be obvious to an adult declarant, a child declarant may be confused or unclear about precisely why certain questions are being asked. In contrast to an adult, a child is unlikely to be able to independently and affirmatively seek out medical treatment or even know when medical treatment may be necessary. In addition, professionals who are responsible for the well-being of children may, understandably, tailor their approach to eliciting sensitive health information to account for a child's unique perceptions and vulnerabilities.

¶ 26 Given these challenges, some jurisdictions have been reluctant to apply Rule 803(4) to admit hearsay statements given by child declarants. North Carolina has charted a different course. This Court has instead sought to adhere to "the common law rationale underlying Rule 803(4)" in cases involving child declarants by closely analyzing the "objective record evidence to determine whether the declarant had the proper treatment motive." *Id.*; *see also State v. Stafford*, 317 N.C. 568, 574 (1986). Rather than a bright-line rule, we have instructed trial courts to "consider all objective circumstances of record surrounding [the] declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Hinnant*, 351 N.C. at 288. Accordingly, in determining the admissibility of Jack's and Sarah's statements, we look primarily to "objective circumstances" in deciding whether or not the children possessed the requisite "motivation to provide truthful information" which assures the reliability of otherwise inadmissible hearsay. *Id.* at 288 (quoting *United States v. Barrett*, 8 F.3d 1296, 1300 (8th Cir. 1993)).

¶ 27 The first prong of the *Hinnant* test requires us to examine the specific context in which Jack's and Sarah's statements were made. As the majority below correctly noted, our analysis is not limited to any one specific factor, and no specific factor is dispositive. *Corbett*, 269 N.C. App. at 530–31. However, we find the following three factors articulated in *Hinnant* to be most probative in determining the reliability of the children's statements: (1) whether "some adult explained to the child the need for treatment and the importance of truthfulness"; (2) "with whom, and under what circumstances, the declarant was speaking"; and

(3) "the surrounding circumstances, including the setting of the interview and the nature of the questioning." *Hinnant*, 351 N.C. at 287–88. In the present case, our analysis of each of these three factors strongly supports admitting the statements Jack and Sarah made during their interviews at Dragonfly House.

¶ 28 First, the intake procedure at Dragonfly House included a thorough, age-appropriate explanation of the overarching medical purpose of the children's visit. Unlike in *Hinnant*, where neither the interviewer "[n]or anyone else explained to [the child] the medical purpose of the interview or the importance of truthful answers," both were explained in significant detail to Jack and Sarah. *Id.* at 289–90. When the children arrived at Dragonfly House, a child advocate explained the child medical evaluation process "at their level" to "make[ ] sure that they understand and . . . know what to expect" during their "forensic interview and medical exam." The children were informed that while they are being interviewed by a forensic interviewer, their "caregiver will be talking with our doctor. Our doctor will be asking questions about your health throughout your whole life." The forensic interviewer then provided Jack and Sarah with examples of the types of questions they would be expected to answer and a detailed description of the medical examination they would undergo immediately after the interview. The forensic interviewer testified that before beginning any interview, she articulates the following three ground rules that the children must understand and adhere to, each of which emphasizes the importance of truthfulness:

> [The] rules are to—do you know the difference between a truth and a lie? We get them to establish they know the difference. The second rule is if I make a mistake, you can correct me to let them know while I'm an adult, you can tell me I'm wrong. If I ask you a question that you don't know the answer to, it's okay to say you don't know. We don't want you to guess at anything.

To reinforce the importance of telling the truth, the child advocate will "show them the cameras and show them the rules and tell them where they are being recorded" before they "start the actual interview process." The intake procedure and the structure of the children's entire visit to Dragonfly House are designed to help the treating physician "find out the truth regardless of what that is," in order to help the organization fulfill its "primary purpose" of serving "the physical and mental wellbeing of the child." The reliability of the children's testimony is enhanced by Dragonfly House's adherence to procedures that experts in child

psychology rely upon to determine if children can distinguish between truth and fiction and provide truthful statements. *See State v. Thornton*, 158 N.C. App. 645, 650 (2003) (finding the fact that "[t]he Center [for Child and Family Health in Durham] utilizes a team approach to the diagnosis and treatment of sexually abused children" supported admissibility).

¶ 29 Second, the children were interviewed by a trained professional specifically employed to elicit truthful information from children suspected to have recently experienced child abuse. Although it is true that Jack and Sarah did not make the statements at issue directly to a medical doctor, statements "need not have been made to a physician" to be admitted under Rule 803(4). *State v. Smith*, 315 N.C. 76, 84 (1985) (quoting the official commentary to Rule 803(4)). Instead, we examine the role of the person to whom the child declarant makes the statements, that person's relationship (if any) to the child's treating physician, and the way in which that person's function has been communicated to the child in order to ascertain whether the statements are "inherently trustworthy and reliable" based upon the declarant's "interest in telling or relaying to medical personnel as accurately as possible the cause for the patient's condition." *Id.*

¶ 30 The objective circumstances of Jack's and Sarah's interviews demonstrate they likely understood that the information they provided would be used for their diagnosis and treatment. Prior to Jack's and Sarah's forensic interviews, the child advocate made clear to the children that the forensic interview and medical examination were both necessary components of the child medical evaluation. The interviewer told the children that their interviews were being recorded and that other members of Dragonfly House's "multi-disciplinary team"—which includes a physician—might review them. Immediately after finishing the interviews, the forensic interviewer "discuss[ed] that information that [she] had gathered" with the treating physician, for the purpose of "aid[ing] [the physician] in her physical exam of the children . . . so she can perform that physical exam best for that child." Further, the physician's anticipated, customary, and actual use of the information gleaned from the forensic interviews in diagnosing and treating Jack and Sarah is an objective indicator of the reliability of their statements.

¶ 31 In addition, we agree with the Court of Appeals that the "child-friendly atmosphere and the separation of the examination rooms do not indicate that the children's statements during the interviews were not intended for medical purposes." *Corbett*, 269 N.C. App. at 534. The reason Dragonfly House utilizes a child-friendly approach in conducting child medical evaluations is because research demonstrates that it

is the best way to obtain reliable information from children who may have recently experienced abuse.[7] With an adult patient, it is reasonable to expect that a medical professional would elicit the kind of substantive information Jack and Sarah provided to the forensic interviewer. An adult would typically complete a form in the waiting room or disclose the information directly to a nurse or physician in the examination room. But Dragonfly House, in accordance with state policy and national best practices, has determined that such an approach would be ill-suited to the sensitive task of obtaining this information from children. Indeed, the stated purpose of relying upon a forensic interviewer is to ensure that the interview is "done by someone who is trained to talk to children in a non-leading manner in a format that is approved on a national level while being recorded." Dragonfly House needs reliable information in order to serve its primary purpose of serving the well-being of children. They utilize this method of evaluating children to increase the likelihood that the information the physician receives will be reliable. Based on existing best practices developed by medical professionals treating child abuse victims, their approach supports, rather than detracts from, the reliability of Jack's and Sarah's statements. *See State v. Shore*, 258 N.C. App. 660, 676 (2018) (statements obtained by forensic examiner at child advocacy center deploying best practices in interviewing children sufficiently reliable to form basis of expert witness's testimony).

¶ 32 Finally, the "setting" of Jack's and Sarah's interviews and the "nature of the questioning" by the forensic interviewer both support defendants' argument that the children's statements were reliable and therefore admissible as an exception to the hearsay rule under Rule 803(4). The forensic interview took place "one room down and across the hall" from the room where the children were physically examined by the treating physician. The physical examination immediately followed the forensic interview. Thus, the interview was both spatially and temporally proximate to Jack's and Sarah's interactions with the physician—the children were told in advance to expect, and did indeed experience, "a seamless

7. The executive director of Dragonfly House testified that they conduct child medical evaluations while utilizing procedures approved by the North Carolina Department of Health and Human Services, based on a program established by the University of North Carolina at Chapel Hill. In addition, as an accredited children's advocacy center, Dragonfly House must "meet the accreditation standards and guidelines set forth by the National Children's Alliance," a national professional membership organization which develops best practices to "support child abuse victims" by "help[ing] children and families heal in a comprehensive, seamless way so no future is out of reach." *See* National Children's Alliance, *Our Story*, https://www.nationalchildrensalliance.org/our-story (last visited Feb. 28, 2021).

transition from the forensic interview into the physical exam." This is a strong objective indicator that the children understood the forensic interview and the physical examination as two aspects of a single, integrated process—their child medical evaluations—rather than discrete, unrelated events. *See State v. Lewis*, 172 N.C. App. 97, 104 (2005) (finding probative of reliability the fact that "[t]he interviews took place . . . immediately prior to an examination by a doctor."); *Thornton*, 158 N.C. App. at 650 (finding probative of reliability the fact that "[b]oth the physical examination and the initial interview were conducted on [the same day]").

¶ 33 In addition, the protocol used by the forensic interviewer, which is based on a "national model" that "all [forensic interviewers] have to follow," prohibits the kind of questioning that might give cause to doubt the reliability of the children's answers. The interviewer is not permitted to "ask leading questions or suggest answers or suggest topics to the children" and instead relies upon "open-ended" questions designed to allow the children to freely share their own narrative. This style of interview stands in stark contrast to the circumstances in *Hinnant*, where this Court held inadmissible statements obtained through an "entire interview [which] consisted of a series of leading questions, whereby [the interviewer] systematically pointed to the anatomically correct dolls and asked whether anyone had or had not performed various acts with [the child]." *Hinnant*, 351 N.C. at 290. *Cf. Thornton*, 158 N.C. App. at 651 (concluding that statements elicited by an interviewer who asked the child "very general questions about her home life, and 'very general and nonleading' questions about any touching that may have occurred" were admissible).

¶ 34 The State does not meaningfully dispute that the objective circumstances of Jack's and Sarah's interviews at Dragonfly House "indicate that the children understood that the purpose of the interviews was to obtain medical diagnosis or treatment." *Corbett*, 269 N.C. App. at 532. In its brief, the State assures this Court that, as a general matter, it believes that statements made during interviews conducted at a child advocacy center like Dragonfly House should be admitted under Rule 803(4). The State expressly disclaims the argument that "there was any error with the questions asked by [Dragonfly House] or the procedures used in the [ ] interviews in this case, all of which was proper." Instead, the State argues that this case is different because when asked by the interviewer to "[t]ell me why you're here," Sarah responded "[b]ecause my dad died," and Jack responded, "my dad died, and people are trying—my aunt and uncle from my dad's side are trying to take away—take me away from

my mom." In the State's view, those answers explicitly demonstrate that the children did not understand their interviews to be for the purpose of medical diagnosis, and therefore, the rationale that statements made for the purpose of medical diagnosis are likely to be reliable does not apply.

¶ 35 The problem with this argument is that the standard under Rule 803(4), developed in our case law and interpreted in the context of assessing statements made by child patients, does not look to whether the child has explained the purpose of the interview to the interviewer in any particular manner. Instead, we ask whether the interviewer explained to the child the importance of being truthful and whether the interview occurred in circumstances which indicate that "the child understood the [witness'] role in order to trigger the motivation to provide truthful information." *Hinnant*, 351 N.C. at 288 (alteration in original) (quoting *Barrett*, 8 F.3d at 1300). Indeed, the children's own statements at other points in the interview dispel the notion that that they failed to grasp the importance of being truthful. Sarah told the forensic interviewer that "everybody's like just say what's the truth. . . . And my mom just says, tell the truth, Sarah. That's all she says." Jack told the interviewer that when he learned he was being taken to Dragonfly House, he was "nervous at first, but then . . . my grandma and mom said everything's going to be fine. You're just going to ask me some questions, and they wanted me to tell the truth." The State's narrow argument otherwise stands in significant tension with its typical position when litigating criminal prosecutions which rely on child declarants. *See Corbett*, 269 N.C. App. at 537 ("Most often it is the State seeking [the] admission" of "this type of evidence in cases involving children"). As one law enforcement officer testified at trial, he had brought "[o]ver 500" children to Dragonfly House for treatment since it opened in 2010, and he agreed that these types of forensic interviews were extremely helpful in the prosecution of individuals.

¶ 36 Here, the Court of Appeals correctly concluded that Jack's and Sarah's statements in response to the question asking why they were at Dragonfly House do not change the outcome of the analysis under the first prong of the *Hinnant* test. Jack's and Sarah's answers were not inconsistent with an understanding of the overarching medical purpose of their visit to Dragonfly House and the need for them to be truthful. In their answers, Jack and Sarah properly identified the event which triggered their referral to Dragonfly House to be treated for possible physical and psychological trauma. If the event triggering Jack and Sarah's visit to Dragonfly House had been a car accident and they had responded to the question "why are you here" with the statement "I am here because I was in a car accident," this answer would not be proof that the children

did not understand that they were receiving medical treatment. It would prove only that they had a basic understanding of cause and effect. The same is true here. The violent death of their father at the hands of the people they considered their mother and grandfather was relevant to their need for medical evaluation. Their diagnosis and treatment for the condition of experiencing child abuse illustrate that for Jack and Sarah, the circumstances of their father's death and their medical needs were intertwined. Similarly, Jack's awareness that the outcome of his medical examination might have implications for his custody situation—a proposition which is likely true anytime a child is examined at Dragonfly House—is not evidence that he did not understand the medical purpose of his visit or the need to be truthful.

¶ 37 As described above, the basic premise of *Hinnant* is that given the inherent difficulties in ascertaining a child declarant's subjective motivations—and the child's comparative lack of agency in seeking out medical treatment and lack of understanding of when medical treatment is necessary relative to an adult—a trial court "should consider *all objective circumstances of record* surrounding [a] declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Hinnant*, 351 N.C. at 288 (emphasis added). As the Court of Appeals correctly held in an earlier case, it is highly probative of Jack's and Sarah's motivations for truthfulness that they were interviewed in private, that they discussed sensitive topics in a "comfortable and 'safe' environment," and that the interviewer "did not use leading questions" or "ask [the child] many specific questions" while " 'adher[ing] to the protocol' established by . . . a 'licensed and accredited child advocacy center.' " *In re M.A.E.*, 242 N.C. App. 312, 321–22 (2015). The objective circumstances of the interview at Dragonfly House indicate that Jack's and Sarah's statements were made for the purpose of obtaining medical diagnosis or treatment and were reliable.

¶ 38 It would turn *Hinnant* on its head to disregard the "objective circumstances of record," which overwhelmingly point toward admitting the children's statements, and instead base our decision on a child's single response of ambiguous significance to a question posed early in the interview process. We hold that defendants have met their burden of "affirmatively establish[ing] that the declarant[s] had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Hinnant*, 351 N.C. at 287. Accordingly, we affirm the Court of Appeals' holding that the trial court erred by ruling that Jack's and Sarah's statements regarding Jason and Molly's relationship and the children's statements regarding their own relationships with Jason and Molly were inadmissible.

2. Residual Hearsay Exception

¶ 39 **[2]** In addition to challenging the Court of Appeals' conclusion that Jack's and Sarah's statements at Dragonfly House were admissible under Rule 803(4), the State argues that the majority below erred in holding that the children's statements to the DSS social worker and at Dragonfly House were both admissible under Rule 803(24).[8] Because we agree with the Court of Appeals that the trial court erroneously excluded the children's statements at Dragonfly House under the medical diagnosis or treatment exception, we now consider whether the children's statements to the DSS social worker were admissible under Rule 803(24). We hold that the trial court abused its discretion in failing to admit Jack's and Sarah's statements to the DSS social worker under the residual exception to the hearsay rule because the trial court's conclusions of law rested on unsupported factual findings and because those conclusions cannot otherwise be supported by the record evidence.

¶ 40 The "residual exception" provides that a hearsay statement "not specifically covered by any of the" other enumerated exceptions is admissible if it possesses "equivalent circumstantial guarantees of trustworthiness." N.C.G.S. § 8C-1, Rule 803(24) (2019). A statement possesses "circumstantial guarantees of trustworthiness" if

> the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Id. A trial court's determination as to the admissibility of hearsay statements pursuant to Rule 803(24) is reviewed for abuse of discretion. *See State v. Smith*, 315 N.C. 76, 97 (1985).

¶ 41 In order to facilitate effective judicial review of a decision to admit or exclude statements under the residual exception, a trial court must "make adequate findings of fact and conclusions of law sufficient to allow a reviewing court to determine whether the trial court abused its

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8. Because Rule 803(24), the residual hearsay exception, applies only if a hearsay statement is not specifically covered by another exception to the hearsay rule, there is no need to consider whether the children's statements made at Dragonfly House are also admissible under this exception. *See* N.C.G.S. § 8C-1, Rule 803(24) (2019).

discretion in making its ruling." *State v. Sargeant*, 365 N.C. 58, 65 (2011). These findings must address

> (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 518 (2003). We have deemed the third factor, the trustworthiness of the statement, to be the "most significant requirement." *Smith*, 315 N.C. at 93. When assessing trustworthiness, a trial court considers the following, non-exhaustive set of factors: "(1) assurances of the declarant's personal knowledge of the underlying events, (2) the declarant's motivation to speak the truth or otherwise, (3) whether the declarant has ever recanted the statement, and (4) the practical availability of the declarant at trial for meaningful cross-examination." *State v. Triplett*, 316 N.C. 1, 10–11 (1986).[9]

¶ 42 In the present case, the trial court made findings of fact which track all four of these factors before concluding that "[t]he proffered statements do not have circumstantial guarantees of trustworthiness." However, upon close examination of the record, we agree with the Court of Appeals that these findings were fundamentally flawed. "If the trial court . . . makes erroneous findings, we review the record in its entirety to determine whether that record supports the trial court's conclusion concerning the admissibility of a statement under a residual hearsay exception." *Sargeant*, 365 N.C. at 65. Thus, after identifying the trial court's erroneous findings, we independently examine the record to determine if the trial court's ultimate conclusion regarding the admissibility of evidence under the residual exception can be supported. We hold that the trial court's conclusion that the statements lacked trustworthiness is not and cannot be supported by the evidence in the record.

¶ 43 First, the trial court determined that it was "not assured of the personal knowledge of the declarants as to the underlying events described" based on its factual finding that "both children identified the

9. There is no dispute regarding the fourth factor of the *Triplett* test, the "practical availability" of the children at trial, as the children were living with their paternal aunt and uncle in Ireland and had not returned to the United States to testify.

source of their knowledge being nothing more than statements of [Molly] and [Molly's] mother. The declarations contain no reference to seeing, hearing or perceiving anything about the events described except these statements of others." This conclusion is not supported by the text of the DSS social worker's record of the interviews with Jack and Sarah. At least some of the relevant and material statements proffered by defendants were based on the children's firsthand knowledge of incidents they contemporaneously saw, heard, or perceived. For example, Jack told the DSS social worker that "his dad curses his mom; he stated that he has seen his dad a few times hit his mom with his fist anywhere on her body that he can." He stated that both he and his sister "tried to stop the fighting by yelling at his parents asking them to stop and by trying to push them apart." Sarah told the DSS social worker that her "dad fights her mom" and "she gets in trouble because her dad gets angry at her for saying [to] stop [fighting]" but that "she doesn't say stop to her mom because her mom is not doing anything wrong she is just [standing] up for herself." She stated that "her dad is angry on a regular basis . . . if you leave a light on he gets angry, or if you leave a door open or do not walk the dog her father gets angry and . . . they (her mother and father) go into their room." She stated that "she saw her dad smack her mom across the face with an open hand," so she "ran into the bathroom [with Jack] and brushed [her] teeth and pretended that [she] did not see it."

¶ 44 To be sure, in response to some questions, Jack and Sarah disclosed that the information they were conveying was communicated to them by Molly. The trial court's conclusion that the children's statements lacked trustworthiness also rested on its unsupported determination that it was "not assured of the children's motivation to speak the truth, but instead finds the children were motivated, in the near immediate aftermath of the death of their father, to preserve a custody environment with the only mother-figure they could remember having known during their lives." In assessing a declarant's motivation for truthfulness, "the issue is not whether [the declarant's] statement is objectively accurate; the determinative question is whether [the declarant] was motivated to speak truthfully when" the statement was made. *Sargeant*, 365 N.C. at 66. The inquiry does not require defendants to prove that every statement made by Jack and Sarah was truthful. Instead, it requires the trial court to determine if the declarants had "reason to lie" or "would have benefitted from altering the[ir] story." *Valentine*, 357 N.C. at 519.

¶ 45 In lieu of direct evidence, the State emphasizes that Jack and Sarah desired to remain in Molly's care and were aware that their custody may be at issue in the aftermath of their father's death. In essence, the State

asks us to presume Jack's and Sarah's motivations to lie because they expressed a desire to remain with their sole surviving caregiver and perceived that their family circumstances might change in the aftermath of a violent altercation which resulted in the death of their only then-living biological parent. We have never held that only children who do not like their parents or who are blind to the potential consequences of a destabilizing family crisis possess a motivation for truthfulness, and we reject the invitation to do so here.

¶ 46 Of course, a trial court does not abuse its discretion when in an exercise of that discretion it assigns different weight to different pieces of evidence in arriving at a determinative legal conclusion. When examining the trial court's order, we do not "reweigh the evidence and make our own factual findings on appeal, a task for which an appellate court like this one is not well suited." *State v. Rodriguez*, 371 N.C. 295, 319 (2018). Even if the record contains significant evidence that the children possessed a motivation for truthfulness, we would be compelled to affirm the trial court's order if there were evidence in the record "tending to support a contrary determination." *Id.* In this case, however, the record is bereft of evidence supporting the trial court's conclusion that the children lacked a motivation for truthfulness.

¶ 47 Finally, we conclude that the trial court's finding that Jack's and Sarah's statements "were specifically recanted and disavowed" is unsupported by the record. The children's subsequent statements calling into question the reliability of their statements to the DSS social worker and at Dragonfly House are not evidence that all of their statements lacked trustworthiness. The primary basis for the trial court's finding that the statements were recanted was the Skype interview with Jack conducted by the ADA, during which Jack stated that he "told the person who was interviewing [him (the DSS social worker and Dragonfly House forensic interviewer)] exactly what [Molly] told me to say." In addition, the trial court found that Sarah "recanted her statements in diary entries made after her return to Ireland." We do not dispute the trial court's authority to rely upon these sources of evidence in making a threshold determination as to the admissibility of Jack's and Sarah's statements under the residual exception.[10] However, this evidence in no way calls into question all of the statements the children made which were relevant and probative to defendants' self-defense claims.

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10. In justifying its conclusion that the trial court erred by failing to admit Jack's and Sarah's statements under the residual exception, the majority below stated that "it is unclear from finding of fact #22 why the trial court deemed the 'diary entries' or the circumstances of Jack's Skype interview with a member of the district attorney's office to

¶ 48 In his Skype interview, Jack stated that while in the car on the way to Dragonfly House, Molly "started making up little stories about my dad, saying that he was abusive. And then she started crying, and she said if you don't tell the truth, we'll never, ever see you again. If you don't tell this, we'll never see you again." When the ADA asked Jack to clarify what he meant by "this," Jack responded "[l]ike what she was telling us to say. She was telling us to say that our dad was abusive and saying that he was very mean to Molly." When asked if he could share "any more of the stories [Molly] told you to tell," Jack replied, "[n]o." There is some reason to doubt that this exchange occurred as Jack recalled it, given that the testimony of the staff at Dragonfly House establishes that Molly did not accompany Jack and Sarah to that interview. Regardless, even if this exchange did occur, it occurred *after* Jack and Sarah were interviewed by the DSS social worker on 3 August 2015. Notably, the DSS social worker's visit was unannounced and Molly was not present at the time. Jack's recantation was limited in nature—at most, he recanted his previous claims that Jason was abusive toward Molly and the children—not a specific disavowal of every statement he had made during his DSS interview. Accordingly, the record cannot support the trial court's conclusion that Jack and Sarah "specifically recanted and disavowed" all of the relevant, probative statements they made to the DSS social worker.

¶ 49 The trial court's ultimate conclusion that Jack's and Sarah's statements to the DSS social worker were not trustworthy was "made on the basis of inaccurate and incomplete findings of fact used to reach unsupported conclusions of law." *Sargeant*, 365 N.C. at 67. After close examination of the record, it is apparent that this conclusion is "not supported by competent evidence in the record." *Id.* at 65. Having determined that defendants have met their threshold requirement of proving the trustworthiness of the proffered statements, we conclude that the other factors enumerated in *Valentine* also support admitting Jack's and Sarah's statements under the residual exception. The proponents gave

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be more trustworthy than either of the objective and impartial interviews at issue here." *Corbett*, 269 N.C. App. at 545. There may have been valid reasons for questioning the reliability of Jack's and Sarah's post-trial recantations. Notably, Jack's statement contained allegations that were internally inconsistent or flatly contradicted by the evidentiary record, and Sarah's diary entries were not authenticated. In addition, Jack explicitly stated that the reason he was recanting his prior statements was because he "found out what happened to my dad" after having begun living with Jason's sister in Ireland. Nevertheless, we agree with the State that the trial court was entitled to consider Jack's Skype interview and Sarah's diary entries, regardless of whether either would ultimately have been deemed admissible evidence, in making a preliminary determination regarding the admissibility of the Dragonfly House interview and DSS interview. *See* N.C.G.S. § 8C-1, Rule 104(a).

proper notice. The substance of Jack's and Sarah's statements were not adequately covered by any other source of evidence. For reasons more fully explained in the section of this opinion examining prejudice, Jack's and Sarah's statements were material and probative and their admission serves the interests of justice by enabling Tom and Molly to present an adequate defense. Accordingly, we conclude that it was an abuse of discretion for the trial court to exclude the statements that Jack and Sarah made in their interviews with the DSS social worker under the residual exception to the hearsay rule contained in Rule 803(24).

3. The Expert's Bloodstain Pattern Analysis

¶ 50 **[3]** During its case-in-chief, the State presented testimony from Stuart H. James, qualified as an expert in bloodstain pattern analysis, who offered his opinion about the location of Tom, Molly, and Jason at various points during the altercation. Most significantly, James testified that in his opinion the bloodstain patterns located on Tom's and Molly's clothing suggested that one or both of them struck Jason in the head as he was descending toward the floor and struck Jason from above while his head was near the floor. The trial court determined that James's testimony was admissible under Rule 702(a). The Court of Appeals reversed, and the State appealed.

¶ 51 To admit expert opinion testimony under Rule 702(a), a trial court must conduct a three-step inquiry to determine (1) whether the expert is qualified, (2) whether the testimony is relevant, and (3) whether the testimony is reliable. *State v. McGrady*, 368 N.C. 880, 892 (2016). As defined by Rule 702(a), expert opinion testimony is reliable

> if all of the following apply: (1) The testimony is based upon sufficient facts or data. (2) The testimony is the product of reliable principles and methods. (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.G.S. § 8C-1, Rule 702(a) (2019). In assessing reliability, the trial court considers the five non-exhaustive factors articulated by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), as well as "other factors that may help assess reliability given 'the nature of the issue, the expert's particular expertise, and the subject of his testimony.' " *McGrady*, 368 N.C. at 891 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999)). A trial court's ruling as to the admissibility of proffered expert testimony "will not be reversed on appeal absent a showing of abuse of discretion." *SciGrip, Inc. v. Osae*, 373 N.C. 409, 418 (2020) (citing *McGrady*, 368 N.C. at 893).

¶ 52 Before this Court, the parties' sole dispute centers on one portion of James's testimony: his testimony that was based upon purported blood spatters found on the underside of Tom's boxer shorts and at the bottom of Molly's pajama pants. The majority below held that because these purported blood spatters were never tested to confirm that they were in fact Jason's blood, in violation of the protocol set out in a "peer-reviewed treatise" that James himself co-authored, *Corbett*, 269 N.C. App. at 554, James's conclusions based on these particular spatters were "based upon insufficient facts and data, and accordingly, could not have been the product of reliable principles and methods applied reliably to the facts of this case," *id.* at 558. By contrast, the dissenting judge would have held that defendants waived their challenge to James's testimony regarding the untested blood spatters by "fail[ing] to object to the testimony when it was elicited by the State at trial." *Id.* at 609 (Collins, J., concurring in part and dissenting in part).

¶ 53 The dissenting judge did not address the majority's conclusions that (1) admission of the disputed testimony was erroneous and (2) the trial court's erroneous admission of this testimony prejudiced defendants. *Corbett*, 269 N.C. App. at 609 ("As Defendants did not object when the State elicited the testimony before the jury, Defendants failed to preserve the alleged error for appellate review."). Nor did the State seek discretionary review of these issues. Accordingly, we must restrict our review of the decision below to the sole issue that divided the majority and the dissent, whether or not defendants preserved their challenge to James's testimony. *See State v. Rankin*, 371 N.C. 885, 895 (2018) (when a case "is before this Court based on a dissent in the Court of Appeals . . . the scope of review is limited to those questions on which there was division in the intermediate appellate court, and this Court's review is properly limited to the single issue addressed in the [Court of Appeals] dissent" (cleaned up) (alteration in original)).

¶ 54 "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion." N.C. R. App. P. 10(a)(1). "To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial." *State v. Ray*, 364 N.C. 272, 277 (2010) (cleaned up). It is correct that although defendants objected to the introduction of the portion of James's expert report addressing the untested blood spatters, defendants failed to again object[11] when James testified at trial that

11. There is no indication in the record that defendants' counsel ever requested a continuing objection to the testimony at issue, which is one way that a party may preserve an objection for appellate review. *See, e.g.*, *State v. Crawford*, 344 N.C. 65, 76 (1996)

> [w]ith respect to *the small spatters on the front underside of the left leg of the* [*boxer*] *shorts*, these were consistent with the wearer of the shorts close to and above the source of the spattered blood. To what extent, I can't really say. In order for the stains to get to that location on the inside of the leg, they would have to be traveling, you know, at least somewhat upward in order to do that. My conclusion there was the source of the impact spatters is most likely the head of Jason Corbett while it was close to the floor in the bedroom.

However, we agree with the Court of Appeals that defendants did not waive their objection to the admissibility of James's testimony regarding these blood spatters. The record establishes that "[d]efendants did, in fact, timely object, and did so on multiple occasions before the jury throughout James's testimony." *Corbett*, 269 N.C. App. at 551. They "immediately objected when the State proffered James's 'Supplementary Report of Bloodstain Pattern Analysis' containing his comments and conclusions concerning, *inter alia*, Tom's boxer shorts and Molly's pajamas, which were the subject of Defendants' objections during voir dire." *Id.* The defendants then renewed their objections prior to James's second day of direct examination. *Id.* Thus, we are persuaded that "[d]efendants properly objected and preserved this issue for appeal." *Id.*

¶ 55 Regardless, we would also hold that defendants' objection to the admissibility of this evidence was preserved by operation of law. "In N.C.G.S. § 15A-1446(d) (2017), the General Assembly enumerated a list of issues it deems appealable without preservation in the trial court." *State v. Meadows*, 371 N.C. 742, 747–48 (2018). Pursuant to N.C.G.S. § 15A-1446(d)(10), notwithstanding a party's failure to object to the admission of evidence at some point at trial, a party may challenge "[s]ubsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning." N.C.G.S. § 15A-1446(d)(10) (2019).[12] Defendants objected to testimony based

("Defense counsel then asked the trial court to permit a 'continuing objection to any of the testimony here offered.' The trial court granted defendant's continuing objection to all of the victim's hearsay statements." (citing N.C.G.S. § 15A-1446(d)(10) (1993); *Duke Power Co. v. Winebarger*, 300 N.C. 57 (1980) (authorizing the use of a continuing objection to a line of questions on the same subject to preserve the objection)).

12. In prior cases, we have held some subsections of N.C.G.S. § 15A-1446(d) unconstitutional as violating this Court's exclusive rulemaking authority. *See State v. Meadows*,

on the purported blood spatters on Tom's boxer shorts and Molly's pajama pants on numerous occasions. Because the dissenting judge did not dispute the majority's conclusion that the blood spatter evidence was erroneously admitted into evidence and because the State did not seek discretionary review of this issue which was not set forth in the opinion of the dissenting judge, the law of the case is that the trial court improperly overruled defendants' objection to this portion of the blood spatter testimony. *See Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 105 (2000) (when "defendant did not seek, and this Court did not grant, discretionary review of . . . two issues . . . those issues are not before this Court; and the determination of the Court of Appeals becomes the law of the case as to those issues"). Accordingly, we affirm the Court of Appeals' holding that the objection was preserved at trial and further by operation of N.C.G.S. § 15A-1446(d)(10), the only issue that is properly before this Court.[13]

4. Tom's Testimony Regarding Molly's Statement "Don't Hurt My Dad"

¶ 56 **[4]** At trial, Tom testified that after he had been shoved to the ground in the midst of the altercation with Jason, he heard Molly yell "[d]on't hurt my dad." The State objected to this testimony. The trial court sustained the objection, told the jury to disregard it, and struck this portion of Tom's testimony from the record. On appeal, the majority below concluded that "[t]he trial court erroneously sustained the State's objection to Tom's testimony because Molly's out-of-court statement was either non-hearsay, or alternatively, admissible hearsay." *Corbett*, 269 N.C. App. at 560. We agree with the Court of Appeals that Molly's statement was admissible because it was relevant non-hearsay.

¶ 57 As explained above, an out-of-court statement introduced to prove the truth of the matter asserted is only admissible if it falls within an

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371 N.C. 742, 748 n.2 (2018) (describing cases holding N.C.G.S. § 15A-1446(d)(5), (6), and (13) unconstitutional). However, we have never held N.C.G.S. § 15A-1446(d)(10) unconstitutional. Because the provision does not "conflict[ ] with specific provisions of our appellate rules rather than the general rule stated in Rule of Appellate Procedure 10(a)," it "operates as a 'rule or law' under Rule 10(a)(1), which permits review of this issue." *State v. Mumford*, 364 N.C. 394, 403 (2010).

13. The dissent claims that our consideration of N.C.G.S. § 15A-1446(d)(10) is inappropriate because the parties did not directly argue that their objection to the bloodstain analysis was preserved by operation of the statute. To the extent that the briefing before this Court is deficient on this point, it is possibly because the State failed to argue that defendants had not preserved their objection to the bloodstain analysis at the Court of Appeals.

enumerated hearsay exception. However, "[a]s has been stated by this Court on numerous occasions . . . , whenever an extrajudicial statement is offered for a purpose other than proving the truth of the matter asserted, it is not hearsay." *State v. Maynard*, 311 N.C. 1, 15 (1984); *see also State v. Kirkman*, 293 N.C. 447, 455 (1977) ("The Hearsay Rule does not preclude a witness from testifying as to a statement made by another person when the purpose of the evidence is not to show the truth of such statement . . . ."). Read in context, it is clear that Tom testified about Molly's statement not to prove that Jason was actually about to harm him but to support his contention that he was, at that moment, subjectively fearful for his and his daughter's lives. His perception of Molly's statement was relevant regardless of the statement's actual "truth or falsity." *Valentine*, 357 N.C. at 524.[14] It was relevant because Tom testified that he heard Molly speak it, which tended to support his claim that he "reasonably believe[d]" that his use of deadly force was "necessary to defend himself . . . or another against [another's] imminent use of unlawful force" which he reasonably believed would have resulted in "imminent death or great bodily harm to himself . . . or another." N.C.G.S. § 14-51.3(a) (2019).

¶ 58 Tom's testimony bolstered his claim that he was subjectively fearful and that his fear was reasonable, based in part upon his hearing of Molly's statement. Thus, his testimony was admissible for the appropriate non-hearsay purpose of "establish[ing] the state of mind of another person hearing the statement" or to "show the presence . . . of an emotion which would naturally result from hearing the statement." *State v. Grier*, 51 N.C. App. 209, 214 (1981). While this portion of Tom's testimony may have been self-serving, it was for the jury to decide "[t]he weight . . . to give the[ ] statement[ ] in deciding the issue of defendant's guilt or innocence depend[ing] upon" their assessment of Tom's credibility. *Valentine*, 357 N.C. at 524–25. Accordingly, we

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14. In fact, Tom's testimony was relevant regardless of whether or not Molly actually made this statement or any statement. What matters for the purpose of assessing Tom's subjective mental state is what Tom thought he heard. It would not matter if Molly had actually said "[d]on't look so sad." If what Tom heard in that moment was that he was about to be hurt, it is relevant to whether he "believed it was necessary to kill the deceased in order to save [him]self from death or great bodily harm, and if defendant's belief was reasonable in that *the circumstances as they appeared to* [*Tom*] *at the time* were sufficient to create such a belief in the mind of a person of ordinary firmness." *State v. Norris*, 303 N.C. 526, 530 (1981) (emphasis added). Thus, neither what Molly said nor whether she actually said anything matters for the purpose of this testimony. Rather, Tom is entitled to testify to his subjective belief at the time and what circumstances led him to have that belief.

affirm the Court of Appeals' holding that the trial court erred by sustaining the State's objection to this portion of Tom's testimony.[15]

III. Prejudice

¶ 59 **[5]** Having concluded that the trial court erred by excluding Jack's and Sarah's statements, by striking a portion of Tom's testimony, and by admitting certain expert witness testimony concerning alleged blood spatters on Tom's and Molly's clothing, we must determine whether defendants were prejudiced thereby. "To establish prejudice based on evidentiary rulings, defendant bears the burden of showing that a reasonable possibility exists that, absent the error, a different result would have been reached." *State v. Lynch*, 340 N.C. 435, 458 (1995); *see also* N.C.G.S. § 15A-1443 (2019). An evidentiary error may be prejudicial on its own, but "should this Court conclude that no single error identified [at trial] was prejudicial, the cumulative effect of the errors nevertheless [may be] sufficiently prejudicial to require a new trial." *State v. Wilkerson*, 363 N.C. 382, 426 (2009). A new trial is warranted if the errors, either individually or "taken as a whole, deprived defendant of his due process right to a fair trial free from prejudicial error." *State v. Canady*, 355 N.C. 242, 254 (2002). Thus, even if we conclude that one evidentiary error, standing alone, is not itself prejudicial, we are still required to consider whether that error contributed to prejudice in the aggregate.

¶ 60 Here, the trial court's erroneous exclusion of Jack's and Sarah's testimony meaningfully deprived defendants of the opportunity to support their self-defense claim in several ways. This error was prejudicial for three reasons.

¶ 61 First, Jack's statement explaining the presence of the brick paver would have provided a non-culpable justification for why one of the defendants possessed one of the alleged murder weapons. We agree with the majority below that the State "benefited from the unexplained presence of one of two potential murder weapons in the master bedroom, and in fact, raised this very question during its opening statement." *Corbett*, 269 N.C. App. at 577 (emphasis omitted). Absent explanation, Molly's possession of the alleged murder weapon at the scene of the killing—a place where her possession of the murder weapon would

15. In the alternative, we agree with defendants that the statement, if hearsay, fell within the "excited utterance" exception to the hearsay rule, which provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible. N.C.G.S. § 8C-1, Rule 803(2) (2019).

otherwise have been highly unusual—naturally gave rise to the inference that Molly did not act in self-defense.

¶ 62 Second, Sarah's statement describing her nightmare and her entry into the master bedroom provided compelling firsthand evidence supporting defendants' account of how the altercation began. Her statement confirmed that the altercation had a precipitating cause besides the actions of either defendant and that Jason was angry when the altercation began.

¶ 63 Third, we agree with the Court of Appeals that Jack's and Sarah's statements regarding Jason's worsening anger and their characterization of Jason and Molly's relationship "would have corroborated and provided significant context for the written statement that Molly provided at the Davidson County Sheriff's Office on 2 August 2015." *Corbett*, 269 N.C. App. at 578. The jury would have been presented with evidence which filled crucial gaps in Molly's statement, most notably why she had a brick paver within arm's reach in her bedroom and why she felt the need to use it under the circumstances as she perceived them.

¶ 64 Without evidence supporting their account of the circumstances leading up to the tragic events of 2 August 2015, it was easier for the jury to conclude that Tom and Molly had invented their story in an effort to cover up their crime and falsely assert that they acted in self-defense. There is a reasonable possibility that the outcome would have been different if the jury had been presented with admissible evidence providing a non-culpable justification for Molly's possession of a possible murder weapon, the brick paver; offering a corroborative description of why the altercation began, because Jason was angry at being awoken by Sarah, which placed Molly in the position of a victim from the outset and evidence of important relevant information about the nature of Jason and Molly's relationship in the weeks and months leading up to this incident. Indeed, as the Court of Appeals recounted, the jury foreman explained that "how and why the paver made it into the home was the #1 question that was talked about when deliberations started.' " *Corbett*, 269 N.C. App. at 578 (cleaned up) (emphasis omitted). Further, Jack's and Sarah's testimony also would have corroborated Jason's medical records, which contained his admission that he had been feeling "more stressed and angry lately for no reason." This corroborative evidence would have provided important context to the jury as it considered how the altercation began, what state of mind Molly possessed during the altercation, and whether that state of mind is reasonable. A different outcome might reasonably have occurred at trial had the jury been provided with evidence tending to show that Jason was frequently angry and experiencing

increased anger over recent months and that Jason and Molly had been awakened that night in a manner known previously to have caused discord in their relationship.

¶ 65 On the other hand, the trial court's erroneous exclusion of Tom's testimony regarding his perception of Molly's statement "[d]on't hurt my dad" was not by itself sufficiently prejudicial to either Tom or Molly as to warrant a new trial. This testimony undoubtedly supported defendants' self-defense claim, in that it tended to corroborate Tom's testimony that he was subjectively fearful during the altercation and that his fear was reasonable. However, in this case, the prejudicial impact of excluding Tom's testimony was limited because this testimony was largely duplicative of other testimony that was admitted into evidence tending to establish his state of mind. Apart from the stricken testimony, Tom was permitted to testify at length and in significant detail about the circumstances of the altercation. Just before the stricken testimony, he stated "if I can get any more afraid, that was it. I can't see [Jason]. It's dark in the bedroom. I'm thinking the next thing is going to be a bat in the back of the head." He also testified that around the time he heard Molly yell, Jason shoved him to the ground, he lost his glasses, and he saw Molly trapped between Jason and the wall with Jason appearing poised to strike Molly with the baseball bat. This testimony amply supported Tom's claim that he was fearful and that his fear was reasonable. Although we cannot say the trial court's exclusion of his testimony had no effect on the jury's deliberations, this error standing alone was not significant enough to establish prejudice sufficient to warrant a new trial. However, we still consider this error in combination with other evidentiary errors that occurred during the trial to determine if the errors, in the aggregate, were prejudicial.

¶ 66 In that regard, it is significant that the trial court's errors in excluding evidence offered by defendants limited defendants in their ability to counter the State's contention that they did not act in self-defense. In order to convict a defendant of second-degree murder in the presence of evidence of heat of passion or self-defense, "the [S]tate must prove beyond a reasonable doubt that defendant did not act in heat of passion and in self-defense in order to prove the existence of malice and unlawfulness, respectively." *State v. Marley*, 321 N.C. 415, 420 (1988). Evidence which tended to show that defendants both subjectively feared imminent death or substantial bodily harm and that their fear was reasonable at the time they used deadly force was extremely salient to the resolution of this question. *See, e.g.*, *State v. Williams*, 342 N.C. 869, 872–73 (1996) (describing the subjective and objective components of

the defense of perfect self-defense). In addition, as the Court of Appeals explained, the erroneous admission of the blood-spatter testimony also undercut defendants' self-defense argument by "bolstering the State's claim that Jason was struck after and while he was down and defenseless." *Corbett*, 269 N.C. App. at 559.[16] In the present case, these errors together imposed a significant constraint on defendants' efforts to establish a crucial fact: namely, their state of mind at the time of the events in question based on all of the circumstances known to them.

¶ 67 We have long held that when a defendant has claimed self-defense, "a jury should, as far as is possible, be placed in defendant's situation and possess the same knowledge of danger and the same necessity for action, in order to decide if defendant acted under reasonable apprehension of danger to his person or his life." *State v. Johnson*, 270 N.C. 215, 219 (1967). In this case, "[i]f defendant[s] had been able to present the excluded testimony, [they] might have been able to convince the jury that [they used deadly force] while under a reasonable belief that it was necessary to do so in order to save [themselves] from death or great bodily harm." *State v. Webster*, 324 N.C. 385, 393 (1989). "Thus, there is a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." *Id.* Accordingly, we affirm the decision of the Court of Appeals concluding that the trial court committed prejudicial evidentiary errors.

IV. Conclusion

¶ 68 The events of 2 August 2015 which led to Jason Corbett's untimely death were tragic. Our system of laws assigns to the jury in this case the onerous responsibility of examining the evidence and determining if Tom Martens and Molly Corbett were guilty of second-degree murder or if the homicide was justified self-defense necessary to save them from serious bodily harm or death. However, it is the responsibility of the courts, including this Court, to ensure that both the State and criminal defendants are afforded the opportunity to fully and fairly present their cases. Here, Tom's and Molly's sole defense to the charges levelled against them was that their use of deadly force was legally justified. By erroneously excluding admissible testimony which was relevant to the central question presented to the jury, the trial court impermissibly constrained defendants' ability to mount their defense. On these facts, we

16. Additionally, because the only issue before us on the issue of the expert's bloodstain testimony was whether the objection was properly preserved, and by statute we necessarily must conclude that it was, the Court of Appeals ruling that the testimony was improperly admitted and prejudicial stands as an alternative ground requiring a new trial.

conclude that "[a]s a matter of fundamental fairness, the exclusion of [Jack's and Sarah's] statement[s] deprived the jury of evidence that was relevant and material to its role as finder of fact." *Sargeant*, 365 N.C. at 68. Similarly, the jury was erroneously instructed to disregard testimony supporting the conclusion that Tom was fearful of being seriously injured or killed. Therefore, we agree with the majority below that "this is the rare case in which certain evidentiary errors, alone and in the aggregate, were so prejudicial as to inhibit Defendants' ability to present a full and meaningful defense." *Corbett*, 269 N.C. App. at 512. Accordingly, we affirm.

AFFIRMED.

Justice BERGER dissenting.

¶ 69 The analysis by the majority contains three fundamental flaws. Concerning preservation, the majority creates an argument for defendants. In addition, throughout the opinion, the majority reweighs the evidence. Finally, and perhaps most remarkably, the majority engages in a de novo analysis of issues which should be reviewed for an abuse of discretion. Because defendants "receive[d] 'a fair trial, free of prejudicial error,' " *State v. Malachi*, 371 N.C. 719, 733, 821 S.E.2d 407, 418 (2018) (quoting *State v. Ligon*, 332 N.C. 224, 243, 420 S.E.2d 136, 147 (1992)), the trial court's judgments should be affirmed. Therefore, I respectfully dissent.

I. Preservation

¶ 70 Rules concerning preservation not only establish a framework for appellate review but also provide parties and trial courts with the opportunity to clarify arguments, frame issues, and correct errors at trial. As a matter of judicial economy, the trial court can ask for additional arguments from the parties, sustain objections, and give necessary curative instructions during trial, allowing for a better understanding of the arguments and issues presented in the case. *See State v. Oliver*, 309 N.C. 326, 334, 307 S.E.2d 304, 311 (1983) ("Rule 10 functions as an important vehicle to insure that errors are not 'built into' the record, thereby causing unnecessary appellate review."). This allows trial courts to correct errors on the front end, rather than engaging in needless after-the-fact appeals. *See generally State v. Bursell*, 372 N.C. 196, 199, 827 S.E.2d 302, 305 (2019) ("[Rule 10] prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required.").

¶ 71 "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ." N.C. R. App. P. Rule 10(a)(1). "To be timely, an objection to the admission of evidence must be made 'at the time it is actually introduced at trial.' " *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (quoting *State v. Thibodeaux*, 352 N.C. 570, 581, 532 S.E.2d 797, 806 (2000)). "[T]he Rules of Appellate Procedure must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

¶ 72 Defendants' argument regarding the evidence of the blood stain on defendant Martens's boxer shorts was not preserved. The parties did not argue in their briefs or at oral argument that N.C.G.S. § 15A-1446(d)(10) was the vehicle through which this issue was preserved. Moreover, neither the Court of Appeals majority, nor the dissent, referenced this statute. However, the majority finds preservation by operation of N.C.G.S. § 15A-1446(d)(10).

¶ 73 It is troubling that the majority impermissibly creates an argument for defendants given the lack of briefing and argument by the parties. It is particularly troubling that the majority does so utilizing a statute that this Court has, in part, declared unconstitutional where it conflicts with our appellate rules. *See State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (stating that provisions of subsection 15A–1446(d) have been declared unconstitutional where those provisions "conflicted with specific provisions of our appellate rules rather than the general rule stated in Rule of Appellate Procedure 10(a)").

¶ 74 During voir dire, defendants objected to the reliability of the conclusion of the State's blood spatter expert, Stuart James, that the stains on defendant Martens's boxer shorts were impact blood spatter arising from blunt force strikes to Jason's head while he was on the ground. The trial court overruled defendants' objections.

¶ 75 At trial, Stuart James testified without objection as follows:

> With respect to the small spatters on the front underside of the left leg of the shorts, these were consistent with the wearer of the shorts close to and above the source of the spattered blood. To what extent, I can't really say. In order for the stains to get to that location on the inside of the leg, they would have to be traveling, you know, at least somewhat upward in order to do that. My conclusion there was the source

> of the impact spatters is most likely the head of Jason Corbett while it was close to the floor in the bedroom.

¶ 76 Defendants failed to renew their objections to this testimony at trial, and the majority acknowledges that "[t]here is no indication in the record that defendants' counsel ever requested a continuing objection to the testimony at issue . . . ." As defendants did not object when the State elicited the testimony before the jury, defendants failed to preserve the alleged error for appellate review. *See State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737 (2016) ("An objection made 'only during a hearing out of the jury's presence prior to the actual introduction of the testimony' is insufficient." (quoting *Ray*, 364 N.C. at 277, 697 S.E.2d at 322)).

¶ 77 In relying on N.C.G.S. § 15A-1446(d)(10), the majority impermissibly creates an avenue for preservation that was not addressed, briefed, or argued. The majority's argument is a departure from our Rule 10 jurisprudence, and rests on questionable constitutional grounds.

¶ 78 Moreover, defendants were not prejudiced by the admission of testimony concerning one drop of untested blood due to the extensive amount of blood and blood spatter evidence that was admitted without objection. The State introduced without objection additional blood spatter evidence that Jason was struck when his head was close to the ground. Regarding the blood stains on the walls, Stuart James testified without objection that "the[ ] patterns are consistent with impacts to the head of [Jason] as he was descending to the floor[,]" that some of the impacts were "24 to 28 inches above the floor . . . [i]t went from five feet down to 24 to 28 inches[,]" and that the other impacts were "[a]pproximately 5 to 16 inches [from the floor] . . . [s]o that's what I meant by descending succession of impacts." Stuart James further testified that there were "impact spatters on the underside of the folded-back quilt" on the bottom of the bed in the master bedroom.

¶ 79 Additionally, defendant Martens testified, "[a]nd so I hit [Jason]. And I hit him until he goes down. And then I step away. . . . I hit him until I thought that he could not kill me." To this point, Stuart James's testimony corroborates defendant Martens's testimony when he stated, "[a]nd if you would take those [untested stains] away, it really doesn't change much of my opinion. It is still impact spatter with the wearer of the shorts in proximity with the source of the blood."

¶ 80 Defendants' failure to object may have been a trial strategy. Defendants may not have wanted to draw additional attention to the overwhelming amount of blood and blood-related evidence associated with Jason's brutal death. Whatever their reason, given the admission

of other blood evidence showing that Jason was struck while close to or near the ground, defendants certainly were not prejudiced by the admission of the blood spatter testimony relating to defendant Martens's boxer shorts.

II. Hearsay Statements

¶ 81 This Court has recognized that, "[t]he competency, admissibility, and sufficiency of the evidence is a matter for the [trial] court to determine." *In re Lucks*, 369 N.C. 222, 228, 794 S.E.2d 501, 506 (2016) (second alteration in original) (quoting *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940)). Because our case law regarding the standard of review applicable to a ruling on whether evidence is admissible under Rule 803(4) is nonexistent, we can look to the federal rules for guidance. *See State v. Wilson*, 322 N.C. 117, 132, 367 S.E.2d 589, 598 (1988) ("Since the case law concerning collateral statements under this rule of evidence in this State is negligible, we shall look to the federal courts for guidance on this point in interpreting its federal counterpart.").[1] Rule 803(4) of the North Carolina Rules of Evidence is

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1. Federal courts also recognize that evidentiary rules and those regarding hearsay are typically reviewed for abuse of discretion. *See*, *e.g.*, *United States v. Earth*, 984 F.3d 1289, 1294 (8th Cir. 2021) ("We review a district court's rulings regarding the admission of hearsay evidence for an abuse of discretion."); *United States v. Lovato*, 950 F.3d 1337, 1341 (10th Cir. 2020) ("We review the district court's evidentiary rulings for an abuse of discretion, considering the record as a whole. Because hearsay determinations are particularly fact and case specific, we afford heightened deference to the district court when evaluating hearsay objections."(citations omitted)); *United States v. Slatten*, 865 F.3d 767, 805 (D.C. Cir. 2017) ("Ordinarily, the Court reviews the exclusion of a hearsay statement under the abuse of discretion standard."); *United States v. Ferrell*, 816 F.3d 433, 438 (7th Cir. 2015) ("To reverse a district court's decision on the admissibility of hearsay statements, we must conclude that the district court abused its discretion."); *United States v. Amador-Huggins*, 799 F.3d 124, 132 (1st Cir. 2015) ("The parties agree that our review of how the district court applied the hearsay rules to these facts is for abuse of discretion."); *United States v. Cole*, 631 F.3d 146, 153 (4th Cir. 2011) ("We review a trial court's rulings on the admissibility of evidence for abuse of discretion, and we will only overturn an evidentiary ruling that is 'arbitrary and irrational.' "); *United States v. Santos*, 589 F.3d 759, 763 (5th Cir. 2009) ("We review evidentiary rulings for abuse of discretion."); *United States v. Price*, 458 F.3d 202, 205 (3d Cir. 2006) ("Whether a statement is hearsay is a legal question subject to plenary review. If the district court correctly classifies a statement as hearsay, its application of the relevant hearsay exceptions is subject to review for abuse of discretion." (citations omitted)); *United States v. Brown*, 441 F.3d 1330, 1359 (11th Cir. 2006) ("We review a district court's hearsay ruling for abuse of discretion."); *United States v. Wright*, 343 F.3d 849, 865 (6th Cir. 2003) ("All evidentiary rulings, including hearsay, are reviewed for abuse of discretion."); *United States v. Shryock*, 342 F.3d 948, 981 (9th Cir. 2003) ("We review for an abuse of discretion the district court's evidentiary rulings during trial, including the exclusion of evidence under the hearsay rule."); *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995) ("[A]n application of the rules concerning hearsay is reviewed for the abuse of discretion.").

similar to its federal counterpart. *Compare* N.C.G.S. § 8C-1, Rule 803(4) (2019), *with* Fed. R. Evid. 803(4). *See Roberts v. Hollocher*, 664 F.2d 200, 204 (8th Cir. 1981) (Federal Rule of Evidence 803(4) excepts from the hearsay rule "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment").

¶ 82 The majority relies on *State v. Norman*, 196 N.C. App. 779, 783, 675 S.E.2d 395, 399 (2009), for the proposition that a ruling on whether evidence is admissible under Rule 803(4) is reviewed de novo. However, *Norman* is not binding precedent on this Court. *See N. Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 311 N.C. 62, 76, 316 S.E.2d 256, 265 (1984) ("This Court is not bound by precedents established by the Court of Appeals."). The *Norman* decision rests on a questionable interpretation of the standard of review utilized by this Court in *Hinnant*. A review of *Hinnant* shows that this Court did not state the standard it used to review the Rule 803(4) issues before it. Because this Court has never expressly established a standard of review under Rule 803(4), the plethora of federal hearsay jurisprudence is more persuasive than a single statement in *Norman*.[2] Accordingly, review of the admissibility of evidence under Rule 803(4) should be for an abuse of discretion.

¶ 83 Rule 803(4) excepts from the general rule against hearsay

> [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C.G.S. § 8C-1, Rule 803(4). "This exception to the hearsay doctrine was created because of a 'patient's strong motivation to be truthful' when making statements for the purposes of medical diagnosis or treatment."

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2. The majority further cites to *State v. Jones*, 339 N.C. 114, 146 (1994) and *State v. Stafford*, 317 N.C. 568, 571 (1986) for the proposition that this Court routinely reviews Rule 803(4) determinations de novo. This Court has never expressly stated the standard of review used to analyze Rule 803(4) issues. The majority acknowledges that this Court has never "explicitly elaborated at length" our standard of review under 803(4). After review of the cases cited by the majority, it cannot be said that "our opinions interpreting Rule 803(4) establish that the Court has routinely reviewed these decisions de novo . . . ."

State v. Lewis, 172 N.C. App. 97, 103, 616 S.E.2d 1, 4–5 (2005) (citing N.C.G.S. § 8C-1, Rule 803(4) official commentary (2003)).

> Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment.

Hinnant, 351 N.C. at 284, 523 S.E.2d at 667. "[T]he proponent of Rule 803(4) testimony must affirmatively establish that the declarant had the requisite intent by demonstrating that the declarant made the statements understanding that they would lead to medical diagnosis or treatment." *Id.* at 287, 523 S.E.2d at 669. To determine whether a child's statements are admissible under this exception, "the trial court should consider all objective circumstances of record surrounding [the] declarant's statements in determining whether he or she possessed the requisite intent under Rule 803(4)." *Id.* at 288, 523 S.E.2d at 670.

¶ 84 At trial, Brandi Reagan, executive director of the Dragonfly House, explained that when a child arrives at the Dragonfly House for an appointment, the child is met by a child advocate who "talks with th[e] nonoffending caregiver and the child about . . . people they are going to meet, every service they are going to receive[,] and what would happen at the end of the appointment." Heydy Day, the child advocate in this case, testified, "I start off talking to the child and the caregiver saying, 'you will be talking with one of my friends today,' whether that's our interviewer Kim or interviewer Brandi, you will be talking to that lady." She testified that she would tell the children, "Once you finish talking with Miss Kim or Miss Brandi and the doctor finishes talking with the caregiver, then the doctor will call you back to do a head to toe check-up of you." Additionally, Reagan testified that interviews at the Dragonfly House took place in bedrooms to create a "child-friendly" interview room, rather than in the medical examination room.

¶ 85 When asked if he knew why he was at the Dragonfly House, Jack responded that he was there because "people are trying" to take him away from his mom. When asked who told him that, he responded "[m]y mom." When Sarah was asked if she knew why she was at the Dragonfly House, she responded, "[b]ecause my dad died."

¶ 86 The trial court determined the statements at issue did not qualify as statements for the purposes of the medical diagnosis or treatment exception because the trial court found that the children thought the interview was about custody. The trial court made appropriate findings

of fact and weighed factors when it determined that the circumstances surrounding the interviews did not indicate that either child understood that the interviews were for the purpose of medical diagnosis or treatment. The declarants stated that they were present at the Dragonfly House either because their dad died or because of some issue relating to custody. The children did not respond with an answer focusing on their physical or emotional well-being. Based on these statements, the trial court reasonably concluded that the statements were not made for the purpose of medical diagnosis or treatment. *See Hinnant*, 351 N.C. at 284, 523 S.E.2d at 667–68.

¶ 87 It is important to acknowledge that the trial court could have admitted the children's statements into evidence. While reasonable minds can differ on the admissibility of this evidence, we cannot say that the trial court abused its discretion. "The purpose of standards of review is to focus reviewing courts upon their proper role when passing on the conduct of other decision-makers. Standards of review are thus an elemental expression of judicial restraint, which, in their deferential varieties, safeguard the superior vantage points of those entrusted with primary decisional responsibility." *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 320–21 (4th Cir. 2008). The majority's de novo review does away with the fundamental safeguards that are available to all litigants when the primary decisional responsibility of the trial court is respected and maintained. *See United States v. Charboneau*, 914 F.3d 906, 912 (4th Cir. 2019). Our inquiry should be limited to whether the trial court's decision to exclude the statements was "manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Based upon the record in this case, the trial court did not abuse its discretion when it excluded the children's statements under Rule 803(4).

¶ 88 Similarly, the trial court did not abuse its discretion when it determined that the children's statements did not meet the requirements of the residual hearsay exception.

¶ 89 The residual hearsay exception is disfavored and should be invoked "very rarely, and only in exceptional circumstances." *State v. Smith*, 315 N.C. 76, 91 n.4, 337 S.E.2d 833, 844 n.4 (1985) (citation omitted). A trial court's determination of whether to admit statements under Rule 803(24) is reviewed for an abuse of discretion. *Id.* at 97, 337 S.E.2d at 847. As stated above, "[a] trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White*, 312 N.C. at 777, 324 S.E.2d at 833.

¶ 90 The trial court "must enter appropriate statements, rationale, or findings of fact and conclusions of law . . . in the record to support [its]

discretionary decision[,]" *Smith*, 315 N.C. at 97, 337 S.E.2d at 847, to allow "a reviewing court to determine whether the trial court abused its discretion in making its ruling," *State v. Sargeant*, 365 N.C. 58, 65, 707 S.E.2d 192, 196 (2011). Moreover, "evidence proffered for admission pursuant to . . . Rule 803(24) . . . must be carefully scrutinized by the trial judge within the framework of the rule's requirements." *Smith*, 315 N.C. at 92, 337 S.E.2d at 844.

> Under either of the two residual exceptions to the hearsay rule, the trial court must determine the following: (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

State v. Valentine, 357 N.C. 512, 518, 591 S.E.2d 846, 852 (2003) (citation omitted). The sole issue here concerns whether the children's statements were trustworthy.

¶ 91 In determining whether a statement under Rule 803(24) is "trustworthy," this Court has identified the following factors to consider:

> (1) assurance of personal knowledge of the declarant of the underlying event; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant ever recanted the testimony; and (4) the practical availability of the declarant at trial for meaningful cross-examination.

Smith, 315 N.C. at 93–94, 337 S.E.2d at 845 (citations omitted). "[I]f the trial judge examines the circumstances and determines that the proffered testimony does not meet the trustworthiness requirement, his inquiry must cease upon his entry into the record of his findings and conclusions, and the testimony may not be admitted pursuant to Rule 803(24)." *Id.* at 94, 337 S.E.2d at 845.

¶ 92 The trial court made the following relevant findings of fact relating to the children's statements:

> 15. The children's statements did not describe actual knowledge of the events surrounding the homicide of Jason Corbett. Jack identified the source of the

> information in his statements by saying "my mom told me" and "she (defendant Molly Corbett) told us." Sarah similarly described the source of her knowledge, saying the [sic] her grandmother "told [me] first and then her mother [told me]." When speaking of her "grandmother," Sarah was referring to the mother of defendant Molly Corbett and the wife of defendant Thomas Martens.
>
> . . . .
>
> 20. The statements of the children which the defense proffers were not made out of the personal knowledge of the declarant children but are instead double hearsay[3] declarations of the defendant Molly Corbett and her mother.
>
> 21. These same statements were not made at a time when the children were motivated to speak the truth but were rather motivated to affect future custody arrangements—specifically the children feared that they were going to be "taken away from their mother" and removed to another country by their father's relatives.
>
> 22. The statements of the children that are offered by the defense as pertinent to the relationship between Molly Corbett and Jason Corbett have been specifically recanted. Sarah Corbett, the younger of the two children, recanted her statements in diary entries made after her return to Ireland. Jack Corbett recanted his statements in diary entries and during a recorded interview with members of the District Attorney's Office.

¶ 93 With regard to finding of fact 15, that the statements did not describe the homicide, there is no evidence that the children witnessed the

3. The majority does not address the issue of double hearsay. In addition, the majority gives no direction to the trial court on which statements are admissible and which are not. Furthermore, the majority does not address the trial court's discretion to exclude this evidence under Rule 403 regardless of its admissibility under Rule 803(24). *See* N.C.G.S. § 8C-1, Rule 403 (2019) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

homicide of Jason. Jack was asleep that night and did not wake up until law enforcement came into his room, and Sarah was documented saying that "at night she was sleeping and an officer came upstairs around 4 AM and took her downstairs to her grandma." Her mom told her that someone got hurt and later told her that her dad died.

¶ 94 As to finding of fact 20, that the statements were not made with personal knowledge, the Dragonfly House's Medical Services Log for Sarah states that "Sarah does not disclose witnessing [domestic violence]." When asked if Sarah saw Jason hurt Molly, Sarah said, "No, not really ever, but one time I saw him step on her foot." Reagan followed up by asking, "So when you said that he would fight with her and he would hurt her, you said you didn't really see it, how would you know about it?" Sarah responded, "Because, um, my mom told me." Further, the DSS social worker's notes stated, "Sarah states her father screams and yells and states when her mom and dad goes into the room her dad hurts her mom. She stated her mom told her."

¶ 95 When Reagan asked Jack, "How did your dad die?" Jack responded:

> Okay. Well, my sister had a nightmare about insect crawling—she had fairy blankets and insects all over her bed. That was a nightmare, though. And my dad got very mad, and he was screaming at our mom, and my mom screamed, and my grandpa came up and started to hit him with a bat. And then my dad grabbed hold of the bat—grabbed—held the bat and hit my grandpa with the bat, until my mom put a—put—we were going to paint a brick that was in there, like a cinder block, and it hit his temple, right here, and he died.

When Reagan asked, "now you said your sister had a nightmare. How did you know that?" Jack responded, "My parents—my mom told me." When asked to recount details about Jason's behavior, Jack admitted he "[didn't] actually remember[,]" or stated that he knew because his mom or grandma told him. Lastly, Reagan asked, "[a]nd just to make sure I understand, how did you find out that your mom hit [your dad] with a brick and your grandpa hit him with a bat?" Jack responded, "She told me."

¶ 96 The record demonstrates that there was evidence to support the trial court's findings of fact 15 and 20 because the children's statements were not made with "actual knowledge of the events surrounding the homicide of Jason" and "were not made out of the personal knowledge of the declarant children." Moreover, finding of fact 21 was supported by

Sarah's exchange at Dragonfly House. When Sarah was asked, "Tell me why you're here today[,]" she responded, "Because my dad died." Sarah stated, "I actually heard people talk about my aunt trying to come get us, trying to come get me and my brother. Like, and she (indiscernible) right now and (indiscernible). And that's why at the funeral, I had to (indiscernible) my mother—my mom's hand the whole time." In addition, Jack stated, "my dad died, and people are trying—my aunt and uncle from my dad's side are trying to take away—take me away from my mom. And—that's why I'm here. My mom's trying to get custody over us."

¶ 97 Further, finding of fact 22, that the statements were recanted, is supported by Jack's Skype interview from Ireland and copies of diary entries written by Sarah and Jack. Jack recanted his earlier statements and stated, "I didn't tell the truth at Dragonfly. I didn't tell the truth [during the DSS Interview]." Sarah's diary entries include statements that defendant Corbett had instructed the children to say that Jason hit and yelled at defendant Corbett and that defendant Corbett told Sarah that Jason had killed Sarah's mom by putting a pillow over her mouth. This evidence supports the trial court's determination that the children's statements concerning the relationship between defendant Corbett and Jason had "been specifically recanted."

¶ 98 Given the findings of fact, the trial court's conclusion that "[t]he proffered statements do not have circumstantial guarantees of trustworthiness" was not an abuse of discretion. In addition, under Rule 104(a) the trial court was entitled to consider the children's recantations in determining whether to admit the children's statements into evidence under the residual hearsay exception. *See* N.C.G.S. § 8C-1, Rule 104(a) (2019) ("Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court . . . ."). Further, the majority acknowledged the trial court's gatekeeping function stating, "the trial court was entitled to consider Jack's Skype interview and Sarah's diary entries, regardless of whether either would ultimately have been deemed admissible evidence, in making a preliminary determination regarding the admissibility of the Dragonfly House interview and DSS interviews." Here, the trial court entered "appropriate statements, rationale, or findings of fact and conclusions of law [ ] in the record to support his discretionary decision[.]" *Smith*, 315 N.C. at 97, 337 S.E.2d at 847.

¶ 99 There is support in the record for the trial court's determination that the statements "were not made at a time when the children were motivated to speak the truth but were rather motivated to affect future custody arrangements." Therefore, the trial court's determination that the

children's statements were not admissible under the residual exception was not "manifestly unsupported by reason." *White*, 312 N.C. at 777, 324 S.E.2d at 833.

¶ 100 Even if we assume the trial court erred when it excluded the children's statements, defendants have not shown that they were prejudiced. It is uncontroverted that defendants killed Jason. The question for the jury was whether defendants' killing of Jason was justified.

¶ 101 The autopsy report stated that Jason died of blunt force trauma to the head. Jason sustained "[e]xtensive skull fractures" from "multiple blunt force impact sites of the head." According to the medical examiner, Jason's injuries "included ten different areas of impact on the head, at least two of which had features suggesting repeated blows indicating a minimum of 12 different blows to the head." The medical examiner testified that an injury on the right side of Jason's head was caused by an object with a sharp edge not consistent with a baseball bat. In addition, Jason had a broken nose and blunt force injuries to his torso, left hand, and legs.

¶ 102 Defendant Martens testified that he first "hit [Jason] in the head, the back of the head with the baseball bat," but the blow did not stop Jason. Defendant Martens then "tried to hit [Jason] as many times as [he] could to distract [Jason]" in the hallway. According to defendant Martens, he had struck Jason at least two times in the back of the head with the aluminum baseball bat at this point in the altercation. After coming back down the hallway, Jason and defendant Martens struggled over the bat. Jason obtained control of the bat and pushed defendant Martens over the bed and onto the floor. Defendant Martens eventually regained control of the bat and struck Jason again. Defendant Martens then testified, "just because [Jason] lost control of the bat doesn't mean this is over. This was far from over. . . . And so I still think that, you know, he has the advantage even though—'cause I know what I'm feeling like. I'm shaking. I'm not doing good now. And so I hit him. And I hit him until he goes down." Defendant Martens admitted that he beat Jason with the aluminum bat until he was no longer moving.

¶ 103 Defendant Martens gave a statement to authorities and testified that he had no knowledge of the brick paver or that the brick paver was used to kill Jason. However, the State's evidence showed that defendant Corbett provided a statement to detectives admitting that she struck Jason with the brick paver. The brick paver had hair fragments and blood stains which were consistent with multiple impacts to Jason's head. Based on defendant Martens's testimony and defendant Corbett's

statement to law enforcement, defendant Corbett could not have struck Jason with the brick paver until after she broke away from his initial assault.

¶ 104 The jury heard this evidence, and defendants had the opportunity to argue this evidence and the issue of self-defense to the jury. Even assuming the children's statements were admissible, defendants have failed to show how these statements have any bearing on whether they were justified in killing Jason. While the children's statements highlight past incidents of alleged domestic abuse, the jury heard defendant Martens's testimony that Jason was abusing defendant Corbett that night in the bedroom. The jury was also able to consider defendant Corbett's statement to law enforcement that Jason was choking her before defendant Martens hit Jason with the aluminum baseball bat.

¶ 105 At the same time, the jury heard evidence that Jason's body "felt cool" and there was "dry blood on him" indicating he had been there for some time before paramedics arrived. The jury also heard evidence that the blood spatter indicated that Jason was struck at or near the ground; that defendant Martens "hit [Jason] until he went down"; and that neither defendant had any visible injuries. Further, an aggressor instruction was given as to defendant Martens. The jury had the opportunity to compare defendants' statements, and the testimony of defendant Martens, with the physical evidence surrounding Jason's death. *See State v. Patterson*, 335 N.C. 437, 451, 439 S.E.2d 578, 586 (1994) (finding that despite the defendant's contention that he killed the victim accidentally, "[f]rom [the physical] evidence, the jury could reasonably infer that defendant intentionally pointed the shotgun at [the victim] at close range and intentionally pulled the trigger"). Any purported errors relating to the trial court's decision to exclude the children's statements as evidence did not deprive defendants of a fair hearing on the issue of self-defense.

¶ 106 Moreover, the children's statements and subsequent recantations were not relevant to defendant Martens's state of mind. *See State v. Smith*, 337 N.C. 658, 447 S.E.2d 376 (1994) (finding evidence of prior violence not admissible because there was no evidence defendant had knowledge of prior violent behavior). Defendant Martens testified that he was unaware of any acts of violence between Jason and defendant Corbett.

¶ 107 The evidence against defendants in this case was overwhelming. Each defendant had the opportunity to argue and present their arguments of self-defense to the jury. Neither defendant has established the possibility of a different result. *See* N.C.G.S. § 15A-1443(a) (2019) ("A defendant is prejudiced . . . when there is a reasonable possibility that, had

the error in question not been committed, a different result would have been reached . . . ."). Therefore, the decision of the trial court should be affirmed.

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

STATE OF NORTH CAROLINA
v.
MARDI JEAN DITENHAFER

No. 126A18-2

Filed 12 March 2021

Obstruction of Justice—felony obstruction of justice—deceit and intent to defraud—sufficiency of the evidence

In a case involving the sexual abuse of a child by the child's adoptive father where defendant (the child's mother) engaged in acts to obstruct the abuse investigation by denying investigators access to the child, the record contained sufficient evidence of deceit and intent to defraud to support defendant's conviction of felonious obstruction of justice. The evidence, in the light most favorable to the State, showed defendant knew the child's accusations against her husband were probably true—and later discovered him having sex with the child— and had motives other than a desire for truthfulness in seeking to interfere with the investigation.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 840 S.E.2d 850 (N.C. Ct. App. 2020), finding no error in a judgment entered on 1 June 2015 by Judge Paul G. Gessner in Superior Court, Wake County. Heard in the Supreme Court on 11 January 2021.

Joshua H. Stein, Attorney General, by Sherri Horner Lawrence, Special Deputy Attorney General, for the State-appellee.

Jarvis John Edgerton, IV, for defendant-appellant.

ERVIN, Justice.

¶ 1 The issue before us in this case involves the sufficiency of the evidence to support defendant Mardi Jean Ditenhafer's conviction for felonious obstruction of justice based upon her actions in allegedly interfering with the ability of law enforcement officers and social workers to have access to her daughter, who had been sexually abused by defendant's husband. After careful consideration of defendant's challenge to the Court of Appeals' decision, we hold that the record contains sufficient evidence that defendant acted with deceit and intent to defraud to support her conviction for felonious obstruction of justice and affirm the decision of the Court of Appeals.

I. Factual Background

A. Substantive Facts

¶ 2 Defendant is the mother of Jane and the wife of William Ditenhafer, who is Jane's adopted father.[1] After reaching middle school, Jane developed mental health and self-esteem-related problems and began to engage in self-harming-related activities. According to Jane, defendant would become angry about her self-harming activities, claiming that she was acting as she was in order to get "attention" and to "fit in" and that Jane needed to stop what she was doing. Jane claimed to be afraid of Mr. Ditenhafer because of his anger, his tendency to yell at her, and the spankings that he would administer for the purpose of disciplining her when she got in trouble. Upon discovering that Jane had sent suggestive photos of herself to a middle school boy, defendant and Mr. Ditenhafer became very angry with Jane and prohibited her from using electronic devices. Around the same time, Mr. Ditenhafer, with defendant's knowledge, began giving Jane full-body massages to "help [her] self-esteem."

¶ 3 After giving Jane a massage in 2013, Mr. Ditenhafer told Jane to come into the living room. Once she had complied with that instruction, Mr. Ditenhafer informed Jane that he had discovered that she had sent additional suggestive photographs to the boy who had received the earlier images. According to Jane, Mr. Ditenhafer claimed to have been "turned on" by these photos and told Jane that they "could either show [defendant] these photos" or she could "help him with his . . . boner." At that point, Jane started crying because, "if [defendant] saw these [images] again, she would call the police and I would get in trouble and I would get sent to jail," and did as Mr. Ditenhafer had instructed her to do.

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1. "Jane" and "John" are pseudonyms that are employed in order to protect the children's identities and for ease of reading.

¶ 4 Subsequently, Mr. Ditenhafer began to pressure Jane to engage in sexual acts with him on a regular basis. Over time, the abuse that Mr. Ditenhafer inflicted upon Jane became more serious, with such abusive episodes occurring "at least two times a week" when defendant was not in the home and progressing to the point that Mr. Ditenhafer had Jane engage in oral and vaginal sex acts with him. Jane claimed that Mr. Ditenhafer told her not to tell anyone about the abuse or he would make her sound like a "crazy lying teenager." Jane refrained from telling defendant about the abuse that she was suffering at the hands of her adoptive father because she "didn't think [defendant] would believe [her] and [defendant] would get angry at [her] for making up a lie."

¶ 5 In the spring of 2013, when Jane was in the ninth grade, she visited an aunt, who was the sister of her biological father, in Arizona. During that visit, Jane informed her aunt that Mr. Ditenhafer had been sexually abusing her. At that point, Jane and her aunt called defendant for the purpose of telling defendant about the abuse that Jane had experienced. Defendant reacted to the information that Jane and her aunt had provided by becoming angry with Jane.

¶ 6 The aunt reported Jane's accusations against Mr. Ditenhafer to law enforcement officers in Arizona. The Arizona officers, in turn, contacted Detective Stan Doremus of the Wake County Sheriff's Office, who initiated an investigation into Jane's allegations. Jane testified that, upon her return to North Carolina, defendant picked her up from the airport and told her that defendant did not believe Jane's accusations; that Jane "needed to tell the truth and recant and not — and not lie anymore because it was going to tear apart the family and it was just going to end horribly"; and "that [Jane] didn't need to do this."

¶ 7 After learning of Jane's accusations against Mr. Ditenhafer, Susan Dekarske, a social worker employed by the Child Protective Services Department of Wake County Human Services, interviewed defendant and Mr. Ditenhafer, both of whom denied Jane's accusations. Even so, Mr. Ditenhafter agreed to move out of the family home and to refrain from communicating with Jane during the pendency of the investigation.

¶ 8 On 11 April 2013 Jane and defendant met with Detective Doremus and Ms. Dekarske at the family home. After Ms. Dekarske asked to speak with her privately, Jane told Ms. Dekarske about several instances of sexual abuse that she had suffered at the hands of Mr. Ditenhafer, the fact that defendant urged Jane to recant her accusations against her adoptive father, and the fact that defendant had blamed Jane for destroying the family given that Mr. Ditenhafer "would get 15 years in prison, that [defendant] would also lose her job and that [John] would

lose his dad, [and] they will lose the house." On 22 May 2013, Detective Doremus and Ms. Dekarske went to Jane's school for the purpose of speaking with her privately in light of their understanding that defendant had been pressuring Jane to deny the truthfulness of her claims against Mr. Ditenhafer.

¶ 9 On 21 June 2013, Detective Doremus and Ms. Dekarske again met with defendant and Jane at the family home. During the course of this meeting, defendant "had her hand on [Jane]'s thigh virtually the whole time" and "was answering the questions for [Jane]." When Detective Doremus asked defendant whether she thought that Jane's accusations against Mr. Ditenhafer were true, defendant, who appeared to be shocked, responded by stating that "there is some truth to everything that [Jane] says but not all of it is true." In addition, defendant told Ms. Dekarske that she and Jane had been working to improve their ability to communicate with each other and that, while defendant believed a portion of what Jane had been saying, she "did not believe it was" Mr. Ditenhafer who had abused Jane. After Detective Doremus and Ms. Dekarske asked if they could speak with Jane privately, defendant responded that she was not comfortable with allowing Jane to be alone with Detective Doremus and declined to allow this request.

¶ 10 Detective Doremus and Ms. Dekarske met with Jane in private again on 11 July 2013. Detective Doremus recalled that, as soon as she entered the meeting room, Jane "became upset and said that the only reason that [defendant] let her talk with us alone is because [Jane was] supposed to recant" and that, upon making this statement, Jane "started to cry, [and] said she was not going to recant to us because she was telling the truth." As the meeting progressed, defendant sent text messages to Jane asking how the meeting was going, interrupted the meeting by entering the room in which the interview was taking place, and appeared angry when Detective Doremus informed her that Jane had not recanted her accusations against her adoptive father. After Detective Doremus showed defendant a stack of sexually explicit e-mails that Mr. Ditenhafer had sent to Jane, defendant "looked at one page [of the e-mails], . . . flipped over to another page, and then left" with Jane in a "[h]urried, angry, rushed" manner.

¶ 11 As the investigation continued, defendant remained angry with Jane and continued to pressure her to recant. At one point, defendant threatened to take Jane to a psychiatric hospital because Jane was "crazy." When asked about the nature of the comments that defendant had made to her during this period of time, Jane testified that

> [defendant] would tell me I was manipulative and crazy and how I needed to tell the truth because I was tearing apart her family and destroying her family and that [Mr. Ditenhafer] was going to go to jail because of my lies and [my younger brother] was going to turn into a drug addict and drop out of high school and that I was, like, ruining, like, our family. And this one time she also called me a manipulative bitch.

In addition, defendant forbade Jane from visiting or talking with her Arizona relatives until she told them that she had falsely accused Mr. Ditenhafer of sexually abusing her. Defendant also informed Jane that a family trip to Disneyland was "not going to happen because we're going to lose our money and we're going to lose our stuff and the animals" and that, on the other hand, if Jane recanted her allegations against Mr. Ditenhafer, the family could still go to Disneyland. Finally, defendant told Jane that defendant might have breast cancer and that Jane needed to stop lying about the way in which her adoptive father had treated her because those lies were causing defendant to experience stress.

¶ 12 The conduct in which defendant engaged and Jane's fear that she would lose her relationship with her younger brother finally caused Jane to recant her accusations against Mr. Ditenhafer in early August 2013. On 5 August 2013, as Ms. Dekarske was preparing to leave after meeting with Jane and defendant at the family home, Jane ran outside and told Ms. Dekarske that she needed to tell her something. Then, in a manner that Ms. Dekarske described as "robotic" and "rehearsed," Jane stated, "I just want to let you know I am recanting my story and I'm making it all up." As Ms. Dekarske looked back towards the house, she saw defendant watching from the window, so she decided to end the conversation and discuss the subject with Jane at a later time.

¶ 13 On 7 August 2013, Jane called Detective Doremus and told him, while defendant listened, that she wished to recant her accusations against Mr. Ditenhafer. In addition, Jane sent an e-mail to Detective Doremus for the purpose of telling him that she wished to recant, with defendant having "prompted [Jane] on what to write."

¶ 14 On 29 August 2013, Detective Doremus went to Jane's school for the purpose of meeting with Jane. As she entered the room in which the meeting was to take place, Jane appeared to be nervous and told Detective Doremus that "I'm not supposed to talk to you." In response, Detective Doremus informed Jane that, while he believed that her allegations against her adoptive father were true, the Wake

County Sheriff's Office had ended its investigation and Mr. Ditenhafer would not be prosecuted for sexually abusing her.

¶ 15 Mr. Ditenhafer moved back into the family home around Thanksgiving and resumed his practice of sexually abusing Jane while defendant was absent from the house. On 5 February 2014, defendant entered the bedroom that she shared with Mr. Ditenhafter and observed Mr. Ditenhafer engaging in vaginal intercourse with Jane. As Jane retreated into the adjacent bathroom, defendant angrily yelled "What's going on? What is this?" While Jane stood crying in the bathroom, defendant asked Jane whether this was her "first time." Although Jane contemplated telling defendant that Mr. Ditenhafer had habitually abused her for the past several years, she told defendant instead that "my boyfriend and I have done it before."

¶ 16 Later that day, defendant drove Jane to a McDonald's at which defendant planned to retrieve a cell phone that Detective Doremus had examined during the investigation of Jane's earlier accusations against Mr. Ditenhafer. At that time, Jane told defendant that she had been telling the truth about Mr. Ditenhafer's conduct and that he had continued to sexually abuse her. In response, defendant stated that "I'm not sure if I believe you or not, but I just—I need to handle this first" before exiting the vehicle to obtain the cell phone from Detective Doremus. Defendant did not report what she had witnessed to Detective Doremus and refused to allow Jane to speak with him. In addition, defendant directed Jane to refrain from telling anyone else about what Mr. Ditenhafer had been doing to her "[b]ecause it was family business" and instructed Jane to help her discard the sheets and bedding upon which the abuse had occurred.

¶ 17 On 16 March 2014, defendant called Mr. Ditenhafer's brother and told him that she had walked in upon an act of sexual abuse involving Mr. Ditenhafer and Jane. After receiving this information, which he found to be shocking, the brother-in-law continued to communicate with defendant over the course of the next several weeks for the purpose of helping defendant determine how she should protect herself and the children. Although the brother-in-law initially thought that defendant would act in the children's best interest, she informed him a few weeks after their initial conversation that she intended to refrain from "involv[ing] anyone else or the authorities because that would cost them more money and time" and because "[w]e don't need anymore [sic] drama." At this point, the brother-in-law notified Child Protective Services about the sexual abuse that Mr. Ditenhafer had perpetrated upon Jane, resulting in the initiation of a new investigation by that agency.

¶ 18 On 29 April 2014, Robin Seymore, a Wake County Human Services employee, went to Jane's school for the purpose of interviewing Jane. Jane appeared anxious during her conversation with Ms. Seymore, denied that Mr. Ditenhafer had ever abused her, and called defendant to let her know that Ms. Seymore was there asking questions. After the end of her conversation with Jane, Ms. Seymore went to John's school in order to interview him. Within five minutes after Ms. Seymore's discussion with John had begun, defendant burst into the room in which the interview was being conducted, grabbed John, and told Ms. Seymore, "[a]bsolutely not. You're not going to talk to him. You are not going to talk to him. This is not happening." After making this series of statements, defendant told Ms. Seymore that "I have nothing to say to you" before leaving the interview room with John.

¶ 19 On 30 April 2014, Ms. Seymore went to the family home for the purpose of interviewing defendant. In spite of the fact that rain was pouring down and thunder could be heard, defendant told Ms. Seymore, "[y]ou're not coming into the house" and insisted that they talk outside. In the course of the ensuing conversation, defendant stated that Mr. Ditenhafer had stopped living in the family home during the preceding February while insisting that his departure "had nothing to do with the children or [Jane]" and suggested that his absence stemmed from the fact that "they had marital problems." In addition, defendant stated that her husband had decided to refrain from entering the house anymore in order to "avoid any more lies from [Jane]." After Ms. Seymore left the family home following her conversation with defendant, she and her supervisor decided to seek the entry of an order taking Jane into the nonsecure custody of Wake County Human Services.

¶ 20 On 1 May 2014, Detective Doremus and other law enforcement officers came to the family home for the purpose of placing defendant under arrest and taking Jane into the custody of the Wake County Department of Human Services. After their arrival, the officers observed defendant driving towards the residence. Upon discovering that Detective Doremus and the other officers were present, defendant backed up, turned around, and began to drive away. After the officers followed defendant and activated their emergency lights, defendant, who had Jane and John in the vehicle with her, pulled over on the side of the road, rolled up the windows, locked the doors, and phoned her attorney while ignoring the officers' requests that she exit from her vehicle. As she sat in the car with the children, defendant told Jane, "[d]on't say anything. Don't get out of the car . . . If they try and take you away, [Jane], don't go. Refuse to go. . . . Run down the street. Just don't go." Eventually, defendant complied with the officers' requests and was placed under arrest.

B. Procedural History

¶ 21 On 20 May 2014, the Wake County grand jury returned a bill of indictment charging defendant with one count of felonious obstruction of justice and one count of accessory after the fact to sexual activity by a substitute parent. On 9 September 2014, the Wake County grand jury returned a superseding indictment charging defendant with being an accessory after the fact to sexual activity by a substitute parent based upon an event that allegedly occurred on or about 5 February 2014. On 10 March 2015, the Wake County grand jury returned another superseding indictment charging defendant with two counts of felonious obstruction of justice, with one count alleging that defendant had obstructed justice by encouraging Jane to recant her allegations of sexual abuse against Mr. Ditenhafer on or about the period from 11 July 2013 to 1 September 2013 and with the second count alleging that defendant had obstructed justice by denying employees of the Wake County Sheriff's Office and the Wake County Department of Human Services access to Jane on or about the period from 11 July 2013 to 1 September 2013.

¶ 22 The charges against defendant came on for trial before the trial court and a jury at the 25 May 2015 criminal session of the Superior Court, Wake County. At the close of the State's evidence, defendant, who did not offer evidence on her own behalf, unsuccessfully moved to dismiss all three of the charges that had been lodged against her for insufficiency of the evidence and on the basis of "a variance between the crime alleged in the indictment and any crime for which the State's evidence may have been sufficient to warrant submission to the jury[.]" On 1 June 2015, the jury returned verdicts convicting defendant of felonious obstruction of justice by encouraging Jane to recant the allegations of sexual abuse that she had made against Mr. Ditenhafer, felonious obstruction of justice based upon her actions in denying employees of the Wake County Sheriff's Office and the Wake County Department of Human Services access to Jane, and accessory after the fact to sexual activity by a substitute parent. Based upon the jury's verdicts, the trial court entered a judgment sentencing defendant to a term of six to seventeen months imprisonment based upon the first of her two convictions for felonious obstruction of justice, a judgment sentencing defendant to a consecutive term of six to seventeen months imprisonment based upon her second conviction for felonious obstruction of justice, and a judgment sentencing defendant to a consecutive term of thirteen to twenty-five months imprisonment based upon her conviction for accessory after the fact to sexual activity by a substitute parent. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

¶ 23 In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the trial court had erred by denying her motions to dismiss all three of the charges that had been lodged against her for insufficiency of the evidence and by "failing to limit Defendant's culpable conduct in its jury instruction for accessory after the fact to her failure to report abuse." *State v. Ditenhafer*, 258 N.C. App. 537, 547 (2018), *aff'd in part and rev'd in part*, 373 N.C. 116 (2019). In a divided decision, the Court of Appeals found no error in the trial court's judgment relating to the first of defendant's obstruction of justice convictions, which rested upon defendant's conduct in encouraging Jane to recant her accusations against Mr. Ditenhafer, on the grounds that the record contained sufficient evidence to support defendant's conviction. *Id.* at 547–49. On the other hand, the Court of Appeals overturned the trial court's judgment relating to the second of defendant's obstruction of justice convictions, which rested upon defendant's conduct in precluding investigating officials from having access to Jane, on the grounds that the record did not contain sufficient evidence to support that conviction. *Id.* at 550–51. Finally, the Court of Appeals reversed the judgment that the trial court had entered based upon defendant's conviction for accessory after the fact to sexual activity by a substitute parent on the grounds the indictment that had been returned against defendant "fail[e]d to allege any criminal conduct" and, instead, sought to hold defendant liable for an omission unrelated to the performance of any criminal act. *Id.* at 551–53. The State noted an appeal to this Court from the Court of Appeals' decision relating to defendant's conviction for accessory after the fact to sexual activity by a substitute parent based upon a dissenting opinion by Judge Inman and this Court granted the State's request for discretionary review with respect to the issue of whether the record contained sufficient evidence to support defendant's conviction for the felonious obstruction of justice charge relating to defendant's actions in precluding investigating officials from having access to Jane.

¶ 24 On 1 November 2019, this Court filed an opinion in which it affirmed the Court of Appeals' decision to reverse defendant's conviction for accessory after the fact to sexual activity by a substitute parent. *State v. Ditenhafer*, 373 N.C. 116, 129 (2019). In addition, we overturned the Court of Appeals determination that the trial court had erred by denying defendant's motion to dismiss the charge that defendant had feloniously obstructed justice by denying investigating officials access to Jane for insufficiency of the evidence on the grounds that the record contained sufficient evidence "to persuade a rational juror that defendant denied officers and social workers access to Jane." *Id.* at 129 (cleaned up). In support of this conclusion, we pointed to the presence of evidence tend-

ing to show that defendant had "talked over Jane during several interviews . . . in such a manner that Jane was precluded from answering the questions," that defendant had "interrupted an interview . . . by constantly sending Jane text messages and by abruptly removing Jane from the interview," and that defendant "successfully induced Jane to refuse to speak with investigating officers and social workers" on multiple occasions. *Id.* at 128. As a result, we remanded this case to the Court of Appeals for the limited purpose of determining "whether there [was] sufficient evidence to enhance the charge of obstruction of justice for denying access to Jane from a misdemeanor to a felony under N.C.G.S. § 14-3(b)." *Id.* at 129.

¶ 25 On remand from this Court, the Court of Appeals held that there was sufficient record evidence to support defendant's conviction for felonious, as compared to misdemeanor, obstruction of justice on the grounds that defendant had precluded investigating officials from having access to Jane. *State v. Ditenhafer*, 840 S.E.2d 850, 855 (N.C. Ct. App. 2020) (holding that "the State [had] introduced evidence, taken in the light most favorable to it, that [d]efendant acted with deceit and the intent to defraud"). In support of its determination that defendant's actions had involved deceit and the existence of an intent to defraud, the Court of Appeals pointed to the fact that defendant "did not permit [Jane] to answer questions and answered for her in one interview, sent text messages and physically interrupted another interview, and sought to constantly influence [Jane]'s statements in those interviews by verbally abusing and punishing [Jane] for the statements she was making." *Id.* at 856. In addition, the Court of Appeals noted the presence of evidence tending to show that defendant had "instructed [Jane] not to speak with investigators and directed investigators not to speak with [Jane] in private, ensuring that the daughter did not have the opportunity to give investigators truthful statements regarding the abuse" and that "[d]efendant [had] controlled the narrative by coaching [Jane] on what to say, listening on the line when [Jane] recanted her story to Detective Doremus, and prompting [Jane] on what to write in the [e-mail] in which [Jane] recanted her story." *Id.* (cleaned up). In dissenting from the majority's decision, Judge Tyson stated that the presence of deceit and an intent to defraud "is not what the indictment alleges nor what the State's evidence shows" and asserted that, on the contrary, the record evidence demonstrated that "[d]efendant presented her daughter and allowed access every time upon request," with this fact tending to negate any contention that defendant acted with deceit and intent to defraud. *Id.* at 858 (Tyson, J., dissenting). Defendant noted an appeal to this Court from the Court of Appeals' decision based upon Judge Tyson's dissent.

II. Substantive Legal Analysis

¶ 26 In seeking to persuade us to overturn the Court of Appeals' decision, defendant argues that the record is devoid of substantial evidence tending to show that she acted with either deceit or the intent to defraud in the course of denying investigating officials access to Jane. According to defendant, the record evidence uniformly demonstrates that, during the time period set out in the relevant count of the indictment, she did not believe Jane's accusations against Mr. Ditenhafer. In addition, defendant contends that, in light of the fact that she did not believe Jane's accusations against her husband, her attempt to induce Jane to recant her accusations against Mr. Ditenhafter amounted to an effort to persuade Jane to tell the truth "even if [she was] ultimately wrong about what the truth was." In support of this argument, defendant directs our attention to what she describes as the expressions of shock that defendant made when she interrupted Mr. Ditenhafer's abuse of Jane in February 2014. As a result, defendant maintains that her "actions during the relevant period were not intended to deceive; but, instead, were intended to protect [Mr. Ditenhafer] from what [defendant] incorrectly believed was a false accusation."

¶ 27 In seeking to persuade us to refrain from disturbing the Court of Appeals' decision, the State argues that "the Court of Appeals majority properly followed this Court's directive and determined that the State presented sufficient evidence to support defendant's felony obstruction of justice charge for denying access to the minor sexual abuse victim, Jane." After acknowledging defendant's claim that "she believed Jane was abused by someone other than [Mr. Ditenhafer]," the State points out that defendant "inconsistently took many steps to intervene in and frustrate law enforcement and [social services]' investigations into the sexual abuse." In essence, the State argues that, "[h]ad defendant indeed committed her acts during the investigation as Jane's concerned biological mother free of any intent to deceive or defraud, defendant would have cooperated with any investigation of Jane's reported sexual abuse" while, instead, defendant "did everything other than cooperate with the investigation" in order "to maintain her belief of a happy life with [Mr. Ditenhafer]." The State further argues that "[d]efendant's intent to deceive and defraud is further revealed by her failure to report or even acknowledge the sexual abuse after directly witnessing it firsthand." As a result, the State argues that "[d]efendant's many actions of pressuring Jane to recant during the indictment period and witnessing the sexual abuse firsthand after the indictment period both show defendant's overall mental attitude towards Jane's sexual abuse allegations and defen-

dant's selfish persistent desire to protect [her husband] and what she believed to be her good life" and permitted the jury to infer "her intent . . . from the circumstances and her actions throughout the investigation."

¶ 28 In deciding whether to grant or deny a motion to dismiss for insufficiency of the evidence, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Crockett*, 368 N.C. 717, 720 (2016) (quoting *State v. Hill*, 365 N.C. 273, 275 (2011)). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Stone*, 323 N.C. 447, 451 (1988) (quoting *State v. Smith*, 300 N.C. 71, 78–79 (1980)). Put another way, substantial evidence is that which is "necessary to persuade a rational juror to accept a conclusion." *Crockett*, 368 N.C. at 720 (quoting *Hill*, 365 N.C. at 275). In determining whether the record contains sufficient evidence to support the submission of the issue of defendant's guilt of a criminal offense to the jury, the trial court must consider the evidence "in the light most favorable to the State," with the State being "entitled to every reasonable intendment and every reasonable inference to be drawn therefrom," *State v. Powell*, 299 N.C. 95, 99 (1980), and with "contradictions and discrepancies [being] for the jury to resolve" instead of "warrant[ing] dismissal," *State v. Winkler*, 368 N.C. 572, 574 (2015) (quoting *Powell*, 299 N.C. at 99). For that reason, "[t]he evidence need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury." *Stone*, 323 N.C. at 452 (citing *State v. Jones*, 303 N.C. 500, 504 (1981)). In view of the fact that determining whether the record contains sufficient evidence to support the defendant's guilt of a criminal offense requires resolution of "a question of law," *Crockett*, 368 N.C. at 720, this Court reviews challenges to the sufficiency of the evidence to support the jury's decision to convict the defendant of committing a crime using a de novo standard of review, *State v. Melton*, 371 N.C. 750, 756 (2018) (citing *State v. Chekanow*, 370 N.C. 488, 492 (2018)).

¶ 29 At the time that this case was initially before the Court, we held, among other things, that the record contained sufficient evidence to support the submission of the issue of defendant's guilt of obstruction of justice based upon an allegation that defendant had denied investigating officials access to Jane to the jury. *Ditenhafer*, 373 N.C. at 128–29. As a result, the sole issue before the Court of Appeals on remand was whether the record contained sufficient evidence to support defendant's guilt of felonious, rather than misdemeanor, obstruction of justice on the basis of N.C.G.S. § 14-3(b), *id.* at 129, which provides that, "[i]f a misdemeanor as to which no specific punishment is prescribed be infa-

mous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony," N.C.G.S. § 14-3(b) (2019). As the Court of Appeals has correctly held, a defendant commits felonious, as compared to misdemeanor, obstruction of justice in the event that he or she "(1) unlawfully and willfully (2) obstruct[s] justice by providing false statements to law enforcement officers investigating [a crime] (3) with deceit and intent to defraud." *State v. Cousin*, 233 N.C. App. 523, 531 (2014). After considering the evidence in the light most favorable to the State, as we are required to do in accordance with the applicable standard of review, we hold that the record contains sufficient evidence to support a jury determination that defendant acted with deceit and an intent to defraud when she denied investigating officials access to Jane.

¶ 30 At trial, the State asserted that defendant sought to deprive investigating officials of meaningful access to Jane in order to preclude her from accusing Mr. Ditenhafer of sexually abusing her. In support of this assertion, the State elicited evidence concerning numerous incidents that occurred during the time period specified in the relevant indictment count. For example, the State presented evidence that defendant answered questions for Jane during meetings with investigators in order to preclude Jane from answering the questions that were posed to her in a truthful manner. In addition, defendant told investigating officials that they were not allowed to speak with Jane privately and instructed Jane to recant the truthful accusations that she had made against Mr. Ditenhafer. On one occasion, defendant interrupted a private meeting between Jane and the investigating officials and removed Jane from the meeting. In the same vein, the record contains evidence tending to show that defendant drafted an e-mail which appeared to state that Jane's accusations against defendant were false and required Jane to send that e-mail to investigating officials. As a result, the record contains evidence tending to show that, in addition to simply precluding investigating officials from having access to Jane, defendant actively encouraged Jane to make what everyone now acknowledges to have been false statements exonerating Mr. Ditenhafer from criminal liability for his sexual abuse of Jane.

¶ 31 Admittedly, the mere existence of evidence tending to show the nature of defendant's obstructive activities does not suffice to show that she acted with the deceit and intent to defraud necessary to support her conviction for felonious, as compared to misdemeanor, obstruction of justice. In addition to containing evidence recounting defendant's obstructive activities, the record is also replete with evidence tending to suggest that, instead of being engaged in a disinterested search for the

truth, defendant knew that Jane's accusations against her husband were likely to be true and had motives other than a desire for truthfulness in seeking to interfere with the investigation into the validity of Jane's accusations against Mr. Ditenhafer. For example, during an early stage in the investigation, defendant acknowledged to investigating officials that Jane had probably been abused and that some, but not all, of Jane's accusations were truthful. In light of this admission, the jury could reasonably have concluded that defendant did, in fact, know that something had happened to Jane and that her accusations rested upon something more than a mere fabrication. Similarly, defendant's knowledge that Mr. Ditenhafer had begun giving full-body massages to Jane sufficed to put defendant on notice that the nature of the interactions between Jane and her adoptive father, at an absolute minimum, posed a risk of harm to Jane. In addition, defendant continued her obstructive conduct after being shown inappropriate e-mails that Mr. Ditenhafer had sent to Jane. Finally, defendant's repeated statements that Jane's accusations risked the destruction of the existing family structure and harm to other members of the family provided ample support for a jury finding that defendant's conduct was motivated by a desire to preserve the existing family structure, from which she clearly believed that she derived benefits, rather than an attempt to dissuade Jane from making false accusations against Mr. Ditenhafer.

¶ 32 The inference that defendant was acting with deceit and an intent to defraud that the jury was entitled to draw based upon the evidence of defendant's conduct during the period of time specified in the relevant count of the indictment is substantially bolstered by the evidence concerning defendant's conduct in the aftermath of her discovery in September 2014 that Mr. Ditenhafer was, in fact, sexually abusing Jane.[2] In spite of the fact that she now had conclusive proof that Jane's accusations against Mr. Ditenhafer were true, defendant continued to attempt to protect her husband from the consequences of his actions. For example, the record reflects that defendant appeared to be more concerned about issues relating to Jane's chastity than about the impact of Mr. Ditenhafer's abusive conduct upon her daughter. In addition, defendant destroyed the bedding upon which the sexual abuse had occurred. On the same day upon which defendant obtained confirmation that Jane's

2. Assuming, without deciding, that evidence concerning defendant's conduct outside the time period specified in the relevant count of the indictment is not admissible as substantive evidence of defendant's guilt of obstruction of justice, we see no reason why that conduct is not relevant to the issue of the intent with which defendant acted when she obstructed investigating officials' access to Jane during the relevant time period.

accusations against Mr. Ditenhafer were true, defendant failed to report the adoptive father's conduct to Detective Doremus during a meeting held for the purpose of retrieving Jane's cell phone and refused to allow Jane to speak with Detective Doremus. After acknowledging the abuse that Mr. Ditenhafer had inflicted upon Jane, defendant told her brother-in-law that she had talked to a lawyer and a therapist and that both of them had advised her to refrain from involving anyone else because "[w]e don't need anymore [sic] drama" and because the making of such a report would "cost them more money and time." Finally, when law enforcement officers came to the family home for the purpose of arresting defendant and taking Jane into nonsecure custody, defendant attempted to escape while instructing Jane to "[r]efuse to go" with the officers and to "[r]un down the street" instead. As a result, the extensive evidence of defendant's efforts to protect Mr. Ditenhafer from the consequences of his actions after her discovery that Jane's accusations of sexual abuse were true coupled with the statements that defendant made to the brother-in-law provides substantial additional support for the State's contention that, rather than simply trying to ensure that investigating officials were not misled by Jane's false accusations against Mr. Ditenhafer, defendant acted with deceit and an intent to defraud.

¶ 33 As a result, for all of these reasons, we hold that the record evidence, when taken in the light most favorable to the State, provides more than sufficient support for a jury finding that defendant precluded investigating officials from having access to Jane with deceit and the intent to defraud. Although defendant does, of course, take a contrary position and although the record does not contain any evidence tending to show that defendant actually admitted that she had obstructed the State's attempts to investigate Jane's accusations against Mr. Ditenhafer for nefarious reasons, the absence of such direct evidence concerning defendant's mental state does not, of course, preclude the State from attempting to establish defendant's guilt through the use of inferences derived from circumstantial evidence. On the contrary, the presence of evidence tending to show defendant's persistent refusal to acknowledge the truthfulness of Jane's accusations against Mr. Ditenhafer in the face of Jane's assertions that she was telling the truth, defendant's knowledge of what appear to have been inappropriate interactions between Mr. Ditenhafer and Jane, defendant's refusal to credit or even review evidence tending to bolster the credibility of Jane's accusations against Mr. Ditenhafer, and the fact that defendant appears to have been acting on the basis of motives other than a disinterested search for truth during the offense date range specified in the relevant count of the in-

dictment suffices, standing alone, to support a reasonable inference that defendant acted with deceit and an intent to defraud rather than in the course of a permissible attempt to exercise her constitutional rights as Jane's parent. And, when one considers the record evidence concerning defendant's conduct after discovering Mr. Ditenhafer in the very act of abusing Jane, the evidence that defendant precluded investigating officials from having access to Jane deceitfully and with an intent to defraud seems even more compelling. Thus, for all of these reasons, we have no hesitation in concluding that the Court of Appeals did not err by upholding defendant's conviction for felonious obstruction of justice based upon defendant's interference with investigating officials' access to Jane.

III. Conclusion

¶ 34 A careful review of the evidence presented for the jury's consideration persuades us that the record, when viewed in the light most favorable to the State, contains substantial evidence tending to show that defendant had acted with deceit and an intent to defraud at the time that she obstructed justice by denying officers of the Wake County Sheriff's Office and Wake County Department of Human Services employees access to Jane during their investigation of Jane's allegations against Mr. Ditenhafer. As a result, the Court of Appeals' decision to find no error in the trial court's judgment based upon defendant's conviction for felonious obstruction of justice arising from the denial of access to Jane is affirmed.

AFFIRMED.

STATE v. FULLER

[376 N.C.862, 2021-NCSC-20]

STATE OF NORTH CAROLINA
v.
RYAN KIRK FULLER

No. 447A19

Filed 12 March 2021

Sexual Offenders—secret peeping—sex offender registration—danger to the community

After defendant's conviction for felony secret peeping, the trial court did not err in finding as an ultimate fact that defendant was a danger to the community and ordering him to register as a sex offender where the evidentiary facts showed defendant took advantage of a close personal relationship, used a sophisticated scheme to avoid detection, deployed a hidden camera and obtained images of the victim over an extended period of time, repeatedly invaded the victim's privacy, caused significant and long lasting emotional harm to the victim, and could easily commit similar crimes in the future.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 268 N.C. App. 240 (2019), affirming an order entered on 23 October 2018 by Judge A. Graham Shirley in Superior Court, Wake County. Heard in the Supreme Court on 11 January 2021.

Joshua H. Stein, *Attorney General*, *by Ryan Y. Park*, *Solicitor General*, *and Caryn Devins Strickland*, *Solicitor General Fellow*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by Andrew DeSimone*, *Assistant Appellate Defender*, *for defendant-appellant.*

BERGER, Justice.

¶ 1 On October 23, 2018, defendant Ryan Kirk Fuller pleaded guilty to secret peeping pursuant to N.C.G.S. § 14-202(d). The trial court placed defendant on supervised probation and ordered him to register as a sex offender under N.C.G.S. § 14-202(*l*). Defendant appealed the order of sex offender registration, and the Court of Appeals affirmed the trial court's order. Defendant appeals.

I. Factual and Procedural Background

¶ 2 In August 2018, defendant lived with the Smith[1] family, whom he had known for over ten years, in their home in Apex, North Carolina. On August 17, 2018, Mr. Smith was watching television in his living room. Mr. Smith stepped outside to smoke a cigarette, and when he returned inside, Mr. Smith saw an image on his television of his wife undressing. Mrs. Smith was not home at the time, and the image was not from a live feed. Mr. Smith saw defendant, and he noticed defendant watching the video which contained the image of Mrs. Smith. Mr. Smith demanded that defendant leave the house and immediately reported the incident to the Apex Police Department.

¶ 3 Officers later spoke with defendant and obtained consent to search his computer. The search of defendant's laptop computer, cell phone, and external hard drives revealed that defendant had saved images and videos of Mrs. Smith in various states of undress from June 2018 to August 2018. Officers were able to determine that defendant had deployed a camera in the Smith's home to obtain photographs and videos of Mrs. Smith. Defendant moved the device between the Smiths' bedroom and bathroom. When questioned by officers, defendant waived his *Miranda* rights and admitted to deploying the camera and possessing images of Mrs. Smith. Defendant stated that he installed the camera because "he had developed feelings for [Mrs. Smith] at some point in the course of their friendship."

¶ 4 On September 11, 2018, defendant was indicted on three counts of secret peeping. On October 23, 2018, defendant pleaded guilty to one count of felony secret peeping pursuant to a plea arrangement with the State. The parties agreed that defendant would receive a suspended sentence and be placed on supervised probation for a period of twenty-four months. In addition, defendant was required to submit to a "mental health evaluation specific to sex offenders and comply with recommended treatment." The issue of sex offender registration was to be determined by the trial court. The plea was accepted by the trial court, and a hearing was then held to determine whether defendant would be required to register as a sex offender. Based upon the arguments of the parties, the trial court ordered defendant to register as a sex offender for thirty years. The trial court did not consider a Static-99 assessment when it determined that sex offender registration was appropriate.

1. Due to the sensitive nature of this case, pseudonyms will be used.

¶ 5 On October 30, 2018, defendant filed written notice of appeal. In an opinion filed November 5, 2019, the Court of Appeals affirmed the trial court's order requiring defendant to register as a sex offender because the trial court's finding that defendant was a "danger to the community" was supported by competent evidence. *State v. Fuller*, 268 N.C. App. 240, 245, 835 S.E.2d 53, 56 (2019). The dissenting judge argued that there was insufficient evidence supporting the trial court's finding that defendant was a "danger to the community." *Id.* at 250, 835 S.E.2d at 59 (Brook, J., dissenting). Specifically, the dissenting judge contended that the State could not show defendant was a "danger to the community" because the State failed to present evidence that defendant was likely to reoffend pursuant to *State v. Pell*, 211 N.C. App. 376, 712 S.E.2d 189 (2011), and *State v. Guerrette*, No. COA18-24, 2018 WL 4702230 (N.C. Ct. App. Oct. 2, 2018) (unpublished). *Id.* at 252–53, 835 S.E.2d at 61.

¶ 6 Defendant argues that the Court of Appeals erred when it affirmed the trial court's order which required defendant to register as a sex offender based on the finding that he was a "danger to the community." We disagree.

II. Standard of Review

¶ 7 The determination of whether an individual "is a danger to the community" under N.C.G.S. § 14-202(l) is an ultimate fact to be found by the trial court. "There are two kinds of facts: Ultimate facts, and evidentiary facts." *Woodard v. Mordecai*, 234 N.C. 463, 470, 67 S.E.2d 639, 644 (1951).

> Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. 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.

Id. at 472, 67 S.E.2d at 645 (citations omitted).

¶ 8 A trial court's finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court's ultimate finding. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 343, 218 S.E.2d 368, 372 (1975); *see also Sherrill v. Boyce*, 265 N.C. 560, 560, 144 S.E.2d 596,

597 (1965) (per curiam); *State Tr. Co. v. M & J Fin. Corp.*, 238 N.C. 478, 484, 78 S.E.2d 327, 332 (1953). Thus, we must uphold the sex offender registration order if there are evidentiary facts that could reasonably support the trial court's determination that defendant "is a danger to the community."

¶ 9 Moreover, because this is the first opportunity for this Court to address sex offender registration pursuant to N.C.G.S. § 14-202(*l*), we interpret that statute de novo. *See City of Asheville v. Frost*, 370 N.C. 590, 591, 811 S.E.2d 560, 561 (2018) ("We review questions of statutory interpretation de novo.").

III. Analysis

¶ 10 Generally, sex offender registration is required upon a defendant's conviction of a reportable sex offense. *See* N.C.G.S. § 14-208.7(a) (2019) ("A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides."); N.C.G.S. § 14-208.6(4)(a) (2019) (defining what constitutes a reportable conviction); N.C.G.S. § 14-208.6(5) (2019) (defining what constitutes a sexually violent offense).

¶ 11 However, even though the crime of secret peeping is a sex offense, registration based upon a conviction for committing that offense is dependent upon additional considerations by the trial court. *See generally* N.C.G.S. § 14-202(d), (*l*). Following a conviction for secret peeping pursuant to N.C.G.S. § 14-202(d), the trial court

> shall consider whether the person is a danger to the community and whether requiring the person to register as a sex offender pursuant to Article 27A of this Chapter would further the purposes of that Article as stated in G.S. 14-208.5. If the sentencing court rules that the person is a danger to the community and that the person shall register, then an order shall be entered requiring the person to register.

N.C.G.S. § 14-202(*l*) (2019). Thus, a defendant convicted of secret peeping under N.C.G.S. § 14-202(d) is required to register as a sex offender only when the trial court, after considering the purposes of the Sex Offender and Public Protection Registration Programs, determines that a defendant "is a danger to the community."

¶ 12 Section 14-208.5 sets forth the purposes of the Sex Offender and Public Protection Registration Programs as follows:

> The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest.
>
> The General Assembly also recognizes that persons who commit certain other types of offenses against minors, such as kidnapping, pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest. Further, the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. Release of information about these offenders will further the governmental interests of public safety so long as the information released is rationally related to the furtherance of those goals.
>
> Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C.G.S. § 14-208.5 (2019).

¶ 13 By the plain language of this section, our Legislature has determined that law enforcement agencies and the public need additional information about sex offenders because of the risks these individuals pose to communities and children. *See Smith v. Doe*, 538 U.S. 84, 93 (2003) ("[A]n imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive governmental objective and has been historically so regarded.' " (quoting *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997)).

¶ 14 On appeal, defendant argues that the Court of Appeals erred when it affirmed the trial court's order of sex offender registration because the record failed to show that defendant was likely to commit sex offenses in the future. Further, defendant asserts that the trial court was required to consider a Static-99 assessment before ordering him to register as a sex offender. However, neither a Static-99 assessment, nor considerations of likelihood of recidivism, are dispositive on the issue of whether a defendant "is a danger to the community."

¶ 15 The phrase "is a danger to the community" is not defined by N.C.G.S. § 14-202(*l*). In addition, the Legislature did not specify a time period for the determination of whether a defendant constitutes a "danger to the community."

> A statute is an act of the Legislature as an organized body. . . . It must speak for and be construed by itself . . . . Otherwise each individual might attribute to it a different meaning, and thus the legislative will and meaning be lost sight of. Whatever may be the views and purposes of those who procure the enactment of a statute, the Legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent.

Abernethy v. Bd. of Comm'rs of Pitt Cnty., 169 N.C. 631, 639–40, 86 S.E. 577, 582 (1915) (citation and quotation marks omitted). It is well-established that the "[o]rdinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language." *Dunn v. Pac. Emps. Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992).

¶ 16 The term "is" has been defined as the "third person singular, present tense of be." *Is*, Webster's II New College Dictionary (3d ed. 2005). Therefore, the determination of whether a defendant "is a danger to the community" necessarily requires a trial court to consider whether the defendant currently constitutes a danger to the community. Further, this Court has previously indicated that the term "is" may be read more broadly to encompass a time period greater than the present. *See Ex parte Barnes*, 212 N.C. 735, 738, 194 S.E. 499, 501 (1938) ("Where a statute is expressed in general terms and in words of the present tense, it will as a general rule be construed to apply not only to things and conditions existing at its passage, but will also be given a prospective interpretation, by which it will apply to such as come into existence thereafter." (citation and quotation marks omitted)).

¶ 17 In addition, we may look to other similar statutes to help define terms. *See In re Banks*, 295 N.C. 236, 239–40, 244 S.E.2d 386, 389 (1978) ("[T]he legislative intent . . . is to be ascertained by appropriate means and *indicia* . . . such as . . . previous interpretations of the same or similar statutes." (cleaned up)).

¶ 18 The Legislature has used similar language in the context of involuntary commitments. Individuals who are determined to be "dangerous[ ] to self . . . or others" are subject to involuntary commitment orders. *See* N.C.G.S. § 122C-263(c)(2), (d)(2) (2019); N.C.G.S. § 122C-268(j) (2019). Finding that an individual is a danger to himself or others involves considerations of conduct "[w]ithin the relevant past" and "a reasonable probability of [similar conduct] within the near future." N.C.G.S § 122C-3(11)(a), (b) (2019).

¶ 19 Thus, in finding that a defendant "is a danger to the community" under N.C.G.S. § 14-202(*l*), a trial court may consider whether the defendant currently constitutes a "danger to the community" such that registration is appropriate. In addition, a finding that defendant "is a danger to the community" may also be satisfied upon a showing that, based upon the defendant's conduct within the relevant past, there is a reasonable probability of similar conduct by the defendant in the near future.[2] A determination that a defendant "is a danger to the community" is not based solely upon the consideration of a singular fact or predictive analysis. Rather, a trial court reaches such a finding through considering and weighing all of the evidence. *See Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968) (stating that ultimate findings are "conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary").

¶ 20 Here, the trial court found the following evidentiary facts on the record:

> In this particular case it seems that there were recordings made over a long period of time. The fact that he only used one device as opposed to two and to move it place to place is to me more concerning than if he had had two devices, because he had . . .

2. Here, defendant was not incarcerated upon his plea of guilty to secret peeping pursuant to N.C.G.S. § 14-202(d). Rather, he was placed on supervised probation for a period of twenty-four months. When a convicted sex offender is not incarcerated but is instead placed on probation, registration may be a necessary additional tool to protect communities. *See* N.C.G.S. § 14-208.5 (2019). In these cases, a trial court's consideration of whether a sex offender currently constitutes a danger to the community may be a more relevant inquiry than that of prospective harm.

> to do an intentional act. You know, the statement that this occurred because he was having feelings for the victim, . . . and the setup was apparently much more sophisticated than [*Guerrette*] where someone was just in a woman's bathroom with a cell phone. By having this secret device, moving . . . the secret device from room to room, the manner in which it was stored, and the fact . . . th[at] . . . anybody could get anything on the internet, so it would make it easy for him to buy similar devices off the internet . . . just make[s] it easier for him to buy these devices off the internet, [the c]ourt finds that he would be a danger to the community . . . .

¶ 21 In affirming the trial court, the Court of Appeals focused on the following evidentiary facts: (1) defendant's willingness to take advantage of a close, personal relationship; (2) defendant's use and execution of a sophisticated scheme intended to avoid detection; (3) the extended period of time that defendant deployed the hidden camera and obtained images of the victim; (4) defendant's ability and decision to repeatedly invade the victim's privacy; (5) defendant's ability and willingness to cause significant and lasting emotional harm to his victim; (6) the ease with which defendant could commit similar crimes again in the future; and (7) defendant's lack of remorse.[3] *Fuller*, 268 N.C. App. at 243–44, 835 S.E.2d at 56. We hold that these facts, without taking the unsupported statement that defendant lacked remorse into account, suffice to establish defendant's status as a "danger to the community."

¶ 22 Because the evidentiary facts reasonably support the trial court's ultimate fact that defendant "is a danger to the community," we uphold the trial court's sex offender registration order and affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

¶ 23 The question in this case is whether a defendant may be considered a "danger to the community" and subject to registration as a sex offender solely on the basis of having committed a certain crime. There are some

3. There is no evidence in the record that defendant lacked remorse.

crimes for which this is the case by virtue of the statutory scheme established by the General Assembly. N.C.G.S. § 14-208.6(4)(a) (2019) (requiring registration for persons convicted of sexually violent offenses and offenses against children). In contrast, the crime committed by Mr. Fuller, however repugnant and violative it may have been, is not one of those crimes. The majority divorces the registration requirement from the inquiry into whether the defendant is likely to reoffend, holding that the trial court may order registration even where there is no evidence that the defendant is likely to recidivate. This is contrary to our own precedent. *See State v. Abshire*, 363 N.C. 322, 323 (2009) ("In response to the threat to public safety posed by the recidivist tendencies of convicted sex offenders, 'North Carolina, like every other state in the nation, enacted a sex offender registration program to protect the public.' "), *superseded by statute*, An Act to Protect North Carolina's Children/Sex Offender Law Changes, S.L. 2006-247, § 8(a), 2005 N.C. Sess. Laws 1065, 1070–71, *as recognized in State v. Barnett*, 368 N.C. 710 (2016). Further, the majority's decision could be interpreted to give trial courts unfettered license to order registration for all offenders, regardless of whether there is any indication that they are likely to pose a danger to the community, undermining the purposes of the program. This goes too far and is contrary to the will of the General Assembly. As a result, I respectfully dissent.

¶ 24 Mr. Fuller pleaded guilty to secret peeping in violation of N.C.G.S. § 14-202(d). The trial court sentenced Mr. Fuller to six to seventeen months' imprisonment. The trial court suspended Mr. Fuller's sentence of incarceration and instead imposed twenty-four months of supervised probation. The trial court also ordered Mr. Fuller to register as a sex offender for a period of thirty years.

¶ 25 There are a number of crimes which require automatic registration as a sex offender. For example, a sex offense against a minor is a reportable offense requiring registration as a sex offender. *See* N.C.G.S. § 14-208.6(4)(a). The same is true for a sexually violent offense. *Id.* However, secret peeping is not one of the offenses for which the General Assembly requires registration automatically upon conviction. Instead, when a person is convicted of secret peeping pursuant to subsection 14-202(d), the trial court is required to consider (1) "whether the person is a danger to the community" and (2) "whether requiring the person to register as a sex offender . . . would further the purposes" of the sex offender registration program. N.C.G.S. § 14-202(*l*) (2019). For Mr. Fuller's crime, the trial court orders registration as a sex offender if both conditions are satisfied. *Id.*

¶ 26 The General Assembly does not define the phrase "danger to the community" in the statute. *See* N.C.G.S. § 14-202; N.C.G.S. § 14-208.6. Nor has this Court interpreted section 14-202 to give meaning to the phrase "danger to the community." As a result, the phrase's meaning is a question of statutory construction. "The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. In seeking to discover this intent, the court should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Stevenson v. Durham*, 281 N.C. 300, 303 (1972). Here, the statute's purpose indicates that a person presents a danger to the community if that person is likely to reoffend.

¶ 27 The registration program exists "to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies," to promote the exchange of offender information among law enforcement agencies, and to provide access to information about sex offenders to others. N.C.G.S. § 14-208.5 (2019). The program's statement of purpose provides that "sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest." *Id.* As a result, while subsection 14-202(*l*) does not define "danger to the community," the statute's purpose statement indicates that the legislature intended to require registration for persons who are likely to recidivate. *See id.* (statute's purpose statement recognizing risk of recidivation); *see also Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 215 (1990) ("The intent of the legislature controls the interpretation of a statute.").

¶ 28 The majority here does not define "danger to the community," choosing instead to investigate the meaning of the word "is." However, the majority's focus on the word "is" does not change the intent of the General Assembly, nor does it have any relevance to this case. No party has suggested an alternate meaning of the word "is." Nor has any party argued that in this case the trial court must determine whether the defendant, while unable to reoffend now, will, at some point in the future, develop the capacity to become a recidivist. Instead, consistent with the stated intent of the General Assembly in the statute itself and the unvarying conclusions of our appellate courts for the past ten years, the trial court's task is to determine, at the time of the hearing, whether the defendant is likely to recidivate. N.C.G.S. § 14-208.5 (stating intent of General Assembly); *State v. Pell*, 211 N.C. App. 376, 379 (2011) ("When examining the purposes of the sex offender registration statute, it is

clear that 'danger to the community' refers to those sex offenders who pose a risk of engaging in sex offenses following release from incarceration or commitment."); *see State v. Guerrette*, No. COA18-24, 2018 WL 4702230, at *2 (N.C. Ct. App. Oct. 2, 2018) (unpublished) (stating that the phrase "danger to the community" refers to sex offenders who pose a risk of reoffending); *State v. Mastor*, 243 N.C. App. 476, 483 (2015) (same); *accord Abshire*, 363 N.C. at 323 ("In response to the threat to public safety posed by the recidivist tendencies of convicted sex offenders, 'North Carolina, like every other state in the nation, enacted a sex offender registration program to protect the public.' "); *State v. Fuller*, 268 N.C. App. 240, 243 n.4 (2019) ("[T]he trial court's findings must demonstrate that the level of risk is such that there is a reasonable likelihood that the defendant in question will recidivate.").

¶ 29 It is true that this is a forward-looking inquiry. But that is what the General Assembly intended. *See* N.C.G.S. § 14-202(*l*) (stating that a trial court shall order registration as a sex offender after considering whether registration "would further the purposes" stated in N.C.G.S. § 14-208.5); N.C.G.S. § 14-208.5 (statement of purpose for registration program recognizing need for protecting the public against recidivation by sex offenders) Indeed, it is difficult to imagine what "danger to the community" an offender could pose other than that danger which is represented by the risk of reoffending. While the majority concludes that the General Assembly's use of the word "is" means that the trial court may consider whether the defendant "currently" represents a danger, that conclusion does not change the meaning of "danger to the community"—that the defendant is likely to reoffend.

¶ 30 Application of these principles to the facts of this case demonstrates that the trial court erred. The question before the trial court was whether Mr. Fuller was a danger to the community. *See* N.C.G.S. § 14-202(*l*). As the majority notes, this is an ultimate finding, which is "a conclusion of law or at least a determination of a mixed question of law and fact." *In re K.R.C.*, 374 N.C. 849, 858 (2020) (quoting *In re N.D.A.*, 373 N.C. 71, 76 (2019)). Such a finding is to be distinguished from "the findings of primary, evidentiary, or circumstantial facts." *In re N.D.A.*, 373 N.C. at 76 (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937)); *see also Woodard v. Mordecai*, 234 N.C. 463, 472 (1951) ("An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts."). As a result, we review the trial court's findings of evidentiary facts to determine whether they "support [the trial court's] ultimate findings of fact and conclusions of law." *In re N.G.*, 374 N.C. 891, 906–07 (2020).

¶ 31 It appears that the majority agrees with this standard of review, as it states that the decision below should be affirmed if the trial court's findings of evidentiary fact support the trial court's ultimate finding. The majority's insertion of the words "could reasonably" has the potential to confuse litigants, but does not change the existing standard. While a reader could misinterpret the majority's formulation of the standard to suggest that a trial court's ultimate finding will be upheld if the evidence *might* support the ultimate finding, such an interpretation is not supported by our precedent. A trial court's ultimate finding is either supported or unsupported. *See In re N.D.A.*, 373 N.C. at 77 (stating that both findings of ultimate fact and conclusions of law "must have sufficient support in the trial court's factual findings"). A reviewing court will not speculate or make inferences to supplement the record when the trial court's evidentiary factual findings are lacking. *See*, *e.g.*, *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402 (1977) (stating that evidentiary findings "are conclusive on appeal if supported by any competent evidence" but that, for ultimate findings of fact, "this Court may review the record to determine if the findings and conclusions are supported by sufficient evidence"); *see also In re N.D.A.*, 373 N.C. at 78 (concluding that evidentiary fact findings were insufficient to support an ultimate finding where the evidentiary findings did not "adequately address" a required aspect of the ultimate finding); *State v. White*, 300 N.C. 494, 503–504 (1980) (observing, in the context of permissive presumptions, that there must be a " 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed" to comport with due process) (quoting *Cnty. Ct. v. Allen*, 442 U.S. 140, 142 (1979)).

¶ 32 In the instant case, the trial court gave the following reasoning for its order:

> In this particular case it seems that there were recordings made over a long period of time. The fact that he only used one device as opposed to two and to move it place to place is to me more concerning than if he had had two devices, because he had to make—each time he had to move the device, he had to do an intentional act. You know, the statement that this occurred because he was having feelings for the victim, the—and the setup was apparently much more sophisticated than [*Guerrette*] where someone was just in a woman's bathroom with a cell phone. By having this secret device, moving—moving the secret device from room to room, the manner in which it

> was stored, and the fact of the—as you said, anybody could get anything on the internet, so it would make it easy for him to buy similar devices off the internet once he's—just make it easier for him to buy these devices off the internet, [the c]ourt finds that he would be a danger to the community and the purpose of the Registry Act would be served by requiring him to register for a period of 30 years.

¶ 33 The only fact identified by the trial court that reasonably relates to a risk of reoffending is the trial court's observation that the defendant purchased a recording device from the internet, and that he could easily do so again. However, the General Assembly did not intend that any sex offense committed with a device purchased from the internet would result in registration as a sex offender. *See* N.C.G.S. § 14-202(f) (criminalizing secret peeping by use of "any device that can be used to create a photographic image"); N.C.G.S. § 14-202(*l*) (stating that such an offense is reportable only if the trial court finds that the defendant is a danger to the community). Moreover, the trial court's logic here is merely a tautology. To say that defendant poses a risk of reoffending because he could again purchase a recording device off the internet amounts to saying he poses a risk of reoffending because he could reoffend. Instead, the trial court needed to examine the factors that typically indicate an individual is more likely to reoffend and determine which of those are true of this defendant. Absent such an inquiry, the trial court failed to comply with the statute. The trial court did not make sufficient evidentiary findings to support its ultimate finding that Mr. Fuller was a danger to the community.

¶ 34 The trial court's suggestion that a risk assessment would have been irrelevant is further evidence of the trial court's legal mistake, and underscores the trial court's failure to consider Mr. Fuller's likelihood of reoffending. After the trial court ordered Mr. Fuller to register, Mr. Fuller's defense counsel requested a continuance in order to obtain a Static-99 risk assessment. The trial court denied the request, pointing out that such a request would normally come before, not after, the trial court's ruling. The trial court was likely well within its discretion in denying such an untimely request. *See, e.g.*, *State v. Branch*, 306 N.C. 101, 104 (1982) ("A motion for continuance, even when filed in a timely manner pursuant to G.S. 15A-952, is ordinarily addressed to the sound discretion of the trial judge whose ruling thereon is not subject to review absent an abuse of such discretion."). However, when making its ruling the trial court stated that the court has "had people who score low on the Static

99 all the time and are placed on the sex offender registry. So my ruling stands as it is." This statement, suggesting that the results of a risk assessment would have been irrelevant to the trial court's inquiry into dangerousness, was wrong. In the absence of any other record evidence indicating Mr. Fuller's likelihood to commit another sex offense, such an objective assessment would have been of some assistance to the trial court as it fulfilled its statutory duty to determine whether Mr. Fuller was a danger to the community. *See* N.C.G.S. § 14-202(*l*). The assessment may not be dispositive or the only permissible type of evaluation—nothing in the statute mandates its use. However, the trial court must have some basis on which to determine that a defendant is likely to reoffend, which would mean that the defendant poses a danger to the community. For this type of offense, the mere fact that he committed the crime is not sufficient to establish that he is a danger to the community. A basis for that conclusion does not appear in the record in this case.

¶ 35 The majority reaches the opposite result, concluding that the Court of Appeals did not err because it focused on the facts that Mr. Fuller took advantage of a close relationship, hid his activity from the victim and her husband, and recorded the victim over an extended period of time. However, none of these facts pertains to the likelihood of a defendant to reoffend. The majority also refers to "the ease with which defendant could commit similar crimes again in the future." However, the only fact identified by the trial court on this point is that the defendant could purchase a device off the internet. As explained above, this does not provide sufficient support for a finding that a defendant is a danger to the community. Finally, the majority identifies a number of facts which do not appear in the trial court's rationale, including "defendant's 'ability and willingness to cause significant and lasting emotional harm to his victim" and "defendant's lack of remorse." However, it is the job of the trial court, not the appellate court, to make factual findings. *See*, *e.g.*, *State v. Hyman*, 371 N.C. 363, 386 n.8 (2018) ("[T]he trial judge, rather than an appellate court, is responsible for resolving factual disputes in the record given the trial judge's superior opportunity to make such determinations."); *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 63 (1986) ("Fact finding is not a function of our appellate courts."). Further, this last "fact" has the distinction of being unsupported by the record in addition to not being found by the trial court. The State's recitation of the facts, provided during the plea colloquy, indicates that Mr. Fuller "was cooperative in the investigation" and "provide[d] a full statement to law enforcement."

¶ 36 Importantly, the factors identified by the majority tell us that the defendant committed a crime. We knew that when the defendant was convicted. The purpose of the sex offender registry, however, is not to punish people who have committed crimes—it is to protect the public from harm. N.C.G.S. § 14-208.5; *State v. Bowditch*, 364 N.C. 335, 342 (2010) (citing *Smith v. Doe*, 538 U.S. 84, 93 (2003) for the proposition that "nonpunitive sex offender registration statutes were designed to protect the public from harm"). As a result, the inquiry must be based on whether the defendant is likely to harm the community through reoffending. This is the only way to make sense of the General Assembly's statement that it sought to further "law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors." N.C.G.S. § 14-208.5. Unless Mr. Fuller is likely to commit another sex offense, registration does nothing to aid these law enforcement efforts.

¶ 37 The majority declines to explain how the evidentiary facts support the trial court's conclusion that Mr. Fuller was a danger to the community, warranting registration as a sex offender. This is perhaps unsurprising, given that the only relevant evidentiary fact found by the trial court does not support the trial court's ultimate determination. Instead, the majority affirms the decision of the Court of Appeals without any explanation of what it means to be a danger to the community, despite ten years of precedent which would suggest that the trial court's order should be reversed. This leaves the trial court's determination of whether a defendant should be required to register without any meaningful guideposts.

¶ 38 If the General Assembly had intended to impose registration as a sex offender for every person convicted of Mr. Fuller's crime, regardless of whether they were likely to reoffend, it could have done so. But it did not. N.C.G.S. § 14-202(*l*). Instead, the General Assembly vested trial courts with (1) the authority to impose registration if certain criteria are met, and (2) the obligation to consider those criteria and make findings accordingly. *Id.* That did not happen in this case. I would hold that the trial court failed to appropriately consider whether Mr. Fuller was likely to reoffend. As a result, I respectfully dissent.

BOST REALTY CO., INC.; GK HAMPDEN VILLAGE, LLP F/K/A GK HAMPDEN VILLAGE, LLC; TUCKER CHASE, LLC; TAYLOR MORRISON OF CAROLINAS, INC.; EASTWOOD CONSTRUCTION, LLC F/K/A EASTWOOD CONSTRUCTION CO., INC.; MTS CLT, LLC; PARK VIEW ESTATES, LLC; AND B&C LAND HOLDINGS, LLC	)	
v.	)	CABARRUS COUNTY
CITY OF CONCORD	)	

No. 32P20

ORDER

Upon consideration of the Petition for Discretionary Review filed by the defendant on the 21st day of January, 2020, the Court allows the defendant's Petition For Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *JVC Enterprises, LLC, et al. v. City of Concord*, 2021-NCSC-14.

By order of this Court in Conference, this 10th day of March, 2021. Berger, J., recused.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of March, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

JOURNEY CAPITAL, LLC; LAURELDALE, LLC; PENDLETON/CONCORD PARTNERS, LLC; PRESPRO, LLC; AND SKYBROOK, LLC	)	
v.	)	CABARRUS COUNTY
CITY OF CONCORD	)	

No. 33P20

ORDER

Upon consideration of the Petition for Discretionary Review filed by the defendant on the 21st day of January, 2020, the Court allows the defendant's Petition For Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *JVC Enterprises, LLC, et al. v. City of Concord*, 2021-NCSC-14.

By order of this Court in Conference, this 10th day of March, 2021. Berger, J., recused.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of March, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

I. BEVERLY LAKE, JOHN B. LEWIS, JR., EVERETTE M. LATTA, PORTER L. McATEER, ELIZABETH S. McATEER, ROBERT C. HANES, BLAIR J. CARPENTER, MARILYN L. FUTRELLE, FRANKLIN E. DAVIS, JAMES D. WILSON, BENJAMINE E. FOUNTAIN, JR., FAYE IRIS Y. FISHER, STEVE FRED BLANTON, HERBERT W. COOPER, ROBERT C. HAYES, JR., STEPHEN B. JONES, MARCELLUS BUCHANAN, DAVID B. BARNES, BARBARA J. CURRIE, CONNIE SAVELL, ROBERT B. KAISER, JOAN ATWELL, ALICE P. NOBLES, BRUCE B. JARVIS, ROXANNA J. EVANS, JEAN C. NARRON, AND ALL OTHERS SIMILARLY SITUATED	)	
v.	)	Gaston County
STATE HEALTH PLAN FOR TEACHERS AND STATE EMPLOYEES, A CORPORATION, FORMERLY KNOWN AS THE NORTH CAROLINA TEACHERS AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN, TEACHERS AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION, BOARD OF TRUSTEES OF THE TEACHERS AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE, JANET COWELL, IN HER OFFICIAL CAPACITY AS TREASURER OF THE STATE OF NORTH CAROLINA, AND THE STATE OF NORTH CAROLINA	)	

No. 436PA13-4

ORDER

After reviewing the responses to the Disclosure Pursuant to Canon 3D of the Code of Judicial Conduct and other filings that have been made by the parties, the Court, acting on its own motion, requests the parties to submit on or before 12 February 2021 any additional comments that they wish the Court to consider concerning the issue of whether the Court should, in the exercise of its discretion, invoke the rule of necessity in order to reach the merits of this case.

By order of the Court in conference, this the 8th day of February 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of February 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

M.C. Hackney
Assistant Clerk, Supreme Court of
North Carolina

METRO DEVELOPMENT GROUP, LLC; NIBLOCK DEVELOPMENT CORP.; LENNAR CAROLINAS, LLC; SHEA HOMES, LLC; SHEA BUILDERS, LLC; SHEA REAL ESTATE INVESTMENTS, LLC; AND CRAFT DEVELOPMENT, LLC	)	
v.	)	CABARRUS COUNTY
CITY OF CONCORD	)	

No. 34P20

ORDER

Upon consideration of the Petition for Discretionary Review filed by the defendant on the 21st day of January, 2020, the Court allows the defendant's Petition For Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *JVC Enterprises, LLC, et al. v. City of Concord*, 2021-NCSC-14.

By order of this Court in Conference, this 10th day of March, 2021. Berger, J., recused.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of March, 2021.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

LORETTA NOBEL	)	
	)	
v.	)	NEW HANOVER COUNTY
	)	
FOXMOOR GROUP, LLC,	)	
MARK GRIFFIS, AND	)	
DAVID ROBERTSON	)	

No. 337A20

ORDER

Having failed to show good cause as required by N.C. R. App. P. 27(c), Defendant-Appellees' 25 February 2021 Motion to Deem Brief as Timely Filed is denied. The Court, on its own motion, pursuant to N.C. R. App. P. 14(d)(2), will allow appellees to participate in oral argument.

By Order of the Court in Conference, this 10th day of March 2021.

s/Berger, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of March 2021.

AMY FUNDERBURK
Clerk of the Supreme Court

M.C. Hackney

s/Amy Funderburk
~~Assistant~~ Clerk

STATE v. BENNETT

[376 N.C. 883 (2021)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Sampson County
	)	
CORY DION BENNETT	)	

No. 406PA18

ORDER

The Court, on its own motion, acknowledges receipt of the order entered by Judge John E. Nobles, Jr., in Superior Court, Sampson County, on 9 February 2021 in accordance with the opinion filed in this case on 5 June 2020. According to that opinion, in the event that the trial court determined "on remand that defendant has failed to make the necessary showing of purposeful discrimination, the trial court shall make appropriate findings of fact and conclusions of law to be certified to this Court for any further proceedings that this Court determines to be appropriate." *State v. Bennett*, 374 N.C. 579, 603 (2020). In light of the filing of the trial court's findings and conclusions on remand, the parties are hereby ordered to submit within ten days from the entry of this order any filings setting out their positions concerning additional procedures, if any, that the Court should follow in this case.

By order of the Court in conference, this the 10th day of March 2021. Berger, J., recused.

s/Barringer, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 12th day of March 2021.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk

M.C. Hackney
~~Assistant~~ Clerk, Supreme Court of
North Carolina

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

12 MARCH 2021

4P14-3	State v. Raymond Dakim Harris Joiner	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion for Conditional Acceptance for Value	1. Dismissed 2. Dismissed
4P16-4	State v. Jamonte Dion Baker	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP20-449) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused** **Berger, J., recused**
4P21	State v. Diallo Dwayne Daniels	1. Def's PDR Under N.C.G.S. § 7A-31 (COA20-242) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
7P21	State v. Adell Grady	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1025)	Denied
8P21	State v. Raymond Dakim-Harris Joiner	Def's Pro Se Motion for PDR	Dismissed
9A21	In re L.M.M.	1. Petitioners' Motion to Dismiss Appeal 2. Petitioners' Motion for Sanctions Pursuant to Rule 25(B) 3. Petitioners' Motion for Sanctions Pursuant to Rule 34	1. Denied 2. 3.
10P21	State v. Megan Alicia Haynes	Def's PDR Under N.C.G.S. § 7A-31 (COA20-21)	Denied
16P21	State v. Elliot Lee Grimes	1. Def's Pro Se Petition for Writ of Habeas Corpus (COA20-244) 2. Def's Pro Se Motion for Certificate of Appealability 3. Def's Pro Se Motion for En Banc Consideration by Court of Appeals	1. Denied 2. Dismissed 3. Dismissed
17P21	State v. John David Wood	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA20-222)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

12 MARCH 2021

23A21	State v. Darrell Tristan Anderson	1. Def's Motion for Temporary Stay (COA19-841) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **01/19/2021** 2. Allowed **02/10/2021** 3. ---
25P21	State v. Eric Alexander Campbell	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1035)	Denied
27A21	State v. Michael Devon Tripp	1. State's Motion for Temporary Stay (COA18-1286) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/20/2021** 2. Allowed **02/04/2021** 3. ---
28A21	State v. Deshandra Vachelle Cobb	1. State's Motion for Temporary Stay (COA19-681) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/19/2021** 2. Allowed **02/09/2021** 3. ---
29A20	Stacy Griffin, Employee v. Absolute Fire Control, Employer, Everest National Ins. Co. & Gallagher Bassett Servs., Carrier	1. Defs' Notice of Appeal Based Upon a Dissent (COA19-461) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31 4. Defs' Petition for Writ of Certiorari to Review Decision of the COA 5. Defs' Motion for Daniel J. Burke to Withdraw as Counsel of Record	1. --- 2. Allowed **04/29/2020** 3. Allowed **04/29/2020** 4. Dismissed as moot 5. Allowed **12/29/2020** **Berger, J., recused**
30A21	State v. Robert Wayne Delau	1. State's Motion for Temporary Stay (COA19-1030) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/20/2021** 2. Allowed **02/05/2021** 3. ---

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

12 MARCH 2021

32P20	Bost Realty Co., Inc.; GK Hampden Village, LLP f/k/a GK Hampden Village, LLC; Tucker Chase, LLC; Taylor Morrison of Carolinas, Inc.; Eastwood Construction, LLC f/k/a Eastwood Construction Co., Inc.; MTS CLT, LLC; Park View Estates, LLC; and B&C Land Holdings, LLC v. City of Concord	Def's PDR Under N.C.G.S. § 7A-31 (COA19-309)	Special Order **Berger, J., recused**
33P20	Journey Capital, LLC; Laureldale, LLC; Pendleton/ Concord Partners, LLC; Prespro, LLC; and Skybrook, LLC v. City of Concord	Def's PDR Under N.C.G.S. § 7A-31 (COA19-310)	Special Order **Berger, J., recused**
34P20	Metro Development Group, LLC; Niblock Development Corp.; Lennar Carolinas, LLC; Shea Homes, LLC; Shea Builders, LLC; Shea Real Estate Investments, LLC; and Craft Development, LLC v. City of Concord	Def's PDR Under N.C.G.S. § 7A-31 (COA19-311)	Special Order **Berger, J., recused**
35P21	In the Matter of A.J.L.H., C.A.L.W., M.J.L.H.	1. Respondent Appellee's (GAL) Motion to Withdraw and Substitute Counsel 2. Respondent Father's Motion to Dissolve the Temporary Stay	1. Allowed **02/17/2021** 2. Denied **02/17/2021**
40P21	Charlie L. Hardin v. Todd E. Ishee, et al.	Plt's Pro Se Motion for Review	Dismissed
41P17-7	Arthur O. Armstrong v. State of North Carolina, et al.	1. Plt's Pro Se Motion for Relief 2. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wilson County 3. Plt's Pro Se Petition for Writ of Certiorari 4. Plt's Pro Se Motion for Relief - Gross Negligence	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed

		5. Plt's Pro Se Motion for Relief - Conspiracy Complaint	5. Dismissed
		6. Plt's Pro Se Motion for Relief - Defamation of Character	6. Dismissed
		7. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	7. Dismissed
		8. Plt's Pro Se Motion for Relief - Gross Negligence Complaint	8. Dismissed
		9. Plt's Pro Se Motion for Relief - Professional Malpractice and Gross Negligence	9. Dismissed
		10. Plt's Pro Se Motion for Relief	10. Dismissed
		11. Plt's Pro Se Motion for Relief - Civil Rights Violation - Gross Negligence and Breach of Fiduciary Responsibility	11. Dismissed
		12. Plt's Pro Se Motion for Relief - Conspiracy Complaint	12. Dismissed
		13. Plt's Pro Se Motion for Relief	13. Dismissed
		14. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	14. Dismissed
		15. Plt's Pro Se Motion for Relief - Complaint	15. Dismissed
		16. Plt's Pro Se Motion for Relief - Professional Malpractice and Gross Negligence	16. Dismissed
		17. Plt's Pro Se Motion for Relief - Complaint Conspiracy	17. Dismissed
		18. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	18. Dismissed
		19. Plt's Pro Se Motion for Relief - Complaint Defamation of Character	19. Dismissed
		20. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	20. Dismissed
		21. Plt's Pro Se Motion for Relief - Breach of Written Contract & Conspiracy Complaint	21. Dismissed
		22. Plt's Pro Se Motion for Relief - Malicious Prosecution & Gross Negligence Complaint	22. Dismissed
		23. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	23. Dismissed
		24. Plt's Pro Se Motion for Relief - Defamation of Character	24. Dismissed

		25. Plt's Pro Se Motion for Relief - Unlawful Occupation	25. Dismissed
		26. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	26. Dismissed
		27. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	27. Dismissed
		28. Plt's Pro Se Motion for Relief - Legal Professional Malpractice and Gross Negligence Complaint	28. Dismissed
		29. Plt's Pro Se Motion for Relief - Complaint - Defamation of Character	29. Dismissed
		30. Plt's Pro Se Motion for Relief - Complaint - Defamation of Character	30. Dismissed
		31. Plt's Pro Se Motion for Relief - Complaint Defamation of Character	31. Dismissed
		32. Plt's Pro Se Motion for Relief - Conspiracy	32. Dismissed
		33. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	33. Dismissed
		34. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	34. Dismissed
		35. Plt's Pro Se Motion for Relief - Complaint	35. Dismissed
		36. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	36. Dismissed
		37. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence	37. Dismissed
		38. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	38. Dismissed
		39. Plt's Pro Se Motion for Relief - Complaint	39. Dismissed
		40. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	40. Dismissed
		41. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	41. Dismissed
		42. Plt's Pro Se Motion for Relief - Conspiracy Complaint	42. Dismissed
		43. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	43. Dismissed
		44. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	44. Dismissed
		45. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	45. Dismissed

		46. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	46. Dismissed
		47. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	47. Dismissed
		48. Plt's Pro Se Motion for Relief - Conspiracy Complaint	48. Dismissed
		49. Plt's Pro Se Motion for Relief - Gross Negligence Complaint	49. Dismissed
		50. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	50. Dismissed
		51. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	51. Dismissed
		52. Plt's Pro Se Motion for Relief - Harassment and Conspiracy Complaint	52. Dismissed
		53. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	53. Dismissed
		54. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	54. Dismissed
		55. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	55. Dismissed
		56. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	56. Dismissed
		57. Plt's Pro Se Motion for Relief - Conspiracy Complaint	57. Dismissed
		58. Plt's Pro Se Motion for Relief - Breach of Written Contract and Conspiracy Complaint	58. Dismissed
		59. Plt's Pro Se Motion for Relief - Conspiracy Complaint	59. Dismissed
		60. Plt's Pro Se Motion for Relief - Conspiracy Complaint	60. Dismissed
		61. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	61. Dismissed
		62. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	62. Dismissed
		63. Plt's Pro Se Motion for Relief - Conspiracy Complaint	63. Dismissed
		64. Plt's Pro Se Motion for Relief - Conspiracy Complaint	64. Dismissed
		65. Plt's Pro Se Motion for Relief - Conspiracy Complaint	65. Dismissed
		66. Plt's Pro Se Motion for Relief - Conspiracy Complaint	66. Dismissed

		67. Plt's Pro Se Motion for Relief - Civil Right Violations Complaint	67. Dismissed
		68. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	68. Dismissed
		69. Plt's Pro Se Motion for Relief - Civil Right Violations Complaint	69. Dismissed
		70. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	70. Dismissed
		71. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	71. Dismissed
		72. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	72. Dismissed
		73. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	73. Dismissed
		74. Plt's Pro Se Motion for Relief - Conspiracy Complaint	74. Dismissed
		75. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	75. Dismissed
		76. Plt's Pro Se Motion for Relief - Conspiracy Complaint	76. Dismissed
		77. Plt's Pro Se Motion for Relief - Gross Negligence Complaint	77. Dismissed
		78. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	78. Dismissed
		79. Plt's Pro Se Motion for Relief - Legal Professional Malpractice Complaint	79. Dismissed
		80. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	80. Dismissed
		81. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	81. Dismissed
		82. Plt's Pro Se Motion for Relief - Conspiracy Complaint	82. Dismissed
		83. Plt's Pro Se Motion for Relief - Conspiracy Complaint	83. Dismissed
		84. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	84. Dismissed
		85. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	85. Dismissed
		86. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	86. Dismissed

		87. Plt's Pro Se Motion for Relief - Gross Negligence Complaint	87. Dismissed
		88. Plt's Pro Se Motion for Relief - Conspiracy Complaint	88. Dismissed
		89. Plt's Pro Se Motion for Relief - Civil Rights Violation	89. Dismissed
		90. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	90. Dismissed
		91. Plt's Pro Se Motion for Relief - Conspiracy Complaint	91. Dismissed
		92. Plt's Pro Se Motion for Relief - Conspiracy Complaint	92. Dismissed
		93. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence	93. Dismissed
		94. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	94. Dismissed
		95. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	95. Dismissed
		96. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	96. Dismissed
		97. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	97. Dismissed
		98. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	98. Dismissed
		99. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	99. Dismissed
		100. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	100. Dismissed
		101. Plt's Pro Se Motion for Relief	101. Dismissed
		102. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	102. Dismissed
		103. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	103. Dismissed
		104. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	104. Dismissed
		105. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	105. Dismissed
		106. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	106. Dismissed
		107. Plt's Pro Se Motion for Relief - Malicious Prosecution - Gross Negligence Complaint	107. Dismissed

		108. Plt's Pro Se Motion for Relief - Gross Negligence Complaint	108. Dismissed
		109. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	109. Dismissed
		110. Plt's Pro Se Motion for Relief - Conspiracy Complaint	110. Dismissed
		111. Plt's Pro Se Motion for Relief - Conspiracy Complaint	111. Dismissed
		112. Plt's Pro Se Motion for Relief - Conspiracy Complaint	112. Dismissed
		113. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	113. Dismissed
		114. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	114. Dismissed
		115. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	115. Dismissed
		116. Plt's Pro Se Motion for Relief - Complaint	116. Dismissed
		117. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	117. Dismissed
		118. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	118. Dismissed
		119. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	119. Dismissed
		120. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	120. Dismissed
		121. Plt's Pro Se Motion for Relief - Gross Negligence Complaint	121. Dismissed
		122. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	122. Dismissed
		123. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	123. Dismissed
		124. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	124. Dismissed
		125. Plt's Pro Se Motion for Relief - Malicious Prosecution Complaint	125. Dismissed
		126. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	126. Dismissed
		127. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	127. Dismissed
		128. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	128. Dismissed

		129. Plt's Pro Se Motion for Relief - Complaint	129. Dismissed
		130. Plt's Pro Se Motion for Relief - Complaint - Malicious Prosecution and Gross Negligence	130. Dismissed
		131. Plt's Pro Se Motion for Relief - Conspiracy Complaint	131. Dismissed
		132. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	132. Dismissed
		133. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	133. Dismissed
		134. Plt's Pro Se Motion for Relief - Conspiracy Complaint	134. Dismissed
		135. Plt's Pro Se Motion for Relief - Conspiracy Complaint	135. Dismissed
		136. Plt's Pro Se Motion for Relief - Civil Rights Violations Complaint	136. Dismissed
		137. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	137. Dismissed
		138. Plt's Pro Se Motion for Relief - Civil Right Violations Complaint	138. Dismissed
		139. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	139. Dismissed
		140. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	140. Dismissed
		141. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	141. Dismissed
		142. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	142. Dismissed
		143. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint	143. Dismissed
		144. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	144. Dismissed
		145. Plt's Pro Se Motion for Relief - Defamation of Character Complaint	145. Dismissed
		146. Plt's Pro Se Motion for Relief - Complaint Conspiracy	146. Dismissed
		147. Plt's Pro Se Motion for Relief - Conspiracy Complaint	147. Dismissed
		148. Plt's Pro Se Motion for Relief - Malicious Prosecution and Gross Negligence Complaint	148. Dismissed

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		149. Plt's Pro Se Motion for Relief - Civil Rights Violation Complaint 150. Plt's Pro Se Motion for Relief - Mail Fraud Civil Rights Violation Complaint	149. Dismissed 150. Dismissed
42P21	State v. Jasper R. Marshall, III	Def's Pro Se Motion for Relief	Dismissed
44P21	Reginald Anthony Falice v. State of North Carolina	Petitioner's Pro Se Motion for Demand for Certification	Dismissed
48A21	In the Matter of K.B. & G.B.	Respondent-Father's Motion to Amend the Record on Appeal	Allowed **03/04/2021**
52P21	State v. Lester Henry Kearney	1. Def's Pro Se Motion for Removal of District Attorney 2. Def's Pro Se Motion for Challenge to Arrest Warrant 3. Def's Pro Se Motion for Dismissal Due to Wrongful Arrest 4. Def's Pro Se Motion to Withdraw Counsel 5. Def's Pro Se Motion for Notice of the Invocation of Rights	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed
54A19-3	State v. Rogelio Albino Diaz-Tomas	The North Carolina Advocates for Justice's Motion for Leave to File Amicus Brief	Allowed **03/02/2021**
56PA20	Copeland v. Amward Homes of N.C., Inc., et al.	North Carolina Association of Defense Attorneys' Motion for Extension of Time to File Amicus Curiae Brief	Allowed **02/19/2021**
58P21	William S. Mills, as Guardian *ad litem* for Angelina DeBlasio v. The Durham Bulls Baseball Club, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA19-510) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
60P21	In the Matter of K.S.	1. Petitioner and Guardian *ad litem*'s Motion for Temporary Stay (COA20-271) 2. Petitioner and Guardian *ad litem*'s Petition for Writ of Supersedeas 3. Petitioner and Guardian *ad litem*'s PDR Under N.C.G.S. § 7A-31	1. Allowed **02/05/2021** 2. 3.
75P21	In the Matter of I.R.	Respondent-Parent's Motion for Notice of Appeal	Dismissed

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77P21	Nancy Ann Fuller v. Rafael E. Negron-Medina, M.D., in his individual and official capacity	1. Plt's Motion for Temporary Stay (COA19-492) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/12/2021** 2. 3.
78P21	State v. Jaciel Espino	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion of Ineffective Assistance of Counsel	1. Dismissed 2. Dismissed without prejudice
79P19-3	William Paul James v. Rumana Rabbani	Plt's Pro Se Motion for Notice of Appeal (COAP19-156)	Dismissed
80P21	State v. Gary R. Hadden	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Gaston County (COAP20-587) 2. Def's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed **02/22/2021** 2. Denied **02/22/2021**
81P21	State v. Steven Lynn Greer	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **02/22/2021**
86P21	Thomas M. Anderson, Perry Polsinelli, Dori Danielson, William Hannah, Deborah Hannah, Richard F. Hunter, Andrew Juby, Thomas T. Schreiber, Fred R. Yates and wife, Karon K. Yates, individually and on behalf of Mystic Lands Property Owners Association, a North Carolina Non-Profit Corporation v. Mystic Lands, Inc., a Florida Corporation and Ami Shinitzky	1. Defs' Motion for Temporary Stay (COA19-801) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Amend PDR Under N.C.G.S. § 7A-31	1. Allowed **02/26/2021** 2. 3. 4. Allowed **02/26/2021** **Berger, J., recused**
93P21	Wilmington Savings Fund Society, FSB, v. Theresa Hall, et al.	1. Def's Motion for Temporary Stay (COA20-176) 2. Def's Petition for Writ of Supersedeas	1. Allowed **03/08/2021** 2.

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131P16-16	State v. Somchai Noonsab	1. Def's Pro Se Motion for Objection to Court Orders 2. Def's Pro Se Motion to Compel to Produce Nov. 30, 2012 Records 3. Def's Pro Se Motion for False Imprisonment 4. Def's Pro Se Motion to Take Judicial Notice 5. Def's Pro Se Motion for Delivery of Transcripts 6. Def's Pro Se Motion for Subpoena *Duces Tecum*	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed
149P20	State v. James Edward Leaks	Def's PDR Under N.C.G.S. § 7A-31 (COA19-479)	Allowed
187PA20	State v. Shanna Cheyenne Shuler	State's Motion to Amend the Record on Appeal	Denied **02/08/2021**
201P20	State v. Johnathan Alexander Burton	Def's PDR Under N.C.G.S. § 7A-31 (COA19-246)	Denied
205P04-2	State v. Derrick Jovan McRae	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COAP19-632) 2. Def's Motion to Incorporate Additional Authority in Petition	1. Dismissed 2. Allowed
208P14-2	Steele v. Mecklenburg County Senior Resident Judge, et al.	1. Petitioner's Pro Se Emergency Petition for Writ of Mandamus 2. Petitioner's Pro Se Petition in the Alternative for Writ of Habeas Corpus	1. Dismissed as moot **03/03/2021** 2. Denied **03/03/2021**
268P20	State v. William Bernicki	Def's PDR Under N.C.G.S. § 7A-31 (COA19-649)	Denied
270A18-2	State v. Thomas Earl Griffin	1. State's Motion for Temporary Stay (COA17-386-2) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/06/2020** 2. Allowed 3. Allowed
270P20	State v. Datorius Lane McLymore	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-428) 2. Def's Motion to Amend PDR	1. Allowed 2. Allowed **Berger, J., recused**
272A14	State v. Jonathan Douglas Richardson	Def's Motion to Bypass Court of Appeals	Allowed **02/24/2021**

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285P20	In the Matter of B.H.	Respondent's PDR Under N.C.G.S. § 7A-31 (COA19-411)	Denied
287P20	Topping v. Meyers, et al.	1. Defs' Notice of Appeal Based Upon a Constitutional Question (COA19-618) 2. Defs' PDR Under N.C.G.S. § 7A-31 3. Plt's Motion for Extension of Time to Respond to PDR and Notice of Appeal 4. Plt's Motion for Extension of Time to Respond to PDR and Notice of Appeal 5. Plt's Motion to Dismiss Appeal	1. --- 2. Denied 3. Denied **06/26/2020** 4. Allowed **07/01/2020** 5. Allowed **Berger, J., recused**
292A20	State v. Donald Eugene Hilton	Def's Motion to Deem Reply Brief Timely Filed (COA19-226)	Allowed **02/18/2021**
297PA16-2	In the Matter of the Adoption of C.H.M., a Minor Child	1. Petitioners' Petition for Writ of Mandamus (COA19-558) 2. Petitioners' Petition in the Alternative for Discretionary Review Under N.C.G.S. § 7A-31 3. Respondent's Notice of Substitution of Party 4. Respondent's Supplemental Motion to Dismiss Petition for Writ of Mandamus and Petition in the Alternative for Discretionary Review 5. Respondent's Motion to Supplement the Record Before this Court	1. Dismissed as moot 2. Dismissed as moot 3. --- 4. Dismissed as moot 5. Dismissed as moot
304P20-2	Clyde Junior Meris v. Guilford County Sheriffs' Department, et al.	Plt's Pro Se Motion to Appeal	Dismissed
306P18-4	Hunter F. Grodner v. Andrzej Grodner (now Andrew Grodner)	1. Def's Pro Se Motion to Clarify this Court's Order From 22 December 2020 2. Def's Pro Se Motion for Temporary Stay 3. Def's Pro Se Petition for Writ of Supersedeas 4. Def's Pro Se Motion for Expedited Review	1. Dismissed **03/10/2021** 2. Denied **03/10/2021** 3. Denied 4. Denied **03/10/2021**

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313P19	Brenda Fennell, Administratrix of the Estate of Claude McKinley Fennell v. East Carolina Health d/b/a Vidant Roanoke-Chowan Hospital, Darla K. Liles, M.D., and Vidant Medical Center	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-1096) 2. American Patient Rights Association's Motion for Leave to File Amicus Brief in Support of PDR 3. Def's (Darla K. Liles, M.D.) Motion to Strike Motion of American Patient Rights Association to File an Amicus Curiae Brief	1. Denied 2. Dismissed 3. Dismissed as moot
318P20-2	State v. Eric Pittman	1. Def's Pro Se Motion to Enforce International Law 2. Def's Pro Se Motion for Release 3. Def's Pro Se Motion for Letter of Rogatory	1. Dismissed 2. Denied 3. Dismissed
326P07-2	State v. Dwight McLean	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-904) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
331P20	Edward G. Connette, as Guardian *ad litem* for Amaya Gullatte, a Minor, and Andrea Hopper, individually and as parent of Amaya Gullatte, a Minor v. The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System, and/or The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Medical Center, and/or The Charlotte-Mecklenburg Hospital Authority d/b/a Levine Children's Hospital, and Gus C. Vansoestbergen, CRNA	Plts' PDR Under N.C.G.S. § 7A-31 (COA19-354)	Allowed **Ervin, J., recused** **Berger, J., recused**
337A20	Nobel v. Foxmoor Group, LLC, et al.	Defendants' Motion to Deem Brief as Timely Filed	Special Order

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360P20	State v. Thomas Allen Hunt	1. Def's PDR Under N.C.G.S. § 7A-31 (COA19-855) 2. State's Motion to Deem Response Timely Filed	1. Denied 2. Allowed
368A20	Reynolds American Inc. v. Third Motion Equities Master Fund Ltd, et al.	Plt's Motion to Reschedule Oral Argument Hearing	Allowed **03/09/2021**
374P15-2	State v. Matthew Ray Hooks	Def's Petition for Writ of Certiorari to Review Order of the COA (COAP20-522)	Dismissed
378P18-7	State v. Napier Sandford Fuller	Def's Pro Se PDR Prior to a Determination by the COA (COA21-9)	Dismissed
384P20	State v. Jeron Gavin French	Def's PDR Under N.C.G.S. § 7A-31 (COA19-997)	Denied **Berger, J., recused**
406PA18	State v. Cory Dion Bennett	Filing of Remand Order	Special Order **Berger, J., recused**
408P16-2	State v. Lowell Thomas Manring	1. Def's Pro Se Motion for PDR (COAP20-525) 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
422P20	The North Carolina State Bar v. Venus Y. Springs, Attorney	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-1120) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Berger, J., recused**
427PA17-2	State v. Jermaine Antwan Tart	Def's Pro Se Motion to Correct Sentence	Dismissed without prejudice
428P18-2	State v. Raymond Dakim Harris Joiner	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Motion for Conditional Acceptance for Value	1. Dismissed 2. Dismissed 3. Dismissed

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432P20	Wanda Campbell McLean, as administrator for the estate of Josephine Smith v. Katie Spaulding	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-36)	Denied
436PA13-4	Lake, et al. v. State Health Plan for Teachers and State Employees, et al.	Disclosure Pursuant to Canon 3D of the Code of Judicial Conduct	Special Order **02/08/2021**
439P20	Brian Kent Brown and Brown Brothers Farms v. Between Dandelions, Inc., f/k/a Remodel Auction, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1074)	Denied
442P20	State v. James Ryan Kelliher	1. Plt's Motion for Temporary Stay (COA19-530) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31 5. Def's Conditional PDR	1. Allowed **10/23/2020** 2. Allowed 3. Dismissed *ex mero motu* 4. Allowed 5. Allowed
443P20	State v. Marvin Hargrove, Jr.	Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 (COAP20-422)	Dismissed
444P20	State v. Arkeem Nellon	1. Def's Pro Se Motion for Notice for Certiorari Appeal (COAP20-469) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Motion of Discovery 4. Def's Pro Se Motion for Production of Exculpatory Evidence 5. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Allowed
448P07-2	State v. Jacobie Quonzel Brockett	1. Def's Pro Se Motion for Order Directing Resentencing Hearing 2. Def's Pro Se Motion to Proceed Pro Se 3. Def's Pro Se Motion for Counsel to Withdraw and to Withdraw Documents, Motions, and Paperwork by Counsel	1. Dismissed without prejudice 2. Dismissed without prejudice 3. Dismissed without prejudice

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452P20	State v. Masses Andrew Cain	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1095)	Denied
457P20	State v. Khalil Abdul Farook	1. State's Motion for Temporary Stay (COA19-444) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Lift Temporary Stay 5. Def's Motion to Expedite Appeal	1. Allowed **11/06/2020** 2. Allowed 3. Allowed 4. Dismissed as moot 5. Dismissed as moot
462P20	Helen Lynette Gibbs, Widow of David W. Gibbs, deceased Employee v. Roca's Welding, LLC, Employer, Builder's Mutual Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-121)	Denied **Berger, J., recused**
466P20	State v. John Brona Turner, III	Def's PDR Under N.C.G.S. § 7A-31 (COA19-897)	Denied **Berger, J., recused**
472P20-2	State v. Torrance D. Crouell, Sr.	Def's Pro Se Motion for Verified Complaint	Dismissed
478P20	State v. Michael Talley	1. Def's Pro Se Motion for Special Session of Superior Court 2. Def's Pro Se Motion for Subpoena 3. Def's Pro Se Motion for Willful Misconduct in office, Willful and Persistent Failure to Perform Duties, and Conduct Prejudicial to the Administration of Justice 4. Def's Pro Se Motion for Public Inspection of Facts	1. Denied 2. Dismissed 3. Dismissed 4. Dismissed
485PA19	State v. Cashaun K. Harvin	1. Def's Motion for Appropriate Relief (COA18-1240) 2. Def's Motion to Seal Motion for Appropriate Relief	1. 2. Allowed **03/08/2021**
485P20	State v. Tevin O'Brian Dalton	Def's PDR Under N.C.G.S. § 7A-31 (COA20-248)	Denied

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503P20	State v. Christopher Lee McPeters	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA19-687) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied **Berger, J., recused**
514P13-7	State v. Raymond Dakim Harris Joiner	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion for Conditional Acceptance for Value	1. Dismissed 2. Dismissed
518P20	State v. Keyshawn Tyrone Matthews	Def's PDR Under N.C.G.S. § 7A-31 (COA19-1168)	Denied
522P20	State v. Raymond Dakim-Harris Joiner	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-1112) 2. Def's Pro Se Motion for Conditional Acceptance for Value	1. Dismissed 2. Dismissed
523P06-7	Freeman Hankins, Sr. v. Brunswick County	Defendant's Pro Se Motion to Invoke Constitutional Rights	Dismissed
532P20	State v. Harvey Lee Essary, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA19-917)	Denied
536P20-2	State v. Siddhanth Sharma	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA19-591) 2. Def's Pro Se Motion to Add Addendum to PDR 3. Def's Pro Se Motion for Reconsideration	1. Denied 2. Allowed 3. Dismissed **Berger, J., recused**
548A04-3	State v. Vincent Lamont Harris	1. State's Motion for Temporary Stay (COA18-952) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **01/15/2021** 2. Allowed **02/04/2021** 3. --- **Berger, J., recused**

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580P05-20	In re David Lee Smith	1. Def's Pro Se Motion for Court to Liberally Construe Pro Se Motion as an Application for Writ of Mandamus 2. Def's Pro Se Motion for Court to Allow Liberal Construction or Fair Opportunity to Amend Pro Se Petition 3. Def's Pro Se Motion for Application to Amend Pro Se Petition 4. Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 5. Def's Pro Se Petition for Writ of Mandamus	1. Dismissed **02/25/2021** 2. Dismissed **02/25/2021** 3. Dismissed **02/25/2021** 4. Denied **02/25/2021** 5. Denied **02/25/2021** **Ervin, J., recused**

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